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VOLUME 67

PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF

SUPREME AND APPELLATE COURTS OF ALABAMA
AND SUPREME COURTS OF FLORIDA
LOUISIANA, MISSISSIPPI

FEBRUARY 6 — MAY 1, 1915

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JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

ALABAMA—Supreme Court.

JOHN C. ANDERSON, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS C. McCLELLAN.	ORMOND SOMERVILLE.
JAMES J. MAYFIELD.	EDWARD DE GRAFFENRIED. ¹
A. D. SAYRE.	LUCIEN D. GARDNER.
WM. H. THOMAS. ²	

Court of Appeals.

RICHARD W. WALKER, PRESIDING JUDGE.³

JOHN PELHAM, PRESIDING JUDGE.⁴

ASSOCIATE JUDGES.

JOHN PELHAM. ⁴	BENJAMIN P. CRUM. ⁵
E. P. THOMAS.	J. B. BROWN. ⁶

FLORIDA—Supreme Court.

THOMAS M. SHACKLEFORD, CHIEF JUSTICE.⁷

R. FENWICK TAYLOR, CHIEF JUSTICE.⁸

ASSOCIATE JUSTICES.

THOMAS M. SHACKLEFORD. ⁷	WILLIAM A. HOCKER. ⁹
R. FENWICK TAYLOR. ⁸	JAMES B. WHITFIELD.
ROBERT S. COCKRELL.	W. H. ELLIS. ⁷

LOUISIANA—Supreme Court.

FRANK A. MONROE, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

OLIVIER O. PROVOSTY.	WALTER B. SOMMERVILLE.
ALFRED D. LAND.	CHARLES A. O'NIELL.

MISSISSIPPI—Supreme Court.

SYDNEY SMITH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAM C. COOK.
RICHARD F. REED:

¹ Term expired January 17, 1915.

² Elected November, 1914, and qualified January 18, 1915.

³ Resigned October 13, 1914.

⁴ Became Presiding Judge October 13, 1914.

⁵ Appointed October 14, 1914, and held until November 17, 1914.

⁶ Elected and qualified November 17, 1914.

⁷ Qualified as Associate Justice January 5, 1915.

⁸ Designated Chief Justice January 5, 1915.

⁹ Term expired January 4, 1915.

COURT RULES

SUPREME COURT OF LOUISIANA

In Effect, March 15, 1915

RULE I.

PREPARATION OF TRANSCRIPTS.

In preparing transcripts in cases appealed to this court, clerks shall observe the following requirements:

Section 1. Transcripts, in both civil and criminal cases, shall be printed, or typewritten; if typewritten, the paper used in the main transcript shall be opaque, of good quality, not less than 13x8 inches in size, with double borders upon each page, and the type-writing shall show, at least, a quarter of an inch of space between lines; they shall be bound in stiff covers, in book form, so as to open flat, and in two, or more, volumes, when they contain more than 250 pages.

The multiple transcripts shall also be bound in stiff covers, but may be composed of a good quality of the paper ordinarily used for such purposes.

Section 2. *Transcripts in civil cases* shall be made up and the matter of which they are to be composed transcribed in the following order, to-wit: (1) A chronological index of all docket entries; (2) original and interlocutory pleadings, with documents and exhibits annexed and orders of court, except petition, or motion, and order of appeal, in the order in which they are filed and made; (3) documents introduced (save those annexed to the pleadings and already transcribed) in the order in which they are filed; (4) minutes of the court showing action in the case; (5) reasons for judgment, and judgments, interlocutory and final; (6) petition, or motion, order, and bond of appeal; (7) oral testimony, in the order in which it is taken with inscription showing when taken; (8) other records offered in evidence; (9) certificate of the clerk; (10) alphabetical index of pleadings, documents annexed, orders and judgments; (11) similar index of documents introduced in evidence; (12) similar index of oral testimony, in which the names of the witnesses called by the litigants, respectively, shall be arranged, alphabetically, in separate groups.

Each pleading, document and paper shall be indexed by the name given to it in its heading and under the first letter of such name. In indexing contracts, mention shall be made of the names of the parties to them

as well as of the mark put upon them for identification. As, for example, under the letter "S," "Sale by to P-1, or D-1." The several pleadings, documents or papers appearing in the index under the same letter shall appear in the index in the order in which they appear in the transcript.

Section 3. When transcripts are composed of more than one volume, the pleadings, documents and exhibits, orders of court, notes of evidence, minutes, reasons and judgments of the court, petition or motion, order and bond of appeal shall be included, so far as possible in volume 1, and the testimony of the witnesses and records of cases offered in evidence, in the subsequent volume, or volumes; and each volume shall be furnished with indexes, applicable to their contents, and conforming to the requirements prescribed in section 2 of this rule.

Section 4. Each pleading, document and exhibit, as copied in the transcript, shall be preceded by a descriptive heading, indicating its character, date of execution, date of filing, on whose behalf filed or introduced, and mark of identification given when filed: Provided that, where a multiplicity of vouchers or exhibits of a similar character are introduced, it will be sufficient that those offered on behalf of each litigant be assembled together and supplied with a single heading.

Section 5. A space of not less than half an inch shall be left between the heading required by the above paragraph and the instrument to which it relates.

Section 6. No document or paper shall appear more than once in the transcript unless offered, by different litigants, each of whom requests that the copy offered by him be transcribed.

Section 7. When records of one or more suits are introduced as evidence, they shall appear in the transcript subsequent in order to the record and evidence in the principal suit and separated therefrom by colored leaves, or paper covers, which will serve to distinguish them from such principal record and evidence, and from each other; and they shall each be provided with indexes such as are required in the principal record.

Section 8. In the absence of instruction from litigants, citations, notices and returns,

writs—mesne or final, etc., shall be omitted from the transcript, but may be supplied upon timely application to this court by either of the parties to the appeal, upon showing their materiality.

Section 9. The transcript shall show by which litigant each witness was sworn, whether in chief, on cross-examination, or in rebuttal, and, by whom examined and cross-examined.

Section 10. Upon the outside of the front cover of the transcript, and of each volume (where there are more than one), there shall be inscribed, with proper separation of lines and spaces and in the following order: (1) The number of the case in this court; (2) the number of the volume, if there be more than one (below which there shall be left a space of two inches for the date of the filing in this court); (3) the date of the filing in this court; (4) the title of the case, with words showing the status of the parties, respectively (i. e., whether appellant or appellee); (5) the name of the court and of the parish from which the appeal comes, with the number of the case in such court, and of the judge who rendered the judgment appealed from; (6) the name, or names, of counsel for appellant, with words showing whether their client is plaintiff, defendant, intervener, opponent, third person, appellant or appellee; (7) the name of counsel for appellee, with similar statement.

Section 11. Where there is a subsequent appeal in a case, or growing out of a case, theretofore appealed to this court, the transcript already lodged here, may, on obtaining leave of the court, be used for the purposes of such subsequent appeal, and the transcription of its contents dispensed with.

Section 12. *Transcripts in criminal cases* shall contain: (1) The minute entries, showing the opening of the court, the impaneling of the grand jury by which the indictment (if the prosecution was by indictment) was found, and, all other proceedings, in chronological order, relating to the case; (2) the indictment or information, and all pleas, demurrers, motions, orders and bills of exception, including also, verdict and sentence, in the order in which they were filed, made, returned and imposed; (3) the notes of evidence, testimony and clerk's certificate, and the indexes as required in civil cases. The different portions of the transcript shall be provided with headings, as required in civil cases; the headings of the testimony and documentary evidence shall state the particular bill, or bills, of exception to which they, respectively, relate and the heading of each bill of exception shall refer to the page in the transcript upon which such evidence or testimony is to be found. The inscriptions upon the front cover of such transcripts shall conform to the rule relating to transcripts in civil cases.

Section 13. All transcripts must have the

pages numbered consecutively, from beginning to end, and must be indexed solely with reference to such paging.

Section 14. Where a transcript, whether in a civil or criminal case, does not conform to the rules thus established, the clerk by whom it was prepared shall be required to remedy its defects, or prepare another transcript, and show cause why he should not be punished for contempt of the authority of this court, and, in a civil case, the appeal may be dismissed, as circumstances may warrant.

RULE II.

PAYMENT OF COSTS.

The clerk of this court shall not be required to render services in his official capacity, whether by way of filing transcripts or otherwise, save upon the payment of such costs as the law allows.

RULE III.

DOCKETING OF CASES.

Cases will be docketed in the order in which they are filed; and no motion or application, save such as are heard in open court, will be entertained or considered, unless previously filed, numbered and docketed.

RULE IV.

EXTENSION OF TIME FOR FILING TRANSCRIPTS.

Motions for extension of time for filing transcripts shall be supported by affidavit, stating, specifically, the cause which prevents the completion of the transcript within the legal delay. Such affidavit shall be made by the clerk of the court a qua, the litigant applying for the extension, or his attorney, at law or in fact, as the one or the other may be in possession of the requisite information.

RULE V.

WITHDRAWAL OF TRANSCRIPTS.

Section 1. During the three days allowed by law, within which motions to dismiss appeals may be filed, counsel for appellee may withdraw the main, or a multiple, transcript, but counsel for appellant shall not withdraw the main transcript during that period. At all other times, except as hereinafter provided, in paragraph 3 of this rule, it shall be permissible for counsel of record to withdraw the main transcript, or one of the multiples.

Section 2. Transcripts shall be receipted for, on withdrawal, and shall be returned within a reasonable time, or, at any time, upon the requisition of the clerk.

Section 3. The main transcript shall not be withdrawn from the clerk's office after a cause has been submitted, or after the final decree therein has become executory; but one of the multiples may be withdrawn with leave of the court first obtained.

RULE VI.**TRANSCRIPTS, LOST OR MISLAID.**

Whenever a transcript or original record in a case, once filed in the clerk's office, has been lost, mislaid, or removed therefrom, either of the parties in interest may supply its place with another transcript or record, which shall be considered filed as of the same date as that first mentioned; and the case will be heard in its regular place on the calendar; notwithstanding the absence of the transcript or record first filed.

RULE VII.**SITTINGS OF THE COURT.**

The court will hear argument in cases every day, legal holidays excepted, of each alternate week of the session, unless the accumulation of cases, argued and submitted, should require a further pretermission of such hearings.

RULE VIII.**MOTIONS AND OTHER PLEADINGS, INSTRUCTIONS TO CLERK AND AGREEMENTS.**

Section 1. Motions will be entertained during the sittings of the court, before and after regular business.

Section 2. All motions and other pleadings, such as answers, joinders in appeal; pleas of prescription, etc., shall be written upon not less than a half sheet of legal cap, or foolscap, paper, and properly indorsed, and, save in the case provided for in section 1 of this rule, shall be filed in the clerk's office before being presented for the consideration of the court; and no motion, pleading or document shall be filed, in a case, after its submission, unless accompanied by a certificate of service upon the opposing litigant, or counsel.

Section 3. All instructions to the clerk, and agreements of counsel, upon which the court is expected to act, shall be in writing, as provided in section 2 of this rule, and properly indorsed and duly filed.

RULE IX.**MOTIONS TO DISMISS.**

Section 1. Motions to dismiss shall be fixed for the first Monday of each court week, and notice of fixing shall be posted at the court room door, and copies thereof and of accompanying briefs shall be sent, by the clerk, to appellants or their counsel, except in cases appealed from the parish of Orleans.

Section 2. Such motions shall set forth distinctly all the grounds relied on, and, on their hearing, shall be argued by printed briefs, which shall conform in character and number to the requirements for a brief as stated in rule XI.

RULE X.**FIXING CASES FOR ARGUMENT.**

Section 1. Cases which are not entitled to

preference shall be fixed for argument by the clerk, at least, twenty-five calendar days in advance of the days, respectively, to which they are assigned, and notice of such fixing shall be kept posted, during that period, at the door of the court room, which shall serve as full notice, in cases appealed from the parish of Orleans. In cases appealed from other parishes, the clerk shall mail notices of the fixing to the counsel of record, and to the clerks of the courts whence the appeals originated; and it shall be the duty of the clerks of such courts to post the lists at the doors of their respective court rooms.

Section 2. Cases entitled to preference may be fixed for argument by motion, upon ten, calendar, days notice, save where the law or the interests of justice may require a shorter notice. The clerk shall mail the notices, and the fact that he has done so, in a proper manner and properly addressed, will be accepted as prima facie evidence that they have been received. The clerk shall fix no civil case by preference without an order of court, save as provided in section 3 of rule XIV.

Section 3. The following classes of cases are entitled to preference, and may be fixed for argument, by motion, in accordance with section 2 of this rule, to wit: Those to which the state, or any political subdivision, agency, or officer of the state, shall be a party; interdiction appeals; and those involving, affecting or concerning the following matters or any of them, viz.: Contests for public office; the public interest or fisc; the constitutionality or legality of any tax, where the collection of the tax is delayed; the distribution of money in the hands of representatives of successions, sheriffs and other public officers, receivers, garnishees and depositaries; the possession of leased premises; the validity of wills; the putting of heirs in possession; demands for separation from bed and board or divorce; claims for alimony; awards of arbitrators, amicable compounders or referees; claims against sureties on judicial bonds; injunctions in restraint of writs of execution or seizure and sale; claims for wages, salary or compensation for professional service; suits upon promissory notes, where the answer is a general denial.

Section 4. Criminal cases shall be fixed for argument by the clerk, for Saturdays of each court week, at least ten days in advance of the days to which they are assigned, and similar notices shall be required as provided in the foregoing section for civil cases fixed by preference.

Section 5. Where a civil case shall not have been submitted after two opportunities have been afforded for its hearing, it shall be relegated to the delay docket, and shall not be withdrawn therefrom save on motion and by leave of the court.

RULE XI.**BRIEFS—THEIR PREPARATION.**

Section 1. All briefs shall be printed on white paper, measuring 6x9 inches, and each shall bear upon its cover, (1) the number in this court of the case in which it is filed; (2) the name of this court; (3) the name of the court and parish from which the case is appealed, and of the judge by whom the judgment appealed from was rendered; (4) an inscription giving the name and the status in the case (whether plaintiff, defendant, appellant, appellee, etc.) of the party in whose behalf it is filed, and showing whether it is an original or supplemental brief, on rule, merits, rehearing, etc.; (5) the name of the counsel by whom filed.

Section 2. The brief of the appellant shall contain, in the order here set forth: (1) A succinct syllabus, indicating the points and authorities relied on; (2) a concise statement, or abstract of the case; (3) a specification of the errors, whether of fact or law, in the judgment appealed from, of which the appellant complains; (4) a brief of the argument upon the pleadings and the facts, with references to the pages in the transcript, upon which the pleadings and testimony referred to may be found, and to the volumes and pages of the statutes and reported cases referred to, giving also the titles of the cases.

Section 3. The brief of the appellee shall answer the contentions of the appellant, and, in so doing, or thereafter, shall present the appellee's own argument upon the pleadings and the facts, subject to the conditions required of the appellant: Provided, that, if the appellant has filed no brief, the appellee shall state the whole case in the beginning.

Section 4. Failure to comply with the foregoing requirements will subject the party so failing to the penalty of having his brief returned to him.

RULE XII.**BRIEFS—THEIR FILING AND SERVICE.**

Section 1. In ordinary, appealed, cases, the appellant shall file ten copies of his brief within thirty days after the filing of the transcript, and shall, at the same time, serve a copy thereof upon counsel for the appellee; and the appellee shall file ten copies of his brief within thirty days after receiving the brief of appellant's counsel, and shall, at the same time, serve a copy thereof upon counsel for appellant; but, in the event that the brief for the appellant is not served upon him, or is not served, either within the delay prescribed by this rule, or, at least, thirty days before the case is called for argument, it shall be sufficient for him to serve and file his brief when the case is so called. The ten briefs required from the appellant and appellee respectively, are intended for the use of the court, and the clerk is not permitted to part with them during the pendency of the appeal.

Section 2. In cases fixed by preference, on motion of counsel, the mover shall file his brief with his motion and make service thereof on opposing counsel, and opposing counsel shall file and serve his brief within seven days after such service; but, if he receives no brief from the mover, or receives it after the expiration of the delay so prescribed, it shall be sufficient for him to file and serve his brief when the case is called for hearing.

Section 3. In criminal cases, the brief for the appellant shall be filed and served within ten days after the filing of the transcript, and the brief for the appellee shall be filed and served before the submission of the case.

Section 4. Briefs in addition to those filed with, and in support of, motions to dismiss and applications for writs, may be filed, thereafter, before the return days, and briefs for the defendants in such proceedings may be filed on or before the return days.

Section 5. If either of the parties referred to in sections 1 and 2 of this rule shall have failed to comply with the requirements of those sections, he shall not be heard in oral argument, when the case is called for hearing. If both parties shall have so failed, the case shall be relegated to the delay docket, and, in either event, it shall be the duty of the clerk to inform the court as to the situation.

Section 6. No delay will be granted for the filing of briefs, after the submission of a case, but parties may, nevertheless, then, file them; provided, that the clerk shall file no brief in a case which has been submitted, unless it be accompanied by a certificate of service on opposing counsel, showing the date of such service.

Section 7. Where counsel reside in different places, a certificate to the effect that a brief, properly addressed and stamped, has been deposited in the post-office within the time prescribed, will be regarded as prima facie evidence of the service required by this rule; but, where they reside in the same place, the certificate should show service in person or at the office or domicile of opposing counsel.

RULE XIII.**THE ARGUMENT—OPENING AND CLOSING;
TIME ALLOWED.**

Section 1. The appellant shall have the right to open and close the argument in this court.

Section 2. One hour shall be allowed to the appellants and one hour to the appellees, for argument, in each case, unless, for good cause, additional time be granted, before the argument has begun.

Section 3. Counsel who cite authorities which are not in the library of the court will be expected to supply them.

RULE XIV.**REHEARINGS.**

Section 1. The application for rehearing shall be made by petition, filed within the legal delay and containing a statement of the points of law and fact upon which it is founded.

If the applicant desires further time for the filing of a brief, he shall apply to the court.

Section 2. When a petition for rehearing is filed, the clerk shall enter it upon the proper docket, and, immediately upon their receipt, distribute the briefs filed in its support, if any there be, among the members of the court.

Section 3. When a rehearing is granted, the case, unless otherwise ordered by the court, shall be, at once, fixed for hearing, as a preference case; and, when called, may be argued, orally, or submitted upon the briefs already filed, or upon those briefs and such additional briefs as the parties may choose to file, after serving them on opposing counsel.

Section 4. Only one rehearing shall be granted, unless some question has been decided, on the rehearing granted, which had not, before, been considered, and the court has reserved the right to make another application.

Section 5. An application for rehearing will be entertained only when the judgment rendered disposes finally of the case.

Section 6. No application for rehearing shall be entertained with respect to the action of the court in ordering, or refusing to order, the issuance of an alternative writ or rule nisi.

RULE XV.**ORIGINAL WRITS AND RULES NISI.**

Section 1. No application for an original writ, such as mandamus, prohibition, certiorari, writ of review, or the like, or for a rule nisi in such case, shall be entertained by the court, or any of its members, unless previously filed and docketed in the clerk's office, and unless previous notice of the intention to make such application shall have been given to the judge, or judges, of the inferior court, if he, or they, be made respondents, and to the opposing party, or his counsel; the service of such notice to be made to appear by the affidavit of the applicant or his counsel.

Section 2. When an alternative writ, or rule, such as is referred to in the preceding section, shall have been issued, the questions involved shall be submitted for decision on the return day, upon such printed briefs as the parties may file, and without oral argument.

RULE XVI.**WRITS OF CERTIORARI OR REVIEW TO COURTS OF APPEAL.**

Section 1. When the judges of a court of appeal certify to this court any questions of law, arising in any case pending before them, concerning which they desire instruction from this court, they shall, also, certify the findings of fact upon which such questions are predicated, and shall forward to this court such briefs upon the questions certified as may have been submitted to them.

Section 2. The petition for the writ of certiorari or review to a court of appeal shall be verified by the affidavit of the petitioner, or, in case of his absence from the parish in which the judgment sought to be reviewed was rendered, then, by his attorney; and the fact of such absence shall be shown by the affidavit, which shall also show that an application for rehearing has been made to such court of appeal; that the rehearing has been refused, with the date of the refusal; and, that the applicant has filed in the clerk's office of such court, a notice, addressed to the parties to the suit, of his intention, to make the application to this court; and the petition shall be accompanied by an assignment of the errors complained of, by copies of the original petition and answer and other pleadings to which the application may relate, of the reasons assigned by the court of appeal for its judgment, of the petition for rehearing and brief in support thereof, and of the reasons, if any there be, for, and the judgment, refusing the rehearing.

Section 3. The service of notice of intention to apply for certiorari or review, under article 101 of the Constitution, followed by the filing of the application within the time allowed by the Constitution, shall operate to suspend any further proceedings in the case to which the application relates, either in the court of appeal or the court of the first instance, until the further order of this court, and the clerk is required to notify the courts of appeal, in each instance, of the filing of such application.

RULE XVII.**MAKING PARTIES, IN CASE OF DEATH.**

Section 1. Whenever, pending an appeal, either party shall die, his proper representative may voluntarily come in and be admitted a party to the suit, and, thereupon, the cause shall be heard and determined as in other cases.

Section 2. Should the appellant or appellee die, pending the appeal, if his proper representative be known and reside within the state, and has not made himself a party before the court, the opposing party may, on affidavit, apply for an order to summon him to appear within twenty-five days, and, in default of such appearance, after due return of

service, may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

Section 3. If the proper representative of the appellant or the appellee, who has died pending the appeal, be not known, or does not reside within the state, the opposing party may, on affidavit, obtain an order that, unless he shall appear and become a party within three months from publication, the appeal will be dismissed. Such order shall be addressed to the party by registered mail, where the address is known, and shall be published, in English, three times within sixty days from date of order, fifteen days to intervene between publications, in a newspaper printed in the place where the court sits, and, upon proof of such publication, and such mailing, where the address is known, and, in default of appearance, the appeal may be dismissed, or the cause heard and determined, as in other cases.

Section 4. The foregoing provisions shall apply to corporations, the charters of which have expired, pending the appeal, by limitation, forfeiture, or other mode of dissolution.

RULE XVIII.

APPLICATION FOR ADMISSION TO THE BAR.

Section 1. Save as provided in sections 2, 3 and 4 of this rule no applicant for admission to the bar shall be accorded an examination by the court until the following requirements shall have been fulfilled, to-wit:

1. His written application, addressed to the court, as provided in section 7 of this rule, shall have been delivered to the clerk and his name, as a candidate, shall have been published, during three judicial days, by posting upon the bulletin board at the court room door.

2. He shall have been examined by the proper committee, as provided by rule XX, and the certificate required by that rule—to the effect that his examination was satisfactory—shall have been returned to the court.

3. He shall have produced to the court satisfactory evidence:

(a) That he is, or, at least two years prior to the date of his application, had declared his intention, before a competent court, or officer, to become, a citizen of the United States.

(b) That he is, or that it is his intention to become, a citizen of the state of Louisiana.

(c) That he is a man of good moral character.

(d) That he has pursued the study of law for, at least, three years, under the direction of a respectable member of the bar, of this state, who shall certify, in detail, the course of study pursued and works read by the applicant, and the number of hours, approximately, devoted to the study during each year.

Section 2. Applicants who have been graduated in the law schools of Tulane University of Louisiana, Louisiana State University and Agricultural and Mechanical College and Loyola University, will be granted their licenses upon producing their diplomas, with satisfactory evidence of good moral character; and time, shown by competent certificates, to have been diligently spent in the study of law, at those schools, may be counted as part of the three years study required by paragraph "(d)" of the preceding section.

Section 3. Any applicant, who shall have been graduated at a law school of the highest class in any state of the Union, may be relieved of the necessity of complying with the requirement of paragraph "(d)" of section 1, of this rule, upon producing his diploma and complying with the other requirements of that section and with those of Act 136 of 1877 (Extra Session), p. 207.

Section 4. Any applicant, being a citizen of the United States, who shall have been licensed to practice law in the superior courts of any other state in the Union, may be relieved of the necessity of complying with the requirement of paragraph "(d)" of section 1, of this rule, upon producing satisfactory evidence that he was so licensed, that he has resided in this state during the six months immediately preceding his application, and that, during the three years preceding his coming to this state, he actually practiced in such other state, as a member of the bar in good standing; the evidence, as to the matter last mentioned, to consist of a certificate from the presiding judge of such superior court.

Section 5. No applicant will be re-examined by the court within six months following an examination upon which his application has been denied.

Section 6. The court will not be satisfied with the qualifications of an applicant, in point of legal learning, unless it shall appear by examination, that he is well read in the following course of studies, at least: International Law, Willson; Constitutional Law, Cooley's Principles of; Roman Law, Sohm's Institutes; Civil Law, Pothier on Obligations, History of Civil Law in Louisiana, Civil Code of Louisiana, Code of Practice of Louisiana; Admiralty Law, Benedict (4th Ed. 1 Vol.); Equity, Pomeroy (Student's Edition, 1 Vol.); Contracts, Huffcut's Edition of Anson; Torts, Burdick (2d Ed.); Evidence, McKelvey; Bills and Notes, Bigelow; Conflicts, Minor; Insurance, Richards; Corporations, Marshall (1 Vol.); Crimes, Clark & Marshall; Federal Practice, Hughes; Louisiana Statutes, of a general nature: Provided, that satisfactory equivalents may be accepted for any of the works above prescribed.

Section 7. Each applicant shall fill out, in his own handwriting, sign, and file with

the clerk a certificate in the form shown in the appendix to these rules (copies of which will be furnished by the clerk), which certificate, so filled out and signed, shall be referred by the clerk to the proper committee, and shall be returned by the committee to the court, after examination of the applicant, with its indorsement thereon of the result of the examination.

Section 8. Applicants will be examined in open court, on the first Mondays, when the court sits, in the months of October, December, February, April and June.

Section 9. No oath shall be administered or license issued until the fees of the clerk shall have been paid.

RULE XIX.

ROLL OF ATTORNEYS.

Section 1. The clerk is directed to open and keep a roll of attorneys, which shall contain:

- (a) The full name of each attorney
- (b) The place of his birth.
- (c) The date of his birth.
- (d) The place of his admission.
- (e) The date of his admission.
- (f) The authority for his admission.
- (g) The place of his residence.
- (h) The signature in full of the attorney.
- (i) The date of registry.

Section 2. The clerk shall require from the applicant for enrollment evidence of his admission to the bar, but, in case of the loss or destruction of the diploma or license showing admission, the clerk shall make the enrollment, on the affidavit of the applicant, noting the circumstance, in writing, on the roll.

Section 3. No attorney who has failed to comply with this rule shall be permitted to practice before this court.

RULE XX.

EXAMINING AND DISBARMENT COMMITTEES.

Section 1. The court has appointed four committees, consisting, each, of five members of the bar at, or near, New Orleans, Monroe, Opelousas and Shreveport, respectively, and those committees, as now established and constituted, and with all the powers now vested in them and all the duties heretofore assigned to them, and with no change in the tenure by which the members hold their appointments, are now continued for all the purposes for which they were originally established, and with such further specifications of those purposes and such enlargement of the powers and duties of the committees with respect thereto as may be hereinafter set forth.

Section 2. The committee appointed from the members of the bar at, or near, New Orleans, shall exercise its jurisdiction over applicants for admission to, and members of,

the bar, residing in the territory comprising the parishes of Orleans, Assumption, Ascension, St. James, East Baton Rouge, East Feliciana, West Feliciana, St. Helena, Livingston, Tangipahoa, St. Tammany, Washington, St. John the Baptist, St. Charles, St. Bernard, Plaquemines and Jefferson.

Section 3. The committee appointed from the members of the bar at, or near, Monroe shall exercise its jurisdiction over applicants for admission to, and members of, the bar, residing in the territory comprising the parishes of Union, Lincoln, Jackson, Caldwell, Ouachita, Morehouse, Richland, Franklin, West Carroll, East Carroll, Madison, Tensas, Concordia, La Salle and Catahoula.

Section 4. The committee appointed from the members of the bar at, or near, Shreveport, shall exercise its jurisdiction over applicants for admission to, and members of, the bar, residing in the territory comprising the parishes of Caddo, Bossier, Webster, Bienville, Claiborne, De Soto, Red River, Winn, Grant, Natchitoches, Sabine, Vernon, Rapides, Calcasieu, Allen, Beauregard and Jefferson Davis.

Section 5. The committee appointed from the members of the bar at, or near, Opelousas shall exercise its jurisdiction over applicants for admission to, and members of, the bar, residing in the territory comprising the parishes of Avoyelles, Cameron, Pointe Coupee, West Baton Rouge, Iberville, St. Landry, Evangeline, Acadia, Vermillion, St. Martin, Iberia, St. Mary, Terrebonne and Lafourche.

Section 6. The term for which the members of the committees, respectively, are appointed is five years and vacancies occurring before the expiration of that period shall be filled by appointment for the unexpired balance of the original term.

EXAMINATION OF APPLICANTS FOR ADMISSION TO THE BAR.

Section 7. There is assigned to the respective committees designated in the preceding sections 2, 3, 4 and 5, the duty, on receipt of the certificates required by section 7, of rule XVIII, of examining for admission to the bar, all applicants of whom jurisdiction is thereby conferred upon them, and of reporting the results of their examinations, in writing, to this court; and, in the discharge of that duty, the committees will be expected to inquire carefully into the general qualifications of the applicants, as prescribed by rule XVIII, and thoroughly to examine them with respect to the course of study prescribed by that rule.

Section 8. The members of the committees, respectively, shall select their own chairmen, and hold their meetings at times and places as summoned by such chairmen.

DISBARMENT PROCEEDINGS.

Section 9. The committees provided for in the preceding sections of this rule are,

respectively, charged with the further duty of investigating complaints made against members of the bar of whom jurisdiction is conferred upon them by said sections, and, if any one of said committees shall be of opinion that probable cause for disbarment has been shown against a member of the bar within its jurisdiction, it shall certify that fact to the Attorney General, whose duty it shall be, thereupon, to initiate, in this court, a suit for the disbarment of such member, and the said committee shall designate one or more of its members to associate with and assist the Attorney General in the prosecution of such suit, which shall be in the name of the state of Louisiana, and at the cost of the defendant, if condemned, otherwise, without cost.

Section 10. When charges shall have been preferred against a member of the bar and it becomes necessary for one or more members of the committee, having jurisdiction, to be recused, it shall be the duty of the chairman to certify that fact to this court, and, thereupon, the court will designate a member, or members, of the bar to serve, pro tempore, in the place, or places, of the member, or members, so recused.

RULE XXI.

The foregoing rules shall take effect on and after March 15, 1915, until which date the present rules shall continue in force, save in so far as they may be amended or abrogated in the meanwhile: Provided, that these rules shall have no retroactive effect.

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THE SOUTHERN REPORTER VOLUME 67

No. 20560.

In re RECEIVERSHIP OF WEBRE-STEIB CO., Limited.

(Supreme Court of Louisiana. Dec. 14, 1914.
Rehearing Denied Jan. 11, 1915.)

(*Syllabus by the Court.*)

1. CORPORATIONS —189—RIGHT TO RECEIVERSHIP—IMPAIRMENT OF CAPITAL—MINORITY STOCKHOLDERS.

Where, in an action, by minority stockholders, for the appointment of a receiver for a corporation, the evidence discloses that the directors and officers, owning or representing a majority of the stock, acting beyond their lawful authority, have issued negotiable paper, in the name of the corporation, without consideration and for the accommodation of another corporation, in which they are interested, or of an individual, that the effect of the transactions, if sustained, would be to impair the capital of their corporation to an extent exceeding 50 per cent., and that the situation was concealed from, and misrepresented to, the minority stockholders, a case is presented for the appointment of a receiver under Act No. 159 of 1898, §§ 1, 2, 11.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

2. CORPORATIONS —189 — RECEIVERSHIP — GROUNDS—FRAUD.

It is not necessary for minority stockholders, applying for the appointment of a receiver, under Act No. 159 of 1898, §§ 1, 2, 11, to allege fraud. It is immaterial in such case whether the gross mismanagement, ultra vires acts, wasting, misusing, or misapplying of funds or violation of charter rights, specified in the act, are done purposely and fraudulently, or negligently and inefficiently; the result is the same—the innocent stockholders or creditors are the sufferers—and the intent of the law is to protect them from inefficiency and negligence, as well as from fraudulent machination.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 706-722; Dec. Dig. ¶189.]

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; Charles T. Wortham, Judge.

In the matter of the receivership of Webre-Steib Company, Limited. From a judgment denying application for appointment of a receiver, the applicants appeal. Reversed and remanded, with directions.

Eugene J. McGivney and Prentice E. Edrington, Jr., both of New Orleans, for appellants. Pugh & Himel, of St. James, for appellee.

Statement of the Case.

MONROE, C. J. A minority of the stockholders of Webre-Steib Company, Limited, consisting of seven women and three men, and holding 580, out of 2,100, shares of the stock of the company, of the par value of \$25 each, prosecute an appeal in this case from a judgment denying their application for the appointment of a receiver.

They allege, in substance, that the majority of the stockholders, by grossly mismanaging the business of the company, through the officers elected by them, and by the ultra vires acts of such officers, are violating and jeopardizing their rights and putting their interests in imminent danger; that petitioners have been refused a statement of the business and financial condition of the company and permission to examine the books; that no proper books have been kept, but that the affairs of the company have been permitted to become confused with those of Joseph-Webre Company, Limited, an insolvent corporation, now in the hands of a receiver, and against which proceedings in bankruptcy have been instituted; that Joseph-Webre Company, Limited, is indebted to Webre-Steib Company, Limited, and that, against good morals and good practice, the same directors are in control upon the boards of both companies, the president of Webre-Steib Company, Limited, is receiver of Joseph-Webre Company, Limited, and counsel holding large claims for themselves and others, adverse to the interests of Webre-Steib Company, Limited, are representing said adverse interests, both corporations and the receiver; that petitioners are informed and believe that said directors and officers are endeavoring to cause certain liabilities of the bankrupt Joseph-Webre Company, Limited, to be assumed and paid by Webre-Steib Company, Limited; that petitioners are informed and believe that they are contemplating the imposition of an additional mortgage upon, or the pledging of the crop of, Golden Ridge Plantation, the sole asset of Webre-Steib Company, Limited, with a view of purchasing the assets of Joseph-Webre Company, Limited, in the interest of said directors and officers, and to the prejudice of the stock-

holders of Webre-Steib Company, Limited, other than themselves; that said majority stockholders, also directors and officers of said insolvent corporation, propose to re-elect the same directors and officers and retain them in control of the offices of Webre-Steib Company, Limited; and that the appointment of a receiver is necessary to protect the rights and interests of the minority.

Opinion.

[1] It appears from the evidence that, upon January 22d and 23d of this year, counsel representing the petitioners wrote to the president of the defendant company informing him of their employment, requesting that a statement of the assets and liabilities of the company and of its income and disbursements be furnished, and that they be permitted to examine the books of the company, through a certified public accountant. It is not shown that the president replied to the letter, so written, but it appears that he called on the writer and inquired as to the kind of statement that he wanted, promised to furnish it, and directed the secretary to prepare such a statement, and that the statement was prepared and submitted to him, after which he directed the secretary to send it to the counsel representing the company, to be delivered to the counsel by whom the demand had been made. It seems, however, that there appeared upon the statement, as a liability of the company, a certain note for \$20,000, which had been issued, in the name of the company, by its former president, and countersigned by the secretary, without authority or consideration; and, when the case was on trial, some two months later, and the statement was finally produced, the then (and now) president testified that, though he had instructed the counsel of the company to deliver it to plaintiff's counsel (without explanation, so far as the record discloses, and as containing correct information), he had not signed it, because he did not believe that the company was bound for the payment of the note to which we have referred. The counsel to whom the statement was delivered had not previously delivered it to plaintiff's counsel, and explains the omission by saying:

"I was to send that statement to Mr. McGivney and always forgot to bring it to him. I went to the city once with the intention of bringing it to him, and I forgot it on my desk."

Counsel seems also to have forgotten that the statement might have been delivered through the mail, within an hour or two, and the result was that plaintiff's counsel were obliged to prepare their petition with but little definite information and never saw the statement or the books of the company until they were produced on the trial. In the meanwhile, and before the suit was instituted, Louis Brazan, one of the plaintiffs herein, who is said to be a hard-working farmer with little business experience, and who himself, owning but six shares of the stock of

the company, represents most of the minority stockholders, received a note from the counsel to whom we have referred, reading: "Come at once to Joe Webre's store, I want to see you on business." And he went to the place appointed and gives the following account of his experience, to wit:

"They called me about three or four weeks ago; there were three or four members of the board of directors there [meaning of Webre-Steib Company Limited], Theo. Donaldson, Roger Steib, Theo. Gravois, and Stanislaus Sevin, and they asked me if we wanted to buy Joseph-Webre Company and make one corporation with Joseph-Webre Company and Webre-Steib Company, and I said: 'I can't give you no answer. I'll have to see my lawyer.' * * * Mr. Himel [counsel by whom he had been summoned to the meeting] told us the Webre-Steib Company owes Joe-Webre Company \$20,000, and, 'if you want, we are going to make one corporation with both places,' and I told him 'I will have to see my lawyer,' and in the same evening, Mr. Himel came to my house and said, 'Never sign such a proposition,' because that note was no good. Q. Had you ever heard of that \$20,000 being due before? A. No, sir."

Of the parties thus named by the witness, Theodore Gravois was, and is, and has been from the beginning, a member of the board of directors of the defendant company, its field manager for 10 years prior to March, 1913, and, since then, its president, and he was also at that time receiver of the Joseph-Webre Company, Limited; Roger Steib was, and had been for years, a member of the board of directors, and secretary-treasurer of the defendant company, and, in the latter capacity, had signed the \$20,000 note to which we have referred, and he had also been a member of the board of directors of the Joseph-Webre Company, Limited; and Theodore Donaldson had been for several years, up to 1914, a member of the board of directors of the defendant company and the bookkeeper (and probably, also, director) of the Joseph-Webre Company, Limited, by whom the accounts of the Webre-Steib Company, Limited, and the Joseph-Webre Company, Limited, until just prior to the appointment of the receiver for the company last named, had been kept in the same books, and who when, in January, 1914, separate books were opened for Webre-Steib Company, Limited, gave information leading to the entry of the \$20,000 note as a liability (although he testifies that he knew that it had been issued without consideration), and to another false entry, to the effect that the note was secured by a second mortgage, which he knew to be nonexistent and which would have been worthless if it had existed.

Besides the note for \$20,000, which, according to the entry above mentioned, was "given to the Bank of Donaldsonville to be discounted by them for account of L. S. Webre," there had been issued, under the administration of the same parties, controlling the directorates of the two companies, in the name of Webre-Steib Company, Limited, and for the accommodation of Joseph-Webre Company, Limited, two notes, of \$15,000 and \$5,000, re-

spectively, and the \$15,000 note had been paid from the proceeds of the sugar crop made by Webre-Steib Company, Limited, in 1913, whilst the \$5,000 note is still held by one of the banks as an obligation of that company.

Mr. St. Paul, an expert accountant called by plaintiffs, testified that, assuming the \$20,000 note to represent a liability, he found that the capital of the defendant company has been impaired to an extent exceeding 50 per cent.; that Joseph-Webre Company, Limited, is indebted to defendant in the sum of \$7,248.26; that the present directors of the defendant company are indebted to Joseph-Webre Company, Limited, in amounts aggregating \$21,775.15, or more than one-third of the capital of that company; that the same parties allowed Louis Webre to get over \$200,000 from that company upon inadequate security, causing an apparent loss to the company of \$47,998.38; and that the company has been forced into bankruptcy.

The evidence sustains the assertion that Mr. Gravois is a competent field manager; that is to say, witnesses have testified, without contradiction, that Golden Ridge Plantation has been well cultivated and cared for under his administration. In the 13 years, from 1902 to 1914, inclusive, there were 7 years during which no dividends were declared; such profits as may have been earned having been invested in improvements. During the other six years there were dividends aggregating \$28.20 per share (of \$25), so that the average dividend during the 13 years was, say, \$2.17 per share, or 8.68 per cent., which, in view of the loss of \$6,600, by the failure of a bank, and a debt of \$8,000, incurred by reason of overflow, may probably be considered a fair return. But Mr. Gravois himself disclaims knowledge and experience in financial management, and he participated in the action of the board of directors which authorized the accommodation and unsecured loans, of \$15,000 and \$5,000, to Joseph-Webre Company, Limited, made no effective objection to the entry upon the books of the company, as a liability, of the \$20,000 note, subsequently issued, without authority or consideration, for the benefit of Louis S. Webre, and participated in the meeting at which Brazan, a plain, inexperienced farmer, who was endeavoring to represent some of the feminine stockholders, was informed that the company owed the \$20,000, although Brazan was the only person present who did not know to the contrary, which misinformation was not given for any good purpose that we are able to discover.

[2] Our statute (Act No. 159 of 1898, § 1) declares that the district courts may appoint receivers to take charge of the property and business of corporations:

" * * * 2. At the instance of any stockholder or creditor, when the directors or other

officers of the corporation are jeopardizing the rights of the stockholders or creditors by grossly mismanaging the business or by committing acts ultra vires, or by wasting, misusing, or misapplying the property or funds of the corporation. * * *

"11. At the instance of any stockholder when a majority of the stockholders are violating the charter rights of the minority and putting their interests in imminent danger."

Counsel for defendant objected to the introduction of evidence, on the ground that plaintiffs had not alleged fraud, but, as may be seen, no such allegation is required. It is immaterial, therefore, for the purposes of the question here presented, whether the gross mismanagement, ultra vires acts, wasting, misusing, or misapplying of funds, or violation of charter rights specified in the statute are done purposely and fraudulently, or negligently and inefficiently; the result is the same—the innocent stockholder, or creditor, is the sufferer—and the intent of the law is to protect him from inefficiency and negligence, as well as from fraudulent machination. The evidence in this case discloses several, if not all, of the conditions contemplated by the statute, not in that department to which Mr. Gravois devoted his particular attention and in which he is shown to be efficient, but in the handling of the finances, to which he does not appear to have attended, and in which there appears to have been, charitably speaking, marked inefficiency.

The complaining stockholders are therefore entitled to the relief prayed for. Sincer et al. v. Alverson et al., 51 La. Ann. 955, 25 South. 650; Davies et al. v. Waterworks & Light Co., 107 La. 145, 31 South. 694; Varnado et al. v. Banner Cotton Oil Co. et al., 126 La. 590, 52 South. 777; Van Vleet v. Evangeline Oil Co., 127 La. 919, 54 South. 286; Id., 129 La. 406, 56 South. 343; Brock v. Automobile Livery & Sales Co., 130 La. 404, 58 South. 21; Kerlin v. Bryceland Lumber Co., 134 La. 463, 64 South. 289; Bank v. Bailey, 29 Okl. 246, 116 Pac. 812, 39 L. R. A. (N. S.) 1033, and note.

For the reasons thus assigned, it is ordered that the judgment appealed from be set aside, and that this case be remanded, with instructions to the district court to appoint the receiver as prayed for, and otherwise to proceed according to law, the cost of this suit to be paid by the receivership.

(136 La. 280)

No. 20609.

YERGER v. SIMMONS et al. (FITZGERALD et al., Interveners).

(Supreme Court of Louisiana. Dec. 14, 1914.
On Application for Rehearing,
Jan. 11, 1915.)

(Syllabus by the Court.)

1. MORTGAGES — 272 — FORECLOSURE — RIGHT — TIMBER CONTRACT.

The holder of a mortgage, after ratifying the sale of the timber on the land mortgaged,

cannot foreclose on the timber during the existence of the timber contract; and the transferee of such mortgage creditor, with notice, has no greater rights than his transferor had.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 715; Dec. Dig. ¶272.]

2. CONTRACTS ¶221—"CONDITION PRECEDENT."

A "condition precedent" in a contract calls for the performance of some act or the happening of some event after the terms of the contract have been agreed upon before the contract shall take effect.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1015-1032; Dec. Dig. ¶221.]

For other definitions, see *Words and Phrases*, First and Second Series, *Condition Precedent*.]

3. LOGS AND LOGGING ¶3—MORTGAGES ¶272—SALE OF TIMBER—CONSENT OF MORTGAGEE—VALIDITY OF CONTRACT.

A timber contract which stipulates that the purchaser shall have a definite term in which to fell and saw timber and remove same from the land is valid; and, when such contract has been ratified by a mortgage creditor, that creditor, or his transferee, with notice, cannot enjoin the execution of the contract, or have it annulled during the time of its existence, except for noncompliance by the obligor with its terms.

[Ed. Note.—For other cases, see *Logs and Logging*, Cent. Dig. §§ 6-12; Dec. Dig. ¶3; *Mortgages*, Cent. Dig. § 715; Dec. Dig. ¶272.]

Appeal from Ninth Judicial District Court, Parish of Madison; F. X. Ransdell, Judge.

Consolidated actions, one by George S. Yerger against G. W. Simmons and another, wherein R. H. Fitzgerald and another intervened, one by Joel F. Johnson, Sr., against G. W. Simmons, one by Joel F. Johnson, Sr., against R. H. Fitzgerald and others, and one by R. H. Fitzgerald against A. J. Sevier, Sheriff, and others. Judgment favorable to Joel F. Johnson, Sr., and others, and Fitzgerald and others appeal. Reversed.

John M. Munholland, of Monroe, for appellants. John B. Stone and Snyder & Gilfoill, all of Tallulah, for appellee Joel F. Johnson, Sr.

SOMMERVILLE, J. The property involved in this case is known as the Hester plantation or tract, in Madison parish, which passed into the possession of Dr. H. Frizell, of Mississippi, burdened with a vendor's lien represented by a note for \$20,000. Dr. Frizell sold to G. W. Simmons, of Memphis, Tenn., with full warranty, for about \$35,000, represented by notes bearing upon the property as a second mortgage. Simmons sold to J. J. Gehlhausen, of Madison parish, with full warranty, and the latter assumed the payment of the \$35,000 of notes given by Simmons, his vendor, as the purchase price. Gehlhausen is one of the defendants in the first of these consolidated cases.

While Simmons was owner, he placed a small mortgage on the property, evidenced by a note held by R. H. Fitzgerald, who is the real defendant in these cases.

Joel F. Johnson, of Mississippi, is the real plaintiff, although the first suit was brought

in the name of Geo. S. Yerger, of Madison parish.

Prior to the filing of these consolidated suits, Johnson became the owner of the note for \$20,000, reduced to about \$9,000, which was secured by vendor's lien on the property, and he caused executory process to issue thereon in the name of his son, Joel F. Johnson, Jr., July 11, 1911.

This note was taken up by defendant Fitzgerald, the junior mortgage creditor, and execution thereon was stayed.

Johnson subsequently bought from Dr. Frizell the notes for \$35,000, which the latter had received from Simmons as the purchase price of the plantation or tract.

The first of these consolidated suits is by Johnson, the second mortgage creditor, who sues via *ordinaria* Simmons and Gehlhausen, the two last successive owners of the property, on the notes issued by Simmons to Dr. Frizell in payment when he bought the property, and which were assumed by Gehlhausen when he bought from Simmons, and plaintiff asks for judgment against these two defendants for the amount of the notes, and for recognition of the vendor's lien and privilege.

Since the institution of the first suit now before the court, Johnson became the owner and possessor of the first mortgage or vendor's lien and note for the second time, and he again caused executory process to issue thereon. He was the purchaser at the sale, and he is now the owner of the plantation, without certain standing timber thereon. (This timber had been sold by Simmons to Fitzgerald, and the latter had enjoined the sale of the timber by Johnson in this last executory proceeding.)

Gehlhausen's defense is that he bought the property with full warranty of title from Simmons, his codefendant, who in turn bought with warranty from Dr. H. Frizell, and that Dr. Frizell was the holder and transferor of the second mortgage notes sued upon by Johnson.

It is only to be observed in connection with these transfers of the property that title passed with full warranty from these successive owners, without declaring, at the time of the sales, the existence of a prior vendor's lien, and it follows that the present owner of the property, Johnson, who purchased at a sale under that prior lien and mortgage which was warranted against, cannot collect from the last vendee, Gehlhausen, the price which the latter agreed to pay for the property. Johnson cannot take the property and the price too. When Simmons bought with full warranty of title, and gave his notes for the purchase price to Dr. Frizell, and the property was subsequently taken from him by the holder of a first mortgage, he does not owe the price to his vendor, Dr. Frizell; and Johnson, who acquired the notes

sued upon from Frizell, the vendor who sold to Simmons, only acquired the rights which Frizell held. Frizell could not recover from Simmons on these notes; neither can his vendee, Johnson, do so. And the lien, privilege, and mortgage securing these notes fall with them, and execution on them as to the timber will remain suspended until the end of the year 1916, unless a certain timber contract, which will be noticed later in this opinion, is sooner set aside.

The suit against Simmons appears to have been correctly disposed of by the trial judge, who did not render judgment against him, and Johnson has acquiesced in the judgment, for he has not appealed.

But Gehlhausen, codefendant with Simmons, who purchased the plantation from Simmons and assumed payment of the notes issued by Simmons for the purchase price, and who stands in the shoes of Simmons as to these notes, has been condemned to pay said notes, although he has been deprived of the property for which they were given. He (Gehlhausen) did not sell the Simmons' notes to Johnson, or receive any of the selling price thereof. The judgment against Gehlhausen will be reversed.

While Simmons was owner of the property he sold the standing cottonwood timber on certain parts thereof to R. H. Fitzgerald, of West Carroll parish, September 8, 1911. This contract provided that Simmons, the vendor, should build a sawmill for the use of Fitzgerald; but this stipulation was formally waived by a subsequent contract, and Fitzgerald built the mill. It was agreed "that this contract shall continue in force for one year from the date operation of the mill is commenced." The mill began to be operated March 16, 1912, and the contract covering cottonwood timber was to have expired on March 16, 1913, after this suit was filed. The price of the timber was fixed, and \$500 were paid by Fitzgerald to Simmons on the price of the timber. The balance, at the rate of \$2.50 per thousand log scale, was "to be paid on all cottonwood as logs pass through mill; payments to be made every thirty days after operation is commenced. All balance due under grades and prices above specified, if any, to be paid when lumber is loaded on cars, * * * and in any event (Simmons was) to receive a minimum price of not less than \$2.50 per thousand feet on all logs. The cash payment hereunder is to be considered as a credit on said logs at the rate specified until consumed."

The contract also contained an option given to Fitzgerald to purchase certain merchantable ash, oak, gum, and elm timber standing on the place at prices therein fixed, which timber was to be cut by April 1, 1916, and removed within nine months thereafter. This option was accepted June 1, 1912.

It was further stipulated "that one-half of all moneys coming to the said Simmons un-

der this agreement shall be paid over to Dr. Horton Frizell, or to the legal holder or holders of the mortgage notes described in, and secured by," the act of sale from Frizell to Simmons. And the "agreement was conditioned upon the ratification by the said Frizell, or other holders of said notes, and of Mrs. M. C. Ludeling, or the legal holder of that certain mortgage note for \$20,000" heretofore referred to.

Dr. Frizell, vendor and holder of the second mortgage notes, ratified the contract on September 16, 1911, and the notes held by him were paraphrased to identify them with the timber contract of sale. Mrs. Ludeling did not ratify it, and the parties to the contract waived that provision with reference to ratification by her. Dr. Frizell September 26, 1911, guaranteed Fitzgerald against loss and damage from any interference by Mrs. Ludeling.

In the act of ratification Dr. Frizell consented and agreed "to the sale of said timber, as therein provided, provided that payment is to be made to him of one-half of all moneys due, as provided in said act of sale, or to the bona fide owner or holder of said notes," referring to the second mortgage notes for \$35,000 held by him, and now owned and sued on by Johnson.

The parties to the contract executed same, with the modifications stated, and the mill began to be operated March 16, 1912, and continued until the flood from the river stopped the mill for several months.

July 19, 1912, Simmons, by public act, declared that, having received the \$500 mentioned in the contract, having been released from the obligation to build the mill (which would have cost several thousand dollars), and for other considerations received by him, "he fully and completely ratified and accepted the same in all of its parts and clauses," and declared "that the said Fitzgerald has fully and completely done and performed any and every act required and exacted of him under the terms of said agreement."

And to this time the parties to the agreement have recognized it to be of full force and effect; and no one of them is before the court complaining of, or asking for relief from, it.

Joel F. Johnson, Sr., a stranger to the contract, as the holder of the second mortgage, on September 28, 1912, attacked the contract, and asked that it be avoided and set aside. He alleged that it contains a condition precedent, which has never been complied with; that Fitzgerald has not paid the sums due by the terms of the contract; and that the land upon which he (Johnson) has liens, privileges, and mortgages is being destituted of the timber thereon, to his great loss and damage. He sued out writs of injunction and sequestration, and asked further that Fitzgerald account for the timber sawed and sold by him; that he have a money judgment

against Fitzgerald; and that the land and timber be sold to satisfy his claims.

Fitzgerald answered denying the allegations of Johnson, and, reconvening, asked for damages for the wrongful issuance of the writs of injunction and sequestration. He also sued out a writ of injunction to prevent Johnson from interfering with the cutting and sale of the timber covered by his contract with Simmons.

There was judgment in favor of Johnson, decreeing that the land and standing timber be seized and sold under the second mortgage which had been transferred by Frizell to Johnson; that Fitzgerald be enjoined from cutting timber; that Johnson have judgment against Fitzgerald for \$3,292.68 and for \$1,598.68. There was further judgment in favor of Fitzgerald and against Johnson sustaining writs of injunction sued out by Fitzgerald, dissolving writs of injunction and sequestration sued out by Johnson, and a money judgment in favor of Fitzgerald for \$750, \$100, and \$300.

Fitzgerald has appealed, but Johnson has not, and no amendment of the judgment has been asked for.

[1-3] The Hester plantation was seized under executory process in the suit numbered 1814, in the consolidated suits before us. The sale of the timber was enjoined by Fitzgerald in suit numbered 1832, and the land, without the timber, was sold to Johnson, the seizing creditor, December 28, 1912.

The land is now the property of plaintiff Johnson, and certain timber, at the time of suit in the trial court, belonged to defendant Fitzgerald under the contracts for cottonwood timber, expiring March 16, 1913, and for other timber, expiring in 1916.

The timber was ordered sold in the judgment appealed from against Gehlhausen. Gehlhausen cannot be held on the notes sued upon, and that judgment will be reversed in its entirety.

The allegation by plaintiff Johnson that the timber contract entered into between defendant Fitzgerald and Simmons, the owner of the land when the contract was made, and which was ratified by Frizell, the holder of the second mortgage, contains a condition precedent, which condition has not been performed, is not supported by the evidence.

The pertinent terms of the contract have been already given, and it (the contract) contains but one condition which was required to be executed before the contract was to go into effect, and that was "the ratification of the said Frizell * * * and of Mrs. M. C. Ludeling." But this was not something to be done by Fitzgerald; it was a stipulation in his favor. Dr. Frizell ratified the contract by public act, and the ratification by Mrs. Ludeling was waived on the giving of a guarantee by Frizell to Fitzgerald.

Plaintiff argues that Dr. Frizell, in his act of ratification, added another condition precedent, when he, after consenting to the sale of the timber by Simmons to Fitzgerald, added or rather took from the original act of sale this provision, "Provided that payment is to be made to him (Frizell) of one-half of all moneys due, as provided in said act of sale, or to the bona fide owner or holder of said notes," referring to the holder or owner of the \$35,000 of notes then held by him, and now owned by Johnson. But this proviso is not a condition precedent to be performed by Fitzgerald before the contract was executed. The contract became absolute and obligatory by the terms embraced in it. Fitzgerald was to go into possession of Hester plantation for one year, erect a sawmill thereon, fell, and saw timber, and, "every 30 days after operation is commenced," pay to Simmons one-half and to Dr. Frizell one-half of \$2.50 per thousand log scale "as logs pass through the mill," and "the balance, if any, to be paid when lumber is loaded on cars," after the cash payment of \$500 made at the time of signing the contract had been exhausted. These terms clearly give a right to sue to annul or for damages for breach of the contract; but the intention of the parties is so plainly expressed in the language used by them, and the nature of the contract is such, that it is clear that the parties did not agree to suspend the contract until some condition happened. 8 Cyc. 558. No portion of the price was to become due by Fitzgerald until after he had executed the contract to the extent of entering upon the land, building a mill, felling the timber, and passing the logs through the mill. And this construction has been given by all of the parties to the contract during its existence. Simmons has declared by public act that Fitzgerald has complied fully with his obligations under it; and there is before the court only a third person setting up that it contains a condition precedent which has not been complied with, and that the contract is without effect. The contract was effective from its date.

Plaintiff asks, in the alternative, if there is a contract, that it be set aside for non-performance; for the reason that defendant Fitzgerald has not paid the price "every 30 days after operation (of the mill) was commenced." The evidence shows that the mill was run for some time, but was stopped for several months in the summer of 1912, on account of a flood; that operations were resumed after the flood subsided; that the \$500 advanced as a portion of the price was not exhausted for some time; and that subsequently the price was offered to plaintiff or his attorney, and that they refused to receive it, and that it was deposited as it fell due in bank for whomsoever might be

entitled to receive it. The price is not sued for in these consolidated cases. The contract should not have been annulled.

Johnson obtained an injunction to prevent Fitzgerald from cutting under the timber contract, on the allegation that he was the owner of the \$35,000 of second mortgage notes bearing on the property, which notes he had acquired from Dr. Frizell; that Fitzgerald was damaging the property mortgaged; and that the timber contract was void, or should be avoided.

The evidence shows that when Johnson acquired the notes from Dr. Frizell he took them with full notice that Frizell had sold the property to Simmons; that Simmons had sold the timber here in dispute to Fitzgerald; that Dr. Frizell had ratified the sale of the timber and was bound by the terms of the contract; that the notes sued upon by plaintiff were paraphrased to identify them with said contract; that all of these contracts were spread upon the public records of the parish; and that he was otherwise fully informed as to them. He acquired no greater rights than his vendor, Frizell, had. He was therefore without right to enjoin the execution of the contract which his vendor had publicly ratified, which contract had not been transferred to him to any extent, except to receive the price falling due thereunder every thirty days, or to enforce compliance with its terms. The writs of injunction should have been dissolved, and the writs under which the timber had been sequestered should have been set aside.

The record discloses a determined effort on the part of Johnson to get possession of the timber on the Hester plantation for his own purposes, and a reckless resort to the processes of the court to gain his object. The several writs issued at his instance have interfered with Fitzgerald in his operations to a very serious extent, although these writs were all bonded by Fitzgerald. Mill crews were stopped from working and were dispersed, and there is some testimony that profitable sales of lumber were defeated; but there is not sufficient positive evidence in the record upon which to base a fixed sum for loss and damage suffered by Fitzgerald. The amounts fixed by the trial judge, from which part of the judgment no appeal was taken, will be affirmed.

The evidence as to the amount and value of the timber cut by Fitzgerald under his contract involves intricate calculations, and it is insufficient to base a judgment upon.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is reversed in so far as it is in favor of Joel F. Johnson, Sr., and against J. J. Gehlhausen and R. H. Fitzgerald, and it is affirmed in so far as it is in favor of R. H. Fitzgerald and against Joel F. Johnson, Sr., with recognition of the right of Fitzgerald to pro-

ceed with the execution of his timber contract with Simmons. The several suits filed by Johnson, or in his behalf, original and by way of intervention, together with all pleas filed by him, against Gehlhausen and Fitzgerald, are dismissed, with costs to be paid by him in both courts.

The right is reserved to Joel F. Johnson, Sr., to demand an accounting from R. H. Fitzgerald under the timber contracts entered into between the latter and G. W. Simmons, of dates September 8, 1911 and June 1, 1912, and to sue for the amounts which may be found to be due.

O'NIELL, J., takes no part, not having heard the argument.

On Application for Rehearing.

PROVOSTY, J. It is ordered, adjudged and decreed that as to the claims of R. H. Fitzgerald in damages against George S. Yerger in suit No. 1805, of the docket of the lower court, entitled George S. Yerger v. G. W. Simmons and J. J. Gehlhausen, and as to the claim in damages of R. H. Fitzgerald v. Joel F. Johnson and Jeff B. Snyder in the intervention of Joel F. Johnson in said suit No. 1805, the judgment heretofore handed down by this court in the above-entitled consolidated suits be set aside, and that the judgment of the trial court be also set aside and annulled, and it is now ordered, adjudged and decreed that as to and on said claims in damages the case be remanded to the trial court for further trial and adjudication, with leave to both sides to offer further evidence.

Otherwise, the applications for rehearing are refused.

(186 La. 291)

No. 20884.

STATE v. WOODWARD.

(Supreme Court of Louisiana. Nov. 30, 1914.
Rehearing Denied, Jan. 11, 1915.)

(Syllabus by the Court.)

JURY \S 59, 82—JURY COMMISSION—NOTIFICATION—OBJECTIONS TO VENIRE.

Where the clerk of the district court notified by mail a member of the jury commission to attend a meeting on the next day, and the only reason he did not attend was because the carrier delivered the notice to the commissioner's wife, and she did not deliver it to him until too late in the day, *held*, that the notification was sufficient, and, moreover, that the defendant was not prejudiced by the absence of the commissioner.

[Ed. Note.—For other cases, see Jury, Cent. Dig. \S 268-272, 282, 307-309, 331, 332, 348, 359, 367, 380; Dec. Dig. \S 59, 82.]

Appeal from Thirtieth Judicial District Court, Parish of Caldwell; George Wear, Sr., Judge.

Samuel B. Woodward was convicted of shooting with intent to kill, and appeals. Affirmed.

Wear & Jones, of Jena, for appellant. R. G. Pleasant, Atty. Gen., and S. L. Richey, Dist. Atty., of Jena (G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. Defendant was convicted and sentenced for the crime of shooting with intent to kill.

He has appealed, and relies for reversal upon a single bill of exception taken to the refusal of the judge to quash the venire for the week, on the ground that George Ship, one of the jury commissioners, had not been duly notified to attend the meeting at which the venire had been drawn.

The per curiam of the judge reads as follows:

"It was discovered on Thursday of the first week of court that in order to dispose of the business before the court that a jury for the second week would be necessary; the court issued an order to the clerk to convene the jury commission as early as possible and draw a jury for the second week. The clerk summoned all the jury commission to be present on the next day at 1 o'clock, and they were all present at that hour except Commissioner Ship. The clerk notified him by letter, which letter was mailed on the day the order was given and reached him the next day at 1:15 o'clock. Ship not having appeared with the other commissioners, the drawing of the jury was delayed until some time after 4 o'clock p. m., in order that he might be present. It appears from the note of evidence taken that Ship was not at home when the notice reached there, but had he been at home he would have received the notice in time to have participated in the drawing of the jury. The clerk, fearing that the letter or notice mailed would not reach him in time, tried to telephone him to be present, and, failing in that, sent a special notice by deputy sheriff, which notice reached Ship about 4 o'clock.

"The necessity for the second week's jury was brought about by the action of the defendant, who evaded the court in order to avoid the service of the venire of the first week which he is entitled to before trial, and the sheriff succeeding in finding him hid under his house, which is in the town of Columbia where court was being held, on Thursday of the first week, the day on which the order for the second week's jury was given.

"The notice as given through the mail reached the said commissioner's home in time to have enabled him to have been present and participated in the said drawing, according to his own testimony, and in view of the fact that every effort possible was made in order that his presence might be had, the court is of opinion that he was duly notified as is contemplated by law."

Mrs. Ship received the notice about 1:15 p. m., but her husband was at work in the fields some distance from his house, and did not receive the notice until about 5 p. m. Mr. Ship stated that if he had received the notice at 1:15 p. m. he could have arrived at the courthouse by 4 o'clock of the same evening. As it was, Mr. Ship left for Columbia as soon as he received the notice, but arrived too late to participate in the drawing of the jury.

Mr. Ship lived on a rural delivery route, and he or some member of his family met the carrier every day for the purpose of receiving mail.

Under section 3 of Act 135 of 1898, a jury commission consists of six members, including the clerk of the district court, and any three members, together with the clerk, constitute a quorum; provided that all the members shall have been duly notified by the clerk of the time and place designated by him for the meeting of the commission. Of course, the law contemplates a notification in due time to afford an opportunity to members to participate in the business of the commission. *State v. Thomas*, 50 La. Ann. 151, 23 South. 250; *State v. McClendon*, 118 La. Ann. 796, 43 South. 417; *State v. Kellogg*, 104 La. 584, 29 South. 285.

In *State v. Bouvy*, 124 La. 1054, 50 South. 849, it was held that the failure to notify a member of the jury commission, because of his absence from the parish, was not sufficient cause to set aside the venire; and the court, *inter alia*, said:

"The defendant was not prejudiced by the absence of the jury commissioner. There is no rule or principle requiring the setting aside of a verdict on the ground urged. It did not work injury."

See, also, *State v. Kellogg*, 104 La. 584, 29 South. 285.

In the case at bar the jury commissioner was duly notified by mail, and did not receive the notice in time because he was not at his house, and his wife did not carry or send the notice to him. The clerk of the district court was very diligent in his endeavors to notify the jury commissioner, using the mail, the telephone, and, finally, a special messenger.

The defendant suffered no prejudice whatever in the premises, and his objections to the venire are without merit.

Judgment affirmed.

(136 La. 294)

No. 19884.

MISTICH v. COLLETTE.

(Supreme Court of Louisiana. Dec. 14, 1914.
On Application for Rehearing, Jan.
11, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1177 — REMAND — GROUNDS.

A case will not be remanded for an inquiry into matters which have occurred since the trial in the court below and which have no bearing upon the issues brought up by the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4604, 4606-4610; Dec. Dig. § 1177.]

2. MALICIOUS PROSECUTION — 16, 34 — RIGHT OF ACTION — DEFENSE — ANOTHER PROSECUTION.

Where it clearly appears that a criminal prosecution was instigated by malice, and was without probable cause, damages are recoverable, and the fact that the party making the charge instigated other prosecutions against the same defendant, even though they may not have been abandoned until after the institution of the action in damages, throws light upon the mo-

tive for the prosecution which had terminated with the acquittal of such defendant.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 19-22, 59, 70; Dec. Dig. § 16, 84.]

Appeal from Twenty-Ninth Judicial District Court, Parish of Plaquemine; R. E. Hingle, Judge.

Action by Mitchell Mistich against John B. Collette. From a judgment for plaintiff, defendant appeals. Amended and affirmed on application for rehearing.

James Wilkinson, of New Orleans, for appellant. O. S. Livaudais, of New Orleans, for appellee.

Statement of the Case.

MONROE, C. J. Defendant prosecutes this appeal from a judgment condemning him to pay \$600, as damages for causing the arrest of plaintiff upon a charge of assault with a shotgun, and threatening to kill him with it, and for causing one Louis Armstrong to bring a charge of assault and battery against him. Plaintiff has answered the appeal, praying that the amount of the award be increased.

The judge a quo found it to be clear that, in making the charge out of which this suit has arisen, defendant acted with malice and without probable cause, and we discover no error in that finding. The material facts, as disclosed by the evidence, are: That defendant's orange grove, fronting about an arpent and a half, more or less, on the Mississippi river, adjoins that of plaintiff's father; that the latter has reared a large family of children, between whom and defendant there appears to have existed rather bad feeling, during plaintiff's entire life, of, say, 23 years; that plaintiff is undersized, crippled in one leg, and has some bad traits of character and the deserved reputation of carrying a gun; that defendant is a powerful man, and disposed to be domineering and quarrelsome—his next-door neighbor (on the other side from the Mistich's), who was summoned as a witness in his behalf, and who makes no personal complaint against him, testifying that "he has had lots of trouble with other people," and some fights, and witness could not say otherwise than that "he has the reputation of being in court every time that the court meets, making affidavits against parties." On May 25, 1911, a time when plaintiff's father was absent from home, defendant entered upon his premises (possibly, in search of stray chickens), and plaintiff, being told of his presence, and seeing him as he was about reaching, or had reached, his own premises again, asked him what his business was, whereupon there followed an interchange of language neither chaste, elegant, nor complimentary; but, according to the testimony of three witnesses who say that they were present, there was no gun displayed and no threat of using one; and the

most that defendant has to say upon the subject is that, being on his own property, and plaintiff being seated under an orange tree, on his father's place, plaintiff picked up a gun that was lying beside him, and said (after a profane prologue):

"You have been here yesterday and you have been here to-day; if you come over here, I am going to blow your head off." Q. You say he brandished the gun at you? A. He raised it up and shook it at me, and he says, 'You see this,' he says; * * * 'if you come over here, I will blow your head off; you have been here yesterday, and you have been here this morning.'"

On the following day defendant made the charge here complained of, and, upon the hearing of the same before the committing magistrate, gave testimony which, in many respects, differs radically from that given by him on the trial of this case; the result of that hearing having been that the charge was dismissed. Thereafter, on the same day (May 26th), it appears that plaintiff had some difference with a youth of 18 by the name of Armstrong, and struck or slapped him in the face, and, the matter coming to the knowledge of defendant, he took it upon himself to call upon Armstrong's father, at the residence of the latter, where he found him sick in bed, and to insist upon his prosecuting the plaintiff, though Armstrong, Sr., told him that he was sick and had no money and did not wish to prosecute. Defendant, however, undertook to bear the expense, and told Armstrong, Sr., that, unless he or his son prosecuted plaintiff, he (defendant) would prosecute Armstrong, Jr., about some trifling matter that had occurred between them, and in the end he prevailed on Armstrong, Sr., to send his son with defendant to make an affidavit against plaintiff, defendant paying the expense. Later on, however, the Armstrongs abandoned the prosecution, and defendant thereupon filed an affidavit against Armstrong, Jr., of the result of which we are not informed. He also endeavored to induce a young woman to make a charge, the nature of which is not stated, against plaintiff, and she testifies that he offered her \$50 to do so, and he, in effect, admits that she was given \$2 by his wife, with the understanding that she would go to court on the following day and make the charge, which, however, she failed to do.

Opinion.

[1] Defendant has moved to remand the case, on the ground that since the trial in the district court plaintiff has been twice charged with slander, which he has admitted and apologized for; once charged with using bad language on the public highway; once charged and convicted of assault with a dangerous weapon, to wit, a stick; and that, having been given an option of a sentence upon the charge last mentioned or of leaving the parish, he has left the parish.

But, conceding arguendo that the aver-

ments of the motion are sustained by the facts alleged, those facts have no bearing upon the case now before us. The motion is therefore denied.

[2] It is contended that plaintiff should not recover, because, though Armstrong, Jr., abandoned the prosecution of the charge made by him, defendant (plaintiff herein) was not acquitted, and the nolle prosequi was not entered until after the institution of this suit. But there is no merit in that contention, since the action of the plaintiff in connection with that charge, even though the charge had never been abandoned, throws light upon the question of malice vel non in the bringing by defendant of the charge of which plaintiff was acquitted. We find no reason for either reversing the judgment appealed from or increasing the award thereby made.

Judgment affirmed.

On Application for Rebearing.

PER CURIAM. Our former decree is set aside, and it is ordered, adjudged, and decreed that the judgment appealed from be amended by allowing interest from date of judgment, and, as thus amended, it is affirmed.

(136 La. 298)

No. 20093.

FORY v. AMERICAN NAT. BANK.

(Supreme Court of Louisiana. Nov. 30, 1914.
Rehearing Denied January 11, 1915.)

(Syllabus by the Court.)

1. BANKS AND BANKING — 134—DEPOSIT—AGREEMENT—BILLS AND NOTES.

An agreement, entered into between a bank and a depositor with said bank, that a certain deposit to be made in the future by said depositor shall be placed by the bank to the credit of a past-due note of the depositor, which note was held by the bank, is a binding agreement.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. — 134.]

2. BANKS AND BANKING — 134—DEPOSIT—APPLICATION TO NOTE—PRIOR AGREEMENT.

And, if the president of said depositor, it being a corporation, fraudulently causes the deposit to be transferred and credited to the personal account of said president, and it appears that a new deposit of said fund is made in the same bank to the credit of said president, the bank may apply the fund thus fraudulently withdrawn and deposited by the president of the corporation to the payment of the note as previously agreed upon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. — 134.]

3. BANKS AND BANKING — 134—DEPOSIT—CORPORATION—ESTOPPEL.

Under such circumstances, the bank will not be estopped to deny that the president of the corporation was not the real owner of the fund deposited by him, although it may have honored checks drawn by the president individ-

ually to the order of the corporation, the real owner of the fund.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. — 134.]

4. BANKS AND BANKING — 134—DEPOSIT—ESTOPPEL.

If the president of a corporation is injured by the bank under such circumstances, it will be with full knowledge on the part of said president, and because of his own misconduct in violating the agreement made by him as president of the corporation.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 353-374; Dec. Dig. — 134.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by H. R. For against the American National Bank. From judgment for defendant, plaintiff appeals. Affirmed.

Alexander & Wilkinson, of Shreveport, for appellant. Blanchard & Smith and Browne, Williamson & Browne, all of Shreveport, for appellee.

SOMMERVILLE, J. Plaintiff alleges that defendant bank is indebted to him in the sum of \$4,058, with interest, for an alleged balance of a deposit made by him November 11, 1912, in said bank.

Defendant answered, denying any indebtedness whatever to plaintiff. It alleged that plaintiff obtained a certificate of deposit from it on the date mentioned, but alleged further that said certificate of deposit was obtained by fraud on the part of plaintiff, and by error of one of the employees of the defendant bank. It further alleged, in explanation of the certificate referred to, that plaintiff, as president of the Timpson Handle Company, borrowed \$7,500 from defendant bank, represented by a note of said company in favor of the defendant bank, in the amount named; payable four months after date at said bank; that the note matured and was unpaid; that the Timpson Handle Company received a check for \$6,703.38, being the avails of a certain fire insurance policy in its favor, which check was deposited by the Timpson Handle Company in defendant bank to the credit of said company; that prior to the deposit of said check, the plaintiff, representing said company, requested that the bank should not pay the whole amount of the check to be deposited with it on the past-due note of the company, as it, the bank, had the right to do, but that it would receive a partial payment thereof, to the extent of about \$4,000, out of said insurance money; that the bank agreed to said arrangement with plaintiff, and never departed from the agreement; that after the deposit of said check was made with defendant, and while the president of the defendant bank was out of the bank, and away from the city of Shreveport, plaintiff entered the bank and presented to the teller of

the bank a check drawn by him as president of the Timpson Handle Company, in favor of himself individually, for \$5,000, which check was received by the teller of the bank in error, and was credited by him to the account of plaintiff; that said teller was ignorant of the fact that plaintiff, as president of the Timpson Handle Company, had no right to draw said check; that the teller issued a certificate of deposit to plaintiff for the amount of said check, which certificate is here sued upon, in error, and all through the fraud practiced upon him by plaintiff; that said acts on the part of plaintiff were in violation of the agreement entered into with him by defendant; that about \$4,000 of the money to be deposited to the credit of defendant company should go towards the partial payment of the past-due note of the company held by the bank; that the said deposit was the property of the handle company, and not the property of plaintiff; that said amount has now been credited on the note of the handle company before referred to, and that it has no money of plaintiff on deposit; and that it is not indebted unto him in any sum whatever.

The agreement, set forth by defendant in its answer, that it, the bank, should receive and credit on the past-due note held by it of the Handle Company, about \$4,000 out of the deposit, is admitted to be true, and plaintiff answered on cross-examination that the terms of this agreement had not been altered in any way by the defendant bank. But, while admitting that the bank had the right, under the law, to credit the whole of said deposit by the handle company on the past-due note held by the bank, he, plaintiff, contends that the bank did not actually make such payment, or credit; and that the bank did not pay or credit on the note the \$4,000 agreed upon. He alleges that the amount remained to the credit of said company on the books of said bank; and, as president of the handle company, he was authorized to draw, and did draw, a check in his own favor for \$5,000 against the deposit of said company. He further claims that that amount was due him by said company for past-due salary; further, that he bought all of the accounts of the said Timpson Handle Company, and that the amount on deposit with the defendant bank was one of said accounts bought by him; he further filed a plea of estoppel, setting up that the defendant could not be heard to assert that he, plaintiff, had no right to draw the check for \$5,000 referred to, or to deposit the certificate of deposit therefor, for the reason that defendant had recognized him as a depositor in the bank and had paid checks drawn by him individually in favor of the Timpson Handle Company, and had charged the same to his account on its books; and that defendant was further estopped from asserting that the Timpson Handle Company did not authorize him to draw the check for \$5,000, and that

the bank cannot assert defenses personal to said company alone. There was judgment for defendant, and plaintiff appeals.

The allegations contained in defendant's answer were fully proved.

[1-4] Estoppels are not favored. And, where a third person's interests are not involved, and all the facts are known to both sides, there can be no estoppel. If plaintiff has been injured, and the record fails to show that he has been, by the action of the teller of defendant bank in permitting him to draw from the bank the \$5,000 which belonged to the Timpson Handle Company, and which amount the teller placed to the credit of plaintiff's individual account, plaintiff has himself only to blame for drawing said check in violation of the express agreement between him and the president of defendant bank: that \$4,000 belonging to the handle company, to be deposited in the bank, should be paid on the past-due note of the handle company which was held by the bank. *Sicard v. Schwab*, 112 La. 475, 481, 36 South. 500. Under the circumstances related, a bank will not be estopped from alleging and showing that the fund deposited with it by an apparent depositor is a fund belonging to another depositor in said bank, and that the fund deposited with the bank by the apparent depositor was obtained from the bank itself by error and fraud.

It appears from the evidence that two checks were drawn by plaintiff against the deposit made by him in his name, and that they were honored by the defendant bank, and plaintiff alleges that the defendant is thereby estopped from denying that the deposit is his, the plaintiff's. But these two checks were drawn by plaintiff in favor of the Timpson Handle Company, the real owner of the fund on deposit, and they were placed by the bank to the credit of the company's account. Such transactions cannot be construed as a recognition on the part of the bank that plaintiff was the owner of the deposit against which the checks were drawn. The checks were credited by the bank to the real owner of the fund.

The attempt on the part of plaintiff to show that the Timpson Handle Company was indebted to him for salary was not sustained by sufficient evidence; and, if it had been sustained, plaintiff, as president of said company, was prevented from drawing against said fund on behalf of said company because of the agreement entered into between him and the defendant bank that this particular deposit, or a certain portion of it, should go towards the payment of the past-due note of the company held by the bank.

The allegation by plaintiff that he bought from the Timpson Handle Company all the accounts belonging to the said company, and that the deposit referred to was one of the accounts bought by him, is not sustained by the act of sale offered in evidence. The ac-

counts therein referred to are book accounts, and do not include cash belonging to the company on deposit in the defendant bank. Besides, plaintiff knew that said deposit, under an agreement made by himself with the bank, should be used by the bank in part payment of the past-due note of the company held by the bank.

Judgment affirmed.

PROVOSTY, J., takes no part.

(136 La. 303)

(No. 20108.)

COLLINS v. KRAUSE-MANAGAN LUMBER CO., Limited.

(Supreme Court of Louisiana. Nov. 30, 1914, Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT §97, 101, 102—SAFE PLACE OF WORK—DUTY OF MASTER.

The employer is bound to furnish his employes with a reasonably safe place for the performance of their work, and, if the place be unsafe, the remoteness of the danger will not excuse the employer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 163, 171, 174, 178-184, 192; Dec. Dig. §97, 101, 102.]

2. MASTER AND SERVANT §219, 235—INJURY TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Unless the danger be obvious, the defenses of assumption of risk and contributory negligence have no application, where an injured employe was engaged at the time in the performance of his work in the usual manner.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624, 710-722; Dec. Dig. §219, 235.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Harry Collins against the Krause-Managan Lumber Company, Limited. From judgment for plaintiff, defendant appeals. Affirmed.

J. C. Henriques, of New Orleans, for appellant. Cline, Cline & Bell, of Lake Charles, for appellee.

LAND, J. This is a suit for damages for personal injuries sustained by the plaintiff in the course of his employment.

There was judgment in favor of the plaintiff for the sum of \$7,500, and the defendant has appealed.

The petition represents that on December 9, 1912, the plaintiff was an employe of the defendant company in its sawmill, and in the performance of his duties proceeded to repair a hole in the slab conveyor; that in making such repairs he necessarily stood upon the floor of the mill on a slightly elevated board forming a part thereof; that while so engaged one or more boards on which he stood broke or became displaced by reason of being insecurely fastened; that immediately

under the opening thus made were one or more cogwheels and machinery in rapid motion; that his left foot was precipitated through said opening, caught in the machinery, and the foot and a portion of the leg crushed and mangled to such an extent as to necessitate their amputation.

The petition further represents that the accident was the result of the fault and negligence of the defendant company in failing to furnish a safe place within which he was required to perform his labors, and particularly in failing to cover securely the dangerous machinery under said place.

The petition further alleged that the said negligence of the defendant, and the injury resulting therefrom, have damaged the plaintiff in the sum of \$15,000 for the loss of his foot and a portion of his leg, and for physical pain and suffering, and the further sum of \$500 for medical and hospital expenses.

In an amended petition the plaintiff set forth that he was ordinarily employed as gang sawyer, but at the time of the injury was employed to make emergency repairs in the mill when notified by the foreman or by a certain signal, and was engaged in said work, as stated in the original petition, in answer to a signal given by a steam whistle; that he had no knowledge of the defect in the floor where he was standing when the injury occurred, and had never been warned of said defect, or of the danger on account of the same.

The answer admits the employment, accident, and injury, but denies the alleged negligence on the part of the defendant, and avers that the plaintiff's injuries were due solely to his own carelessness and fault.

The answer further pleads, in the alternative, contributory negligence and the assumption of the risk on the part of the plaintiff.

We have carefully perused the evidence, and concur in the findings of the trial judge.

[1] Plaintiff, prior to his employment by defendant, had worked about six months at a neighboring mill as a sawyer, and at the time of the accident had worked about six months at defendant's mill as gang sawyer and as one of two assistants to the millwright. Plaintiff is an intelligent young man, with but little education, and what he knew of mechanics had been learned in the rough school of the sawmill. Plaintiff may have been, in the language of the foreman, "a natural mechanical genius," but nevertheless his knowledge was limited to his experience in sawmill work. There is nothing to show that he was skilled in mill construction.

On the occasion in question, on a certain signal, the plaintiff left his work at the gang saw, and, going to another part of the mill, met one of the hands, who told him that the trouble was a break in the casing of a slab conveyor caused by a slab punching a hole

through it. Plaintiff, after inspecting the hole, proceeded to get the necessary tools and material with which to close it. Directly opposite the conveyor, and a few inches from it, there was a board about five feet long one inch thick and ten inches wide, raised slightly above the floor, serving the purpose of a cover or casing over two cogwheels revolving immediately beneath. This board was elevated above the floor to allow the cogwheels space to run, and had cleats on three sides to hold it in position, but none on the fourth side, the furthest from the conveyor. While plaintiff was standing on this board, leaning over the conveyor to nail on the inside, the board slipped or tilted under plaintiff's foot, which dropped into the cogwheel, and was so badly crushed as to necessitate the amputation of the leg four inches above the ankle.

If the fourth side had been cleated the board would not, in all probability, have been moved by the pressure of plaintiff's foot. The board was left insecure for the sake of convenience in repairing or oiling the cogs, which, however, were generally oiled from beneath. Both safety and convenience could have been secured by the construction of a cover in the nature of a trap-door.

We agree with our learned brother of the court below that the plan of construction was not a safe one, and that proper inspection would have disclosed the danger. It is no excuse that an accident was not likely to occur in the way that it did, or that the chances of employes having any occasion to stand on the board were remote, "because the object of the requirement that employers shall furnish appliances and keep them safe is to protect workmen against the chance or risk of being injured by defects which care or prudence can remedy or avoid." *Smith v. Minden Lumber Co.*, 114 La. 1041, 38 South. 821.

[2] The alternative defense that the danger was obvious, and therefore the plaintiff assumed the risk of injury, is not well founded. Plaintiff testified that he had never examined the board, and knew nothing of its fastenings. The foreman did not perceive danger in the construction, and never had inspected the board or paid any particular attention to it. Not a single witness testified that there was apparent danger in stepping or standing on the board in question. The plaintiff saw no danger, and it is doubtful on the evidence whether he ever moved the board from its position over the hole. The danger was not apparent to the workmen in the mill, or even to the foreman, who represented the defendant.

In *Faren v. Sellers & Co.*, 39 La. Ann. 1019, 3 South. 363, 4 Am. St. Rep. 256, this court said:

"The final contention of the defense is that Faren knew the danger, and assumed the risk

of the work in which he was engaged. Without discussing the nice distinctions underlying the application of the principle referred to, it is sufficient to say that the servant is only bound to see patent defects, not latent ones; that mere knowledge of defects will not bar his recovery, unless accompanied by knowledge that the defects are dangerous; and that he has the right to rely upon the care and superior knowledge and judgment of his employer, and to act upon the assumption that the latter would not expose him to unnecessary risk, and has taken all proper precautions to guard him from danger."

Plaintiff was not guilty of contributory negligence in not stopping the mill to do the work, or in the manner of doing the same, because he had the right to act on the assumption that the defendant had taken proper precautions to make the board, as a part of the floor, safe to step or to stand upon. *Smith v. Minden Lumber Co.*, 114 La. 1040, 38 South. 821.

Mr. Mitchell, the then foreman, testified that the board over the cogwheels was the only place on which the plaintiff could have stood to repair the hole in the slab conductor, and the work required the plaintiff to lean over the conductor in order to nail the piece of plank on the inside.

The same witness further testified that it was not usual to stop the mill to make such repairs as the plaintiff was working upon; that he knew of no other or better way in which the repairing could have been done than the one followed by the plaintiff; and that he himself would not have done the repairing in a different manner. The foreman did not realize the danger of the plaintiff's position on the board until after the accident. The fact that the danger was not obvious disposes of the plea of contributory negligence; and the main defense is that the master is not an insurer, and is not bound to anticipate and guard every possible danger.

We think that the master was bound to know that the board in question was not sufficiently secured to prevent its slipping or tilting, should one of his servants stand upon it in the performance of his work.

Judgment affirmed.

No. 20809.

(126 La. 306)

STATE v. HIGHTOWER.

(Supreme Court of Louisiana. Nov. 16, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §888, 971 — VERDICT — SUFFICIENCY — ARREST OF JUDGMENT.

Where, in a prosecution for murder, it appears that the jury returned into the court for the rendition of its verdict, that the foreman announced, verbally, "manslaughter," that the clerk of court thereupon announced, "We, the jury, find the accused guilty of manslaughter," and that the jury was then polled, with respect to the verdict as thus announced by the clerk, with the result that each of the jurors declared it to be his verdict, no sufficient ground is shown

for sustaining a motion in arrest of judgment, for where the intention of the jury is obvious, but imperfectly expressed, the verdict may be reduced to proper form by an officer of the court, in open court, and in presence of the jury, and affirmed, as thus perfected, by the polling of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109-2112, 2463-2468; Dec. Dig. § 888, 971.]

2. HOMICIDE §300 — INSTRUCTIONS — SELF-DEFENSE.

The charge, "If the accused believed, and had reasonable ground to believe, at the time she fired the shot, that her life was in danger, or that she was in danger of receiving serious bodily harm, then she was justified in acting in self-defense, even to the extent of taking the life of her adversary," is sufficient, without the addition of such words as "although the apprehended danger was not, in fact, real," or their equivalents.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

3. CRIMINAL LAW §945 — NEW TRIAL — NEWLY DISCOVERED EVIDENCE.

Where alleged newly discovered evidence, when compared with facts established and admissions made by the accused, in a prosecution for murder, could not reasonably be expected to change the result, a motion for new trial is properly overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2324-2327, 2336; Dec. Dig. § 945.]

Appeal from Sixth Judicial District Court, Parish of Morehouse; Ben C. Dawkins, Judge.

Annie Hightower was convicted of manslaughter, and, from a judgment sustaining a motion in arrest of judgment and remanding the case for further trial, the State appeals. Reversed and remanded.

R. G. Pleasant, Atty. Gen., and Fred M. Odom, Dist. Atty., of Bastrop (G. A. Gondran, of New Orleans, of counsel), for the State. W. H. Todd, of Bastrop, T. H. McGregor, of Rayville, and T. C. Newton, of Bastrop, for appellee.

MONROE, C. J. The state has appealed from a judgment sustaining a motion in arrest of judgment and remanding the case for further trial.

[1] 1. The basis of the motion in arrest is to be found in the following excerpt from the minutes:

"Whereupon the jury came into court and presented, through their foreman, the following verdict, to wit: 'Manslaughter.' Whereupon the clerk announced, 'We, the jury, find the accused guilty of manslaughter,' and, upon polling the jury, asked each one of the jurors if that was his verdict, and he was answered that it was."

The contention of defendant's counsel is:

"That the verdict was meaningless and fatally defective, and not responsive to the indictment, for the reason that, when the jury returned to render the verdict, the foreman announced, 'Manslaughter,' and never stated, nor was it shown, that their intention was to find the accused 'guilty of manslaughter.'"

Defendant was prosecuted for murder, and, if the jury had not intended to convict her of manslaughter, the use of that word by the foreman, in making his verbal announcement of the verdict, would, indeed, have been irrelevant and meaningless.

Beyond that, however, there is error in the motion in arrest in the statement, "Nor was it shown that their intention was to find the accused guilty of manslaughter," for, as we have seen, the word "manslaughter," as used by the foreman of the jury, was interpreted by the clerk, in his announcement, to mean, "We, the jury, find the accused guilty of manslaughter," and, the jury having been polled, each of them answered that that was his verdict. And, in that respect, the case differs from *State v. Johnson*, 46 La. Ann. 5, 14 South. 295, in which there was the written verdict, "Manslaughter" (signed by the foreman), and the jurors were asked if that was their verdict, so that, though there was opportunity for explanation, none was given, and the court had before it nothing but the bare word "manslaughter," with no language to indicate the intention of the jury as to its application.

There is ample authority for the proposition that when the intention of the jury is obvious, but badly expressed, the judge may direct the district attorney to put it in proper form, in open court, and that it may then be affirmed by the jury. *Pool v. State*, 87 Ga. 526, 13 S. E. 556; *Brantley v. State*, 87 Ga. 149, 13 S. E. 257; *State v. Davis*, 31 W. Va. 390, 7 S. E. 24; 12 Cyc. 699 (3); *Clark's Cr. Pr. verbo "Verdict,"* p. 483.

In *State v. Scott Ross*, 32 La. Ann. 854, the jury brought in a written verdict reading, "Guilty without capital punish," which the clerk interpreted, in announcing, as, "Guilty without capital punishment," after which the jury was polled and each juror answered that the verdict, as thus announced, was his verdict, and the court held that:

"Even if the writing left in doubt what the verdict was, which was not very probable, the proceedings connected with the delivery of the verdict * * * would certainly remove that doubt."

And in *State v. Smith*, 33 La. Ann. 1416, where the jury brought in a verdict reading, "We, the jury, find Watkins guilty of manslaughter," to which a member of the jury had affixed the name "Ja. Washington" as that of the foreman, who was unable to write or sign his name, and whose name was Jiles Washington, the court said:

"There is no law which requires the appointment of a foreman and verdicts to be in writing. Verdicts may be delivered orally. Polling the jury regularizes the proceedings."

We are therefore of opinion that the trial judge erred in sustaining the motion in arrest.

[2] 2. When the judgment sustaining that motion was rendered (and signed), the state

and the defendant were each granted an appeal, and defendant now avails herself of the appeal granted to her by challenging the trial court's action in overruling her bills of exception to its refusal to give a special charge and to grant a new trial.

The bill first mentioned reads, in part:

"It having been proven on the trial that the deceased had threatened to take the life of the accused, and was, at the time of the homicide, over on the premises of the accused, just outside of the fence, counsel for the accused asked the court to make the following charge to the jury: If a defendant had reason to believe that his life is in danger of receiving great bodily harm, he is justified in doing whatever he deems necessary to prevent this danger or loss of life, even though the danger is not real."

The statement, *per curiam*, incorporated in the bill, reads:

"The court had already charged that if the accused believed, and had reasonable grounds to believe, at the time, if she fired the shot, that her life was in danger of great bodily harm, then she was justified in acting in self-defense, even to the extent of taking the life of her adversary."

We assume that both the requested and the given charges have been somewhat mutilated in the transcription, and that the requested charge should read:

If a defendant has reason to believe that his life is in danger or that he is in danger of receiving great bodily harm, he is justifiable in doing whatever he deems necessary to prevent the danger or loss of life, even though the danger is not real.

And that the given charge should read:

If the accused believed and had reasonable ground to believe, at the time that she fired the shot, that her life was in danger, or that she was in danger of receiving serious bodily harm, then she was justified in acting in self-defense, even to the extent of taking the life of her adversary.

And, so interpreting them, we are of opinion that the given charge is to be preferred, since, in order to justify the taking of human life, there should not only be reasonable ground for belief in the threatened danger, but the jury should be satisfied that the slayer acted in such belief, a point covered by the given charge, of which the defendant would appear to have but little reason to complain, since, standing alone, it is open to the interpretation that one who believes, or has reasonable ground to believe, that his life is in danger, or that he is in danger of receiving great bodily harm, thereby acquires the right to take the life of another, which is not the law. *State v. King*, 22 La. Ann. 454. The words "even though the danger is not real," which were requested by the defendant, or their equivalents are not unfrequently added to the charges given in such cases, but we are unable to say that they would have added anything to the meaning of the charge as here given, and we therefore hold that there was no reversible error in the ruling complained of.

[3] 3. The second bill was reserved to the

overruling of a motion for new trial; the ground relied on being that, on the morning after the conviction, there had been found, imbedded in the mud of a creek bottom, at the point where deceased fell into the creek, when shot, a pistol, "which must have been in the hand of the deceased at that time, or it could not have been there found."

The court's addition to the bill reads, in part, as follows:

"The court was of the opinion that, even if the alleged newly discovered evidence had gone before the jury, it would not have changed their verdict (the accused having sworn that she saw no weapon); that deceased's hands were in a position that she could not see them, although she swore that he was coming towards her, in a physical situation received [understood] by the jury and the court, where it was practically impossible for him to have done so, and in view of the further fact that he was shot in the side of the back, under the left shoulder, diagonally through the body."

To the statement of the judge, we may add that the bill of exception does not state that the pistol therein mentioned was loaded when found.

For the reasons thus assigned, it is ordered that the judgment appealed from, sustaining the motion in arrest, be set aside, and that the case be remanded to be further proceeded with according to law and to the views expressed in the foregoing opinion.

(136 La. 314)

No. 20386.

J. M. DRESSER CO., Limited, v. HIBERNIA BANK & TRUST CO. et al.

(Supreme Court of Louisiana. Oct. 19, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

BILLS AND NOTES \S 241, 242—CORPORATIONS \S 123—PLEDGE OF STOCK—"MAKER"—OWNERSHIP OF SECURITIES—SUFFICIENCY OF EVIDENCE.

A promissory note, bearing upon its back, when negotiated, the signature of a person other than the payee, and to which collaterals were attached to secure its payment, bore upon its face the following, with other printed matter, to wit: "We, signers, indorsers, sureties, and all of us, in solido, promise to pay. * * * The proceeds of the sale of the pledged securities shall be applied: * * * (3) To the payment of any other indebtedness then due, or thereafter to become due, by the maker of this note, * * * up to \$250,000. * * *" The securities pledged with this note are also pledged to secure any other obligations of the maker or makers, due or to become due. * * * Held (upon the issue of fact), that the pledged securities belonged to the party by whom the note appeared to have been executed. Held, further, that the obligation to pay the note being imposed, in terms, upon the "signers, indorsers, sureties, and all, * * * in solido," and the obligation with respect to the debts for which the securities attached to the note were pledged, being also in terms confined in its application to the debts of the maker or makers, the obligation last mentioned cannot be extended to debts of parties other than the maker or makers, and that the name appearing upon the back of the note does not appear as that of a maker, either with-

in the contemplation of the contract represented by the note or within the contemplation of the law of this state.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 542, 547-559; Dec. Dig. §§ 241, 242; Corporations, Cent. Dig. §§ 451, 491, 507-512, 537, 539-546, 569, 618; Dec. Dig. § 123.

For other definitions, see Words and Phrases, First and Second Series, Maker.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by the J. M. Dresser Company, Limited, against the Hibernia Bank & Trust Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McCloskey & Benedict, of New Orleans, for appellants. Foster, Milling, Brian & Saal, of New Orleans, for appellee.

MONROE, C. J. Defendant prosecutes this appeal from a judgment declaring paid and canceled (by the tender, and the deposit in the registry of the district court, of \$19,000) plaintiff's note for \$30,000, upon which there appears a credit of \$11,000, theretofore paid on account, and ordering defendant to surrender the note, together with 200 shares of the stock of the Schwing Lumber & Shingle Company, Limited, pledged for its payment. Plaintiff answers the appeal, praying that the judgment be amended by allowing it damages, as claimed in the original petition, in the sum of \$5,000, alleged to have been sustained by reason of the protest of the note, after tender of payment.

It appears that plaintiff borrowed \$30,000 from defendant, for which it gave the note thus mentioned, executed by it on June 13, 1911, made payable to the order of defendant, on December 17, 1911, with interest from maturity, indorsed in blank by J. M. Dresser, plaintiff's then president, and further secured by the pledge of 200 shares of the stock of the Schwing Lumber & Shingle Company, Limited, and 1,000 shares of the stock of the Suburban Realty Company; that, at or before the maturity of the note, the stock of the realty company was sold, and the proceeds, amounting to \$11,000, applied in part payment thereof, leaving due the balance of \$19,000, of which plaintiff made tender, coupled with a demand for the surrender of the stock of the lumber company, which action, upon the refusal of defendant to surrender the stock, was followed by the institution of this suit, the issuance of writs of injunction and sequestration, and the deposit in court of the \$19,000. The note reads, in part, as follows:

"\$30,000. New Orleans, June 13, 1911.

"December 17, after date, we, signers, indorsers, sureties, and all of us, in solido, promise to pay to the order of Hibernia Bank & Trust Company, at their office, in New Orleans, Louisiana, thirty thousand no/100 dollars, for value received, with interest thereon, at the rate of 8 per cent. per annum from maturity until paid. This note is secured by pledge and delivery of

the securities mentioned on the reverse hereof. Should said securities decline in value, the maker of this note hereby agrees, within twenty-four hours from demand on him to that effect, to furnish and pledge additional securities, satisfactory to the holder of this note, to cover such decline. And the failure or refusal by the maker to furnish such additional securities, when so called for, shall at once mature this note and pledge.

"Should this note not be paid at maturity, * * * the then holder thereof is hereby authorized to sell the pledged securities * * * and * * * to transfer any shares of stock * * * on the books of the company issuing the same. * * * The proceeds of the sale of the pledged securities shall be applied: (1) To the payment of all costs and commissions for selling; (2) to the payment of this note, in principal and interest, and the 5 per cent. attorney's fees below stipulated; and (3) to the payment of any other indebtedness, then due or thereafter to become due, by the maker of this note to the said Hibernia Bank & Trust Company, to the sum of \$250,000. * * * The securities pledged with this note are also pledged to secure any other obligation of the maker or makers, due or hereafter to become due to the Hibernia Bank & Trust Company."

"[Signed] J. M. Dresser Co., Ltd.,

"By J. M. Dresser, Pres't."

Upon the reverse there appear: The indorsement, in blank, of J. M. Dresser; a memorandum of the securities pledged; and a credit of \$11,000, resulting from the sale of the stock of the realty company.

It further appears that defendant holds another note, similar in terms to that above quoted, but for \$60,000, drawn by the Southern Gravel & Material Company, through J. M. Dresser, president, and indorsed by Dresser individually, which is past-due and unpaid, and upon which there appears a prospect of loss; and defendant, in its answer, gives its reasons for refusing to surrender the stock pledged for the security of the \$30,000 note as follows:

"That, under the terms of the said \$30,000 note of the J. M. Dresser Company, Limited, it is provided that the securities pledged with this note are also pledged to secure any other obligations of the maker or makers due or hereafter to become due to the Hibernia Bank & Trust Company'; * * * that, under the terms of said note of the Dresser Company, Limited, * * * and that of the Southern Gravel & Material Company, * * * it is provided * * * 'that we, the signers, indorsers, sureties, and all of us, in solido,' bind and obligate ourselves to the conditions stipulated in said notes, and the said J. M. Dresser is, under the law, a comaker and co-obligor in solido, as being such signer, indorser, surety, and maker. * * * Now, your respondent avers that the 200 shares of the Schwing Lumber & Shingle Company which were deposited in pledge * * * to secure the \$30,000 note * * * were, and are, the property of J. M. Dresser individually, and [were] deposited by him, as comaker with said J. M. Dresser Company, Limited, as security for the payment of said note, and said 200 shares were in no sense the property of the said J. M. Dresser Company, Limited, and that, under the law and under the terms of the two respective notes of \$30,000 and \$60,000, the said securities—to wit, the 200 shares of the Schwing Lumber & Shingle Company—were also pledged to secure the payment, by the said J. M. Dresser, as comaker in solido,

of the \$80,000 note subscribed by the said Southern Gravel & Material Company."

The evidence does not sustain the allegation that the 200 shares of stock in controversy belongs to J. M. Dresser, or that they belonged to him when either of the notes which have been mentioned was executed, but shows that, although he had owned the shares for several years, and, during part of that time, being plaintiff's president, had used them as collateral in borrowing money for plaintiff, he had, on March 29, 1909, conveyed them to plaintiff, for a valuable consideration, and that plaintiff has since then been the sole owner, and has enjoyed the exclusive use of them. The inquiry in the district court concerning the ownership of the stock and the manner and effect of its use, in so far as defendant is concerned, extended over a wide range, and a consideration in detail of all the facts developed would be unprofitable. Those which appear to us to have the more material bearing upon the result may be stated as follows: Edward Wisner and J. M. Dresser were, for a number of years, engaged in business together, under the firm name of Wisner & Dresser. The general character of the business, we infer, was the purchase, development, and sale of lands, and we also infer that the business was carried on rather through the medium of corporations promoted by them than by the partnership itself or its members. The partnership was eventually dissolved, and Dresser appears thereafter to have conducted his business mainly through corporations established by him, and referred to in this case as "Dresser Corporations"; the amount of business done by him individually, and with the defendant, having been, so far as this record discloses, comparatively inconsiderable. The plaintiff corporation was established on June 25, 1907, with a declared capital of \$100,000, of which M. A. Dresser subscribed for \$80,000, J. M. Dresser for \$10,000, and M. S. Dresser for \$10,000; M. A. and M. S. Dresser being the daughters of J. M. Dresser, and J. M. Dresser being the president of the company, and the two young ladies occupying the offices of vice president and secretary-treasurer, respectively. So far as we are informed, J. M. Dresser was not indebted to defendant or to any one else at that time, and his deposit book (with defendant) showed credit balances June 4, 1907, \$7,294.48; July 1st, \$3,885.17; July 31st, \$9,622.53.

The business, other than that of depositing money and drawing checks, which was thereafter transacted between the company (represented always by "J. M. Dresser, president") and defendant, and between J. M. Dresser individually and defendant (with which plaintiff was connected), appears to have consisted of the discounting and payment or renewal of the following notes, all of them having ultimately been paid, with the exception of the balance of \$19,000 on the

note for \$30,000, which is here in controversy, to wit:

Note of company, June 9, 1908, \$10,000, bearing on back the legend:

"Schwing Lumber & Shingle Co., Ltd., cts. Nos. 18 & 46 for 50 shares each.

"Collateral with this note.

"[Signed] J. M. Dresser."

Note of company, June 18, 1908, \$5,000, bearing on back:

"Secured by certif. No. 45 for 50 shares Schwing Lumber & Shingle Co., Ltd.

"[Signed] J. M. Dresser."

Note of J. M. Dresser, July 25, 1908, \$21,000, bearing on back:

"50 shares of Schwing Lumber & Shingle Co., Ltd., stock.

"1,000 shares of Suburban Realty Co., Ltd., stock.

"\$9,724.91 vendor's lien note, given by Prairie Lands Co., of La. * * * All of above collateral on the within note.

"[Signed] J. M. Dresser."

Following which there appear credits from payments made in October and November, 1908, amounting to \$19,175.

Note of company, September 16, 1908, \$5,000, bearing on back:

"50 shares of stock of Atchafalaya Land Co., Ltd., collateral to this note.

"[Signed] J. M. Dresser.
"J. M. Dresser."

Note of company, December 2, 1908, \$50,000 bearing on back:

"200 shares Schwing Lumber & Shingle Co.

"1,000 shares Suburban Realty Co.

"50 shares Atchafalaya Land Co.

"Mtg. note Prairie Lands Co. of La., Ltd. * * *

"[Signed] J. M. Dresser.
"J. M. Dresser."

Note of company, June 2, 1909, \$50,000, bearing on back:

"Secured by 300 shares Schwing Lumber & S. Co.

"Secured by 1,000 shares Suburban Realty Co.

"Secured by 50 shares Atchafalaya Land Co.

"Mtg. note Prairie Lands Co. of La., Ltd. * * *

"250 shares Graham Island Lumber Co., Ltd., stock.

"[Signed] J. M. Dresser Co., Ltd.,

"By J. M. Dresser, Pres.

"J. M. Dresser."

Note of company, December 2, 1909, \$50,000, bearing on back:

"[Signed] J. M. Dresser.

"Secured by 200 shares Schwing Lumber & Shingle Co. certs.

50	50	50	25	25
18	45	46	47	48

"1,000 shrs. Suburban Realty Co. 500 sh.

116

500 sh.

117

"50 shrs. Atchafalaya Land Co. cost 50 sh.

"Mtg. note Prairie Lands Co. of La., Ltd., * * *

"\$9,724.91.

"5 notes, \$9,000 each, and each secured by 50 shares Graham Island Lbr. Co., made by D. E. Sharpe. * * *

"[Signed] J. M. Dresser Co., Ltd.,

"By J. M. Dresser, Pres."

Note of company, November 25, 1910, \$50,000, bearing on back:

"[Signed] J. M. Dresser.
"Secured by 200 shares Schwing Lbr. Shin. Co.

"Secured by 1,000 shares Suburban Realty Co.
"Secured by 50 shares Atchafalaya Land Co.
"2 notes St. Bernard Land Co., @ \$4,938 each.

"5 notes D. E. Sharpe, \$9,000 each, 50 shares Graham Island.

"Notes attached to each.

"[Signed] J. M. Dresser Co., Ltd.,

"By J. M. Dresser, Pres.

"Paid on account, Dec. 17, 1910, \$49,960.00, proceeds of"—

Note of company, December 17, 1910, \$30,000, bearing on back:

"[Signed] J. M. Dresser.
"Secured by 200 shares Schwing Lbr. & Shingle Co.

"Secured by 1,000 shares Suburban Realty Co."

Note of company, June 13, 1911, \$30,000, bearing on back:

"Secured by 200 shares Schwing Lbr. and Shingle Co.

"Secured by 1,000 shares Suburban Realty Co.
"[Signed] J. M. Dresser.

"12/18/11 Paid on % \$11,000.00."

The 200 shares of stock that are in dispute are represented by certificates Nos. 47 and 48, for 25 shares each, and Nos. 18, 45, and 46, for 50 shares each. They were all issued and belonged originally to J. M. Dresser, but, for the purposes of the different pledges for loans obtained by him as president of the plaintiff company, he executed, in blank, the usual irrevocable power of attorney, authorizing the transfer which appears upon the back of each certificate, and they still remain in that condition; no transfers having been entered on the books of the company, for the reason that, when the stock was conveyed to plaintiff, the certificates were held in pledge by defendant, and it would have been a matter of some inconvenience to have withdrawn them in order that others might be issued. The conveyance to plaintiff was effected by means of a proposition submitted to its board of directors by J. M. Dresser, accepted by the board on March 29, 1909, and ratified by the stockholders at a meeting held on the following day; and thereafter, on the same day (March 30th), in compliance with a written request that had been addressed to it by defendant on March 15th, plaintiff furnished defendant with a detailed statement of its affairs, which showed the stock which had been thus acquired among its assets; that is to say, it contained, in the list of its assets an item reading:

"Schwing Lumber & Shingle Co.
stock\$28,000.00"

—which is otherwise shown to have referred to the 200 shares that the company had just acquired, at a valuation of \$130 per share. Mr. Dresser testifies that he went over the statement with Mr. Pool, the vice president of the defendant bank, and told him that the item in question referred to the 200

shares of stock that the bank then held in pledge. He says:

"I remember it just as perfectly as though it were yesterday."

Mr. Pool was unable to recall the conversation, but does not say that it did not occur, and he gives certain reasons why, as it appears to us, he would not be likely to recall a reference to a particular item, upon one statement of the many that were brought to his attention, where as in this case, the statement, as a whole, appeared to be satisfactory. Thus he says:

"I would not send for a statement like that and go over every line. I ask if the values are correct, and I pass those up, feeling that the concern is in liquid shape; that is the reason for that, and that is the attention that is paid to them in the average bank. * * * I only glanced over the statement for the purpose of determining whether the concern was in good condition. I probably never noticed that particular entry or saw it on there. I know that I saw the statement, because I had a memorandum showing that we had got it, and from the fact that it has an initial on it I know that I saw it."

Other circumstances developed by the testimony and bearing upon the question of the verity and good faith of the conveyance to plaintiff of the stock in question are as follows:

Upon the back of each of the first two of the notes executed by the company and discounted by defendant the signature of J. M. Dresser appears but once, immediately underneath the memorandum showing the pledge of the collateral, leaving it doubtful (particularly when the notes referred to are compared with those subsequently executed) whether the intention was that he should do more than consent to the pledge of securities which belonged to him. That it was considered that the consent to the pledge and the consent to the indorsement of the notes should be evidenced by separate signatures appears from the fact that the note of \$21,000, made by J. M. Dresser individually, to the order of defendant, bears his signature to the pledge memorandum upon its back, as well as to the obligation to pay, expressed upon its face; and the company's two notes of September 16 and December 2, 1908, for which Dresser's securities were pledged, bear, each, two of his signatures, the one (no doubt) as indorser or surety, and other apparently as pledgor of the collateral. Again, on the note for \$50,000 of June 2, 1909, being the first that was given by the company after its acquisition of the Schwing Company stock, it will be seen that the company ("By J. M. Dresser, Pres.") signs (apparently) as pledgor, as well as maker, and that the signature of J. M. Dresser follows that to the pledge, and so, in effect, with the notes of December 2, 1909, and November 25, 1910; and on the note of December 17, 1910, the signature "J. M. Dresser" appears above the pledge memoran-

dum, and not otherwise, that memorandum being unsigned. The question which suggests itself, then, is: Why, and at whose instance, was the pledge memorandum signed by (or in the name of) the company for the first time upon the note that was executed next after its acquisition of the pledged securities which are now in dispute, if it was not because the company was then recognized as the owner of those securities?

Another question which is suggested is: In what way is the verity and good faith of the conveyance to plaintiff of the Schwing Company stock, on March 29, 1909, affected by the fact that Dresser failed to pay the gravel company note for \$60,000, which was executed two years after that conveyance (March, 1911), and which matured and was dishonored three years later (March, 1912)? Save for his obligation on plaintiff's note of December 2, 1908, Dresser, at the date of the conveyance, owed defendant nothing, and, so far as the record shows, was in debt to no one else, and it is not easy to understand what reason defendant could have found for complaining of the transfer to the maker of a note held by it of the collateral security which it also held in pledge to secure the payment of the note. Again, Dresser conveyed the stock to plaintiff for a valuable consideration, and it is neither alleged nor proved that he did not receive a fair equivalent, or that he became any the poorer by reason of the transaction. The proposition that he made, and that plaintiff accepted, was to convey the stock (200 shares, at a valuation of \$130 per share) for \$26,000, and to assume the payment of notes (of the plaintiff, as we assume) to the amount of \$47,500, and that, in exchange therefor, plaintiff should cancel his note for \$52,191.85, and surrender the collaterals attached thereto, cancel his note for \$5,000, and surrender the collaterals attached thereto, and credit his account with \$16,408.35, all of which, as we understand, was done. And, as it is conceded that plaintiff was, and is, a perfectly solvent corporation, the credit of \$16,408.35 was a good asset.

It is argued that the \$30,000 note here involved was given in renewal of the obligation represented by the preceding notes, and that, as the stock in question had been pledged, as the property of Dresser, to secure his note of \$21,000, its status could not be changed so long as the note, or those given in renewal of it, remained unpaid. The facts, as shown by the evidence, are: That only 50 shares of the Schwing Company stock were pledged to secure the note of \$21,000; that payments were made on that note prior to December 2, 1908, leaving a balance due of something over \$1,200, which was included in the note of \$50,000 given by the company on the date last above mentioned; that the note of that date was taken up by the note for \$50,000 of June 2, 1909, which was taken up by the note of December 2, 1909, which

was taken up by the note of November 25, 1910, which was paid on December 17, 1910. The copy of the note last mentioned that we find in the record shows that it was well secured by collateral, included in which were five notes of D. E. Sharpe, for \$9,000 each, which were paid, and the note shows a payment on account of \$49,960. According to the oral testimony, those figures should perhaps be \$45,960; but, in any event, it appears that the proceeds of the five Sharpe notes, of \$9,000 each, were placed to the credit of plaintiff's checking account, thereby increasing the balance to the credit of that account to an amount exceeding by several thousands of dollars the \$50,000 called for by plaintiff's note, which had not then matured, and plaintiff thereupon gave its check in payment of that note, and the check drawn to the order of defendant, and paid and canceled by it, is in the record. If the check had been paid from the proceeds of the \$30,000 note of December 17, 1910, and not from other funds of the plaintiff, it would have been easy for defendant to show it, but no attempt was made to do so, and we take it as proved that the continuity of the renewals was broken by that payment, and that the discount of the \$30,000 note was an independent transaction, wholly disconnected from those which had preceded, save that some of the same securities were used as collateral.

We repeat, then, that the evidence does sustain defendant's allegation that the stock here claimed by it belongs to J. M. Dresser, or that it belonged to him when the note of \$30,000 with which it was pledged was executed, but shows that it has belonged to plaintiff since March 29, 1909, and has never since that date been pledged to defendant to secure any debt due by Dresser, save in so far as plaintiff's notes, bearing his signature as indorser, surety, or what not, may be considered to have been his debts. Defendant's further, and perhaps main, contention is that Dresser is, in legal contemplation, one of the makers of the \$30,000 note to secure the payment of which the stock in question was pledged, and that, whether he or plaintiff owns or owned the stock, it falls within those provisions of the note which read:

"We, signers, indorsers, sureties, and all of us, in solido, promise to pay. * * * The proceeds of the sale of the pledged securities shall be applied * * * (3) to the payment of any other indebtedness then due or thereafter to become due by the maker of this note * * * up to the sum of \$250,000. * * * The securities pledged with this note are also pledged to secure any other obligation of the maker or makers due or hereafter to become due to the Hibernia Bank & Trust Company."

The form upon which the note is made was evidently prepared by defendant, and the foregoing is an excerpt from certain printed matter which appears upon the face of it. The construction of the instrument must, therefore, in case of doubt, be favorable to

plaintiff and unfavorable to defendant. The proposition that, where two persons unite in making a note, and one of them pledges collaterals belonging to him to secure its payment, such collaterals become thereby ipso facto pledged for the security, not only of all other debts due and to become due of the pledgor, but also for all other debts due and to become due of his comaker, is not altogether easy of digestion, though, if parties choose to make contracts to that effect, they may perhaps be enforced, but the courts would probably be careful to find that they were susceptible of no other construction. And a fortiori is that true where, as here, the proposition is that securities belonging to the maker of a note, and pledged by him to secure its payment, are thereby also pledged to secure, not only all other debts that he may then or thereafter owe the payee, but to secure all other debts which any indorser, surety, or other party whose name appears on the note may then or thereafter owe to such payee.

Bearing in mind the rule of construction which has been stated, and by which we think we should be governed (if there should arise a doubt requiring its application), it will be observed that, while the obligation to pay the note here in question is imposed, in terms, upon "signers, indorsers, sureties, and all . . . in solido," the obligation with respect to the debts for which the securities attached to the note stand pledged is also, in terms, confined in its application to the debts of the maker or makers, and, plainly, it cannot be extended to the debts of other parties. We are of opinion, then, that the name of J. M. Dresser does not appear upon the note as that of a maker, either within the contemplation of the contract represented by the note or within the contemplation of the law of this state. The language of the note which has been quoted contains a recognition of the fact that, though all the parties whose names appear upon it bind themselves in solido for its payment, there may nevertheless be indorsers, sureties, etc., as well as makers, and provides for the application of the proceeds of the pledged securities only to the payment of the debts, other than that represented by the note itself, of the maker or makers. If the "Negotiable Instruments Act" be applied to the case, Dresser's status is that of indorser, though, by having promised in solido with all the other parties and unconditionally to pay, he may have deprived himself of some of the rights of an indorser. Act No. 64 of 1904, § 63, p. 157. If that act be regarded as inapplicable, then, under our jurisprudence as it existed prior to its adoption, his status was that of surety. McCausland v. Lyons, 4 La. Ann. 273; Rogers & Woodall v. Gibbs, 24 La. Ann. 467; Claflin Co. v. Feibelman, 44 La. Ann. 523, 10 South. 862; Bank v.

Brewing Association, 49 La. Ann. 943, 22 South. 48.

We are asked, upon the one hand, to amend the judgment appealed from, by awarding plaintiff damages, and, upon the other hand, to reverse the judgment and remand the case, in order that defendant may derive some possible advantage from the trial of other cases that are said to be pending against Mr. Dresser or some of his companies. We find no sufficient reason for granting either request.

Judgment affirmed.

(136 La. 328)

No. 20749.

HOSSIER REALTY CO. v. CADDO COTTON OIL CO.

In re CADDO COTTON OIL CO.

(Supreme Court of Louisiana. Dec. 14, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. SALES §270—INSPECTION—IMPLIED WARRANTY.

A sale of a quantity of cotton seed out of a certain mass of seed contained in a house on a plantation, is not the sale of an article susceptible of being conveniently examined and inspected.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 766-768; Dec. Dig. §270.]

2. SALES §40—FRAUD—PURCHASE WITHOUT INSPECTION.

Where, in such a case the vendor knew at the time of the sale that 50 per cent. of the seed were rotten, but concealed the fact from the purchaser, and made certain statements which induced the latter to buy the seed for a sound price without previous inspection, *held*, that the transaction was fraudulent, despite invitations to the purchaser to inspect the seed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83; Dec. Dig. §40.]

Action by the Hossier Realty Company against the Caddo Cotton Oil Company. A judgment for defendant was reversed by the Court of Appeals, and judgment rendered for plaintiff, and defendant applies for certiorari or writ of review. Judgment of Court of Appeals reversed, and judgment of district court affirmed.

Alexander & Wilkinson, of Shreveport, for plaintiff. Thigpen & Herold and Elias Goldstein, all of Shreveport, for defendant.

LAND, J. Plaintiff sold to defendant, represented by an agent, three car loads of cotton seed, at a price of \$20 per ton. At the time of the sale the seed formed part of a pile of seed in plaintiff's ginhouse. The cars of seed were shipped to defendant at Shreveport, and after inspection were rejected as damaged and unmerchantable and over 50 per cent. rotten. Whereupon the plaintiff paid the freight and demurrage, sold the seed at the market price, and sued the defendant for \$651.25, representing its loss in the transaction.

Defendant answered that it had bought good, sound seed, at the current market price, and that the seed shipped by the plaintiff was damaged and unmerchantable and more than 50 per cent. rotten, and that consequently the defendant was justified in rejecting the seed and refusing to pay for the same.

On the first trial of the case in the district court judgment was rendered in favor of the plaintiff. A new trial was granted, and on the second trial judgment was rendered in favor of the defendant. Plaintiff thereupon appealed to the Court of Appeals, which reversed the judgment below, and rendered judgment in favor of the plaintiff as prayed for in the petition.

The case is before us on a writ of review granted on the application of the defendant.

It is an undisputed fact that on inspection at Shreveport about one-half of the seed in the three cars were found to be rotten, and the seed as a whole were mixed with bolls, motes, and dirt. One witness estimated the dirt at 10 per cent.

[1, 2] The contention of the plaintiff is that the agent of the defendant was invited to inspect the seed, and if he did not do so it was his own fault, that the defective condition of the seed was ascertainable by simple inspection, and that the plaintiff's manager did not make any misrepresentation as to the quality of the seed.

The Court of Appeals said, in part, as follows:

"The evidence in our opinion altogether fails to sustain the charge that plaintiff misrepresented the seed to the defendant's agent, or that he concealed the real and actual condition of the seed from him. The plaintiff did inform the buyer of what he knew about the seed, how they had been treated and cared for, and that they were the last of the season of the crop of 1911. These statements are not shown to have been untrue. The plaintiff urged the defendant and his friend to go and examine the seed and to make a price on them, saying he did not know what they were worth. There was certainly no concealment in this, but on the contrary it evidenced the good faith on the part of the plaintiff, and completely negatives any intimation or a desire or an attempt on the part of the plaintiff to impose on the defendant's agent. There is a total lack of any evidence going to show that plaintiff was guilty of any deceit, fraud, or ill practice. * * *

"There was no special warranty nor representation of soundness; there was no concealment of hidden defects which were known to the plaintiff. In such a case the buyer cannot impeach or be relieved from his contract."

The Court of Appeals cited *Rocchi v. Schwabacher & Hirsch*, 33 La. Ann. 1364, where, as expressed in the syllabus, the following doctrine was enunciated:

"In the sale of goods by merchants, who were not the manufacturers thereof, where there has been no deceit practiced, and where the means of knowledge were at hand and equally available for both parties, and the subject of purchase was alike open to their inspection, and the purchaser did not avail himself of these means and opportunities, he will not be heard to say that, in impeachment of the contract of sale, he was deceived by the vendor's misrepresentations."

We do not think that the *uncontradicted* evidence in the case supports the statement of facts made in the opinion of the Court of Appeals.

On the second trial of the case in the district court, A. W. Hicks, the manager of plaintiff's plantation during the years 1911 and 1912, was called as a witness for the defendant. We make the following excerpts from Mr. Hicks' testimony:

"Q. When were these seed ginned?

"A. At different times, I think that they ginned off and on until the last of March.

"Q. What was their condition when they were put into the seedhouse?

"A. It had rained all fall and they were in bad condition.

"Q. Do you know the condition of these seed prior to the 6th of August, 1912.

"A. Yes, sir, I made a test of them before I went out of the cotton house.

"Q. About what time?

"A. The time we were trying to sell them.

"Q. About what time?

"A. It must have been July or August, or somewhere along there.

"Q. What did you find from your test?

"A. I am not an expert, but I think they run about 60 per cent. bad."

The witness further stated that he sent a sample of the seed to some parties in Natchitoches, who bid \$10 per ton, but the offer was not accepted.

Mr. Penland was the president of the plaintiff company. In the examination of Mr. Hicks, counsel for defendant referred to the president as "Mr. Pennel." We make further excerpts from Mr. Hicks' testimony:

"Q. Did you ever make any examination of these seed in Mr. Pennel's presence?

"A. Yes, sir.

"Q. Cut the seed in his presence?

"A. Yes, sir.

"Q. Did Mr. Pennel know that any of these seed were rotten?

"A. I told him that I thought the seed run about 75 per cent. bad."

Mr. Hicks further stated that Mr. Penland tried to sell the seed, but "he was always particular not to guarantee them."

Mr. Penland was not recalled to contradict the testimony of Mr. Hicks.

Hence it may be accepted as a fact that the seed were rotten to the extent of at least 50 per cent. to the knowledge of the manager and president of the plaintiff company when they were offered for sale to the defendant company.

Mr. Strube, the agent of the defendant company, was a very poor judge of cotton seed, and on his arrival at plaintiff's plantation sought an interview with Mr. Penland. Mr. McIver, a dealer in agricultural implements, but who had been a cotton planter for a number of years, was present at the interview. The gist of Mr. McIver's testimony is contained in the following answer:

"A. Well, the manager, Mr. Penland, was not feeling very well, and he was over at the house. Mr. Strube went over to the house and talked to him, and then he called me over there and asked me what I thought about last year's cotton seed; he said that the Hossier Realty Company had some for sale, but that he did not

know anything about seed, and I says, 'If they were not wet when they were ginned and have not been wet since, they ought to be as sound as they were when they were put in there,' in other words, if the house did not leak, and Mr. Penland says, 'The house does not leak, and they have not been exposed to the weather.' We discussed it in that way; he said he did not know anything about it."

Mr. Strube, testifying to the conversation had with Mr. Penland before Mr. McIver was called in, said that Mr. Penland stated that he had cut a lot of the seed open and found them sound, and that he had planted out of the same seed, and had gotten a good stand, that the seedhouse was first-class and in good condition, and that the seed were from the last cotton, and would not be in any danger of heating.

Mr. Penland was not recalled to rebut the testimony of either McIver or of Strube.

Mr. Penland's version of the transaction is, in substance, as follows:

That Strube came and talked to him, and he advised Strube to go and look at the seed and make him a price; that Strube asked what the seed were worth, and he replied that he had no price on them, and did not know what they were worth; that he wanted Strube to go and look at the seed, and did not want to move them until he knew what he could get for them. That Strube said that he was not a very good judge of seed, but a gentleman with him could possibly tell and was more familiar with them than he was, so Penland told them to go to the seedhouse and examine them. That Strube called the gentleman over to the gallery, and they talked about the seed, but Penland did not know very much about the seed and told them to go and look at them, and then Strube made an offer of \$20 per ton f. o. b. Lake End, which after some thought Penland accepted, and the contract was signed up.

Strube and McIver never saw the seed, which were in a closed house, and the action of the former, as a reasonable being, must have been influenced by the statements of Penland, the president of the plaintiff company.

Penland knew that the seed had been tested by the manager of the company, and found more than half rotten. He also knew that the seed had been held over because it was not merchantable as a sound article.

He withheld the fact that the seed offered by him for sale were half rotten from the agent of the buyer, who was no judge of seed, and who could not have inspected them in the usual manner.

The representations of the president were, however, sufficient to induce the agent of the defendant to believe that the seed were sound.

In *Millaudon v. Price*, 3 La. Ann. 4, the purchaser, after making a partial inspection of 2,400 sacks of salt, was influenced to ac-

cept the same on the representation of the vendor that they had not been on storage for more than five or six months. As a matter of fact, the salt had been in storage for 16 or 17 months, and in consequence had deteriorated in quality. The court released the purchaser from his bargain.

In the case at bar there was error in the transaction on the part of defendants' agent superinduced by the concealment of the truth, and by representations on the part of the president of the plaintiff company.

The seed sold were a part of a mass of seed comprising about four car loads, and could not be identified until they were segregated and loaded on the cars. The evidence tends to show that the fourth car load was subsequently sold for more than \$20 per ton, and was accepted by the purchaser. Therefore the seed in the mass could not have been of uniform quality. It is difficult to conceive how, under such conditions, the seed sold to the defendant could on the day of sale, have been identified for the purpose of inspection. As held in *Millaudon v. Price*, 3 La. Ann. 4, the exception to the rule of implied warranty applies "if the article is susceptible of convenient inspection and examination," and the court cited *Duranton*, vol. 16, p. 339, to the effect that inspection is not required where the article is covered up by other goods or is in a poorly lighted house.

On this branch of the case we are of opinion that the seed sold could not have been conveniently inspected at the time of the sale, as they were not segregated from other seed in the same house. The sale was of a thing indeterminate in itself. Civil Code, arts. 1915, 1916.

Plaintiffs' alternative contention that it is entitled to recover the freight and demurrage paid seems to us to be without merit.

It is therefore ordered that the judgment of the Court of Appeals herein be reversed, and that the judgment of the district court herein be affirmed, and that the plaintiff pay costs in the Court of Appeals and the costs of this proceeding.

(136 La. 334)

No. 20624.

STATE v. BENNETT.

(Supreme Court of Louisiana. Nov. 30, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §252 — AFFIDAVIT — OBJECTION — TIME.

It is too late, after a defendant has been tried and convicted on a specific criminal charge, to make the objection that the affidavit upon which the prosecution was based was not made at the time that it was signed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 526-536; Dec. Dig. §252.]

2. CRIMINAL LAW — 260—PRACTICE—TRANSCRIPT.

The premise, stated in a bill of exception, herein filed, that the charge in this case reads, "City of Shreveport v. Jacie Williams Bennett, No. 143—Docket of the City Court—City of Shreveport, Louisiana," is destroyed by the fact, patent upon the face of the transcript, that the caption of the case reads, "State of Louisiana v. J. C. Williams Bennett," etc., and, the premise being destroyed, the conclusion (that defendant was charged with an offense against the city and, upon that charge, convicted of an offense against the state) falls with it. "Sublato fundamento, cadit opus."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. ¶ 260.]

Appeal from City Court of Shreveport; L. C. Blanchard, Judge.

Jacie Williams Bennett was convicted of retailing intoxicating liquors without a license, and appeals. Affirmed.

Blanchard & Smith, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant was charged before the city court of Shreveport, with having retailed intoxicating liquors, without first having obtained a license from the police jury of Caddo parish, and, having been convicted and sentenced to pay a fine of \$400, prosecutes this appeal from that sentence.

The only bill of exception which the record discloses was reserved to the refusal of the judge a quo to grant a new trial, and contains the following recitals (stated in substance) to wit:

That defendant called to the stand Ben Bernstein, who testified that he signed the affidavit upon which the prosecution is based, and that he was not sworn at that time, wherefore defendant prays for an acquittal, on the ground that prosecutions, for misdemeanors, in the city court, must be by affidavits; that Bernstein was not the district attorney, but only the desk clerk of the Shreveport police department; that the charge in this case reads, "City of Shreveport v. Jacie Williams Bennett, No. 143—Docket of the City Court—City of Shreveport, Louisiana"; that, under that charge defendant was convicted and sentenced to pay \$400 to the state and \$100 to the city of Shreveport; that the judgment is illegal, in that defendant could only have been convicted under the charge made by the city, and hence that the conviction under which she is condemned to pay \$400 to the state is void. The judge adds the following as his reason for overruling the demurrer:

"That the witness, Ben Bernstein, while not sworn at the time of making said affidavit, was sworn to same before actual arraignment of defendant, it being the practice of the city court to let the desk clerk make out all affidavits, as parties are arrested, and swear to all, at once, immediately before court, each day. * * * That, while one affidavit did read,

'City of Shreveport v. Jacie Williams Bennett,' there was another affidavit which read 'State of Louisiana v. Jacie Williams Bennett,' both charges being for selling liquor without a license, etc.; defendant being tried on both affidavits at the same time," etc.

[1] The objection that the affidavit was not made at the time that it was signed came too late after defendant had been tried and convicted on a specific criminal charge. *State v. Taylor*, 37 La. Ann. 40; *State v. Summerlin*, 116 La. 455, 40 South. 792.

[2] 2. In *State v. Fulco*, 135 La. 269, 65 South. 239, it was said by this court:

"It is conceded that a person may be prosecuted for the same offense under a state statute and also under a municipal ordinance, and we know of no reason why the prosecutions may not be conducted at the same time, the more particularly where no objection is made, since the evidence to be adduced relates to the same act, charged as a violation of both the statute and the ordinance. Counsel say, in their brief: 'We find but one plea and one trial, and, although one plea and one trial, the accused is convicted of both offenses.'

"But the statement is not borne out by the record, from which it appears that there were two charges, and an arraignment, plea, conviction, sentence, and appeal on and from each of them."

And the appeal from the conviction under the city ordinance was dismissed, for want of jurisdiction in this court, whereas, the conviction under the statute was affirmed.

In the instant case, save for the recitals and the statement per curiam, contained in the bill of exceptions, the transcript contains no reference to any other prosecution than that bearing the title "State of Louisiana v. J. C. Williams Bennett," and the number 143, and hence does not sustain the premise (stated in the bill) that the charge in this case reads, "City of Shreveport v. Jacie Williams Bennett, No. 143—Docket of the City Court—City of Shreveport, Louisiana," and, the premise being destroyed, the conclusion goes with it. *Sublato fundamento, cadit opus*.

Judgment affirmed.

(136 La. 337)

No. 20535.

BOARD OF DIRECTORS OF PUBLIC SCHOOLS OF CALDWELL PARISH v. LOUISIANA CENTRAL LUMBER CO. et al.

(Supreme Court of Louisiana. Dec. 14, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS — 114—SCHOOL PROPERTY — SCHOOL DIRECTORS — RIGHT OF ACTION.

The board of school directors of the parish of Caldwell has no authority to sue, as the representative or on behalf of the public schools, school children, taxpayers, and citizens of the parish, to recover property alleged to have been donated to the Pine Grove Academy for school purposes and alleged to have been sold

by the trustees of the academy after the expiration of its charter.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 271; Dec. Dig. § 114.]

Appeal from, Thirtieth Judicial District Court, Parish of Caldwell; George Wear, Sr., Judge.

Action by the Board of Directors of Public Schools of Caldwell Parish against the Louisiana Central Lumber Company and others. From a judgment of dismissal, plaintiff appeals. Affirmed.

A. A. Gunby, of Monroe, for appellant. Stubbs, Russell, Theus & Wolff, of Monroe, for appellees Louisiana Central Lumber Co. and M. H. Spades.

O'NIELL, J. The plaintiff has appealed from a judgment dismissing this suit on the defendants' exceptions of misjoinder of parties, of improper cumulation of actions and of no cause or right of action.

It is an action to recover various tracts of land in the possession of the defendants, respectively, and to recover the value of the timber alleged to have been cut and removed from a part of the land by one of the defendants, and to recover, also, the value of the right of way of the defendant St. Louis, Iron Mountain & Southern Railway Company across the land.

The suit is brought in the name of the parish board of school directors as the representative of the public schools, school children, and school property of the parish of Caldwell.

The petition recites that two tracts of the land sued for were donated by James McCoy, Robert Chew, and Henry M. Hyams to the Pine Grove Academy on the 7th of January, 1839, for the exclusive purpose of an academy site, and that the balance of the land was donated by Daniel W. Cox to the Pine Grove Academy on the 2d of May, 1839, for school purposes.

It is alleged that these donations were made for the benefit of the school children of the parish, and were made to the Pine Grove Academy and its directors because that corporation was created by Act No. 76 of 1838, by which \$1,500 was donated by the state to the academy, for the use and benefit of the youth and inhabitants generally of the parish of Caldwell.

The plaintiff alleges that these lands were embraced in what was known as the Maison Rouge Grant, which was decreed invalid, in a contest between the United States and the claimants under the grant. It is alleged that subsequently, by the act of Congress of the 29th of July, 1854 (10 Stat. 802, c. 161), entitled "An act for the relief of Pine Grove Academy in Louisiana," the title in the academy and its president, directors, and trustees was confirmed.

It is alleged that a certain sale of this property by one William Sweaney to the police jury in 1843 and a certain sale by the sheriff in 1845, and all subsequent or other sales thereof, are absolutely null.

The plaintiff alleges that, under Act No. 76 of 1838, no authority was given to the Pine Grove Academy or its trustees to sell or otherwise dispose of the property of the corporation; that the statute of 1838 was repealed and superseded by Act No. 195 of 1860, re-incorporating the Pine Grove Academy for a period of 25 years, at the expiration of which time the corporation ceased to exist.

It is alleged that, after the Pine Grove Academy had ceased to have a corporate existence, that is, on the 21st of August, 1903, its president and secretary sold, or pretended to sell, 2,369 acres of its land to the Greenville Land Company for the price of \$5,922.50, and that the defendants are claiming title to the tracts occupied by them, respectively, under invalid titles acquired, or pretended to have been acquired, from the Greenville Land Company.

Opinion.

The learned counsel for the plaintiff has not referred us to any law authorizing the plaintiff to prosecute this suit to recover the lands alleged to have belonged to the Pine Grove Academy. His argument is that the board of school directors has the administration of all the property of the public schools of the parish, and that, when the Pine Grove Academy ceased to have a corporate existence, its property became public school property. And he suggests that the board of school directors may assume the authority to prosecute this suit on behalf of the taxpayers, the school children, and citizens generally, of the parish, because the right does not seem to be vested in any other department of the government of the state or parish.

We are not called upon to determine what became of the title of the lands which had been donated to the Pine Grove Academy at the expiration of the term of its corporate existence, or who, if any one, has the right to sue to recover the property formerly belonging to the academy. The only question presented by the exceptions of no cause or right of action is whether the plaintiff has that right. And we are of the opinion that the right to institute this suit could only be conferred upon the plaintiff by a legislative act.

There is no authority or reason for the contention that the property of the Pine Grove Academy became public school property of this state or of the parish of Caldwell when the academy came to the end of its corporate existence.

In the case of *School Directors v. Anderson*, 28 La. Ann. 739, it was held that the board of school directors of the parish of Carroll had been given authority to sue to rescind a sale of

a sixteenth section of land by a provision of Act No. 121 of 1861. That decision, however, was criticized, declared to have no general application, and was, in effect, overruled, in the case of Board of School Directors of Concordia Parish v. Ober, 32 La. Ann. 417, where it was said that the right to prosecute such a suit had been maintained in behalf of Carroll parish on the ground that the legislative authority had been expressly given by a statute which conferred the right only upon that parish; and the opinion was then expressed that, if the statute had been scrutinized, it would have been found deficient even in the authority conferred upon the parish of Carroll.

As the plaintiff has no proprietary interest in the subject or object of this suit, no administrative authority in the premises, no legislative authority or implied right to prosecute this suit, the judgment of the district court, maintaining the defendants' exceptions of no cause or right of action and dismissing the plaintiff's suit, was correct, and it must be affirmed.

It is therefore unnecessary to consider the other pleas or exceptions.

The judgment appealed from is affirmed, at the cost of the appellant.

(136 La. 341)

No. 20941.

STATE v. MACKIE.

In re MACKIE.

(Supreme Court of Louisiana. Dec. 14, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §143—"BLIND TIGER"—STATUTORY DEFINITION.

The definition of a "blind tiger," in Act No. 146 of 1914, as a place in a subdivision of this state where the sale of intoxicating liquor is prohibited, where it is kept for sale, barter, exchange, or habitual giving away as a beverage, in connection with any business conducted at such place, is controlled by the phrase, *in connection with any business conducted at such place*, whether the intoxicating liquor is kept there for sale, barter, exchange, or to be habitually given away.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 152; Dec. Dig. §143.

For other definitions, see Words and Phrases, First and Second Series, Blind Tiger.]

2. INTOXICATING LIQUORS §213—KEEPING BLIND TIGER—INFORMATION—SUFFICIENCY.

A bill of information, charging that the defendant kept intoxicating liquors for sale at a certain corner in a city where the sale of intoxicating liquor is prohibited, without alleging that it was in connection with any business conducted at such place, does not charge the offense of keeping a "blind tiger," denounced by Act No. 146 of 1914.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 255-257; Dec. Dig. § 213.]

Land, J., dissenting.

Frankie Mackie was convicted of keeping a blind tiger, and appliers for a writ of certiorari. Reversed, and defendant discharged.

R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Goudran, of New Orleans, of counsel), for the State. L. C. Butler, of Shreveport, for applicant.

O'NIELL, J. The defendant was prosecuted for, and convicted of, violating Act No. 146 of 1914, entitled:

"An act to define and prohibit the keeping of a 'blind tiger'; to provide for the search of same, and for the seizure and destruction of any spirituous, malt or intoxicating liquor found therein; to provide for the punishment of any violations of this act."

The bill of information is in the following words:

"That Frankie Mackie * * * unlawfully did keep a 'blind tiger,' by keeping intoxicating liquors for sale as a beverage at corner of Hunter and Elm streets, Shreveport, Caddo parish, La., where the sale of intoxicating liquors is prohibited."

The defendant moved to quash the bill of information on the ground that it did not charge her with violating any crime or misdemeanor under the law of this state.

The court overruled the motion, and, according to the statement in the bill of exceptions, she was convicted on the evidence that she had in her ice chest 30 bottles of beer; that there were 18 freshly opened empty beer bottles on the premises, and a half cask of beer unopened in the defendant's "living room," where there were two other women and two men.

We have no jurisdiction to determine whether the proof would have been sufficient to justify a conviction of the defendant for keeping intoxicating liquors for sale as a beverage in a parish where its sale is prohibited, if that was a crime or misdemeanor, or to justify a conviction for selling intoxicating liquor in a prohibition parish or retailing it without a license.

[1, 2] We have only to decide whether the bill of information charges a violation of Act No. 146 of 1914, denouncing as a misdemeanor the keeping of a "blind tiger," and defining it as:

"Any place in those subdivisions of the state where the sale of spirituous, malt or intoxicant liquors is prohibited, where such spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giving away as a beverage *in connection with any business conducted at such place.*"

The learned trial judge held that it was not necessary for the state to charge or prove that the place alleged to be a "blind tiger" was one in which the intoxicating liquors were kept for sale *in connection with any business conducted at such place*, although he said it would have been necessary to charge and prove that the intoxicating liquors were kept for the habitual giving away as a beverage *in connection with some business conducted at the place*, if she had been charged with keeping the intoxicating

liquors for habitually giving them away, though not for sale, barter, or exchange.

The Legislature, however, did not see fit to make any distinction between keeping intoxicating liquor for sale, barter or exchange and keeping it for habitually giving it away, in a place where the sale of it is prohibited.

The statute does not provide that it shall be unlawful to keep intoxicating liquor for sale, barter, or exchange in any place where the sale of it is prohibited, and that it shall also be unlawful to keep it for habitually giving it away as a beverage in connection with any business conducted at such place. The act provides that whoever shall keep a "blind tiger" shall be guilty of a misdemeanor, and, on conviction, be punished by fine and imprisoned. It defines a "blind tiger" as:

"Any place in those subdivisions of the state where the sale of spirituous, malt or intoxicant liquors is prohibited, where such spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giving away as a beverage in connection with any business conducted at such place."

This statutory definition of a "blind tiger" is the same whether the intoxicating liquor be kept for sale, barter, exchange, or habitual giving away, as a beverage.

The statute of 1914 further provides that any place suspected of being a "blind tiger" shall be searched by an officer designated in a search warrant; that any spirituous, malt, or intoxicating liquors found in such place shall be seized; and that the officer shall, within 24 hours, make his return and bring into court, along with the intoxicating liquor, all persons found in such place.

We are of the opinion that these harsh proceedings were advisedly made to apply only to a place where some business is conducted. And we have no authority to divide and modify the statutory definition of a "blind tiger" so as to have one definition for a place where intoxicating liquor is kept to be habitually given away and another definition for a place where it is kept for sale, or for barter or exchange.

The decision in *City of Shreveport v. Maroun*, 134 La. 490, 64 South. 388, where it was said that a "blind tiger" is defined in the dictionaries as a place where intoxicants are sold on the sly and contrary to law, was rendered before the adoption of Act No. 146 of 1914, and therefore without any reference to the statutory definition of a "blind tiger." The court said that the city ordinance which Maroun was convicted of violating did not attempt to create an offense, but merely declared a "blind tiger" to be a nuisance, and that the definition in the ordinance was tautological and unnecessary.

Act No. 146 of 1914 does create an offense, and it can only be charged in accordance with the statute.

For the reasons assigned, the bill of information and the conviction and sentence

had thereunder are annulled, and it is ordered that the defendant be discharged from further prosecution under the bill of information.

LAND, J., dissents.

(136 La. 345)

No. 20711.

STATE v. WILSON et al.

(Supreme Court of Louisiana. Nov. 4, 1914.
On Application for Rehearing, Jan.
11, 1915.)

(Syllabus by the Court.)

1. ROBBERY §17—INFORMATION—REQUISITES.

In an information for robbery of money from a person named therein, and which alleges force, violence, and putting said person in fear by defendants, the words "against his will" would be tautological; and they are unnecessary.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16-23, 26; Dec. Dig. §17.]

(Additional Syllabus by Editorial Staff.)

2. ROBBERY §17—INFORMATION—REQUISITES—"AGAINST THE WILL"—"UNLAWFULLY, WILLFULLY, FORCIBLY, AND VIOLENTLY."

Since the words "unlawfully, willfully, feloniously, forcibly, and violently" in an information charging robbery under Rev. St. § 810, imply a taking "against the will," this latter phrase need not be added to the information.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 16-23, 26; Dec. Dig. §17.]

On Application for Rehearing.

3. ROBBERY §1—DEFINITION OF CRIME.

"Robbery" is the felonious taking of the property of another from his person, or in his presence, against his will, by violence, or by putting him in fear.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 1, 13; Dec. Dig. §1.]

For other definitions, see Words and Phrases, First and Second Series, Robbery.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; Wm. Campbell, Judge.

Houston Wilson and another were convicted of robbery, and appeal. Affirmed, and rehearing refused.

Percy T. Ogden, of Crowley, for appellants. R. G. Pleasant, Atty. Gen., and C. B. De Bellevue, Dist. Atty., of Crowley (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Defendants were charged with assaulting one Charles Zenor, and by putting the said Zenor in fear, did unlawfully, willfully, feloniously, forcibly, and violently rob, take, steal, and carry away \$13, the property of said Zenor.

[1, 2] Defendants argue that the information against them was filed under section 809, Revised Statutes. In this, they are mistaken. It was filed under section 810. The robbery with which they are charged was of money from the person of Zenor; and robbery from the person is provided for

in section 810. The prior section (809) is more directly applicable to "the robbery of goods and chattels."

Defendants moved to arrest the judgment on the ground that the indictment is fatally defective on its face, in that it does not contain the allegation "against the will" of the person said to have been robbed; and, further, because the indictment does not contain the allegation that the money was robbed "from the person" of the said Charles Zenor.

It was unnecessary to charge that the robbery was committed "against the will" of Charles Zenor, for the reason that the indictment charges that the defendants put said Zenor "in fear," and unlawfully, feloniously, willfully, forcibly, and violently robbed him of \$13.

After thus charging defendants, it would have been tautological to have added the phrase "against his will." The words "against the will" are not more expressive than are the words "unlawfully, willfully, feloniously, forcibly, and violently." The latter words imply that the money was taken against the will of the person robbed. *State v. Patterson*, 42 La. Ann. 934, 8 South. 529. Judgment affirmed.

On Application for Rehearing.

PER CURIAM. Defendants urge that the absence of the words, "from the person," from the indictment charging the robbery, rendered the indictment insufficient, or rather fatal.

[3] "Robbery" is the felonious taking of the property of another from his person, or in his presence, against his will, by violence or by putting him in fear.

The indictment sufficiently charges that the robbery was committed in the presence of the person robbed in setting forth that defendants unlawfully, feloniously, and violently did make an assault upon the person of one Charles Zenor, and then and there by putting him in fear, did unlawfully, etc., rob him of \$13, the property of said Zenor.

Rehearing refused.

(136 La. 347)

No. 20697.

Succession of REILLY.

(Supreme Court of Louisiana. Nov. 30, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. WILLS §473—CONSTRUCTION—VALIDITY.

Where the language of a testament clearly expresses the intention of the testator to be to invest his legatee with the ownership of the legacy, with the direction to make a designated disposition of it, the direction as to how the legatee, as owner, is to dispose of the legacy, is reputed not written, but it does not affect the validity of the bequest to the legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. §473.]

2. WILLS §473—CONSTRUCTION—VALIDITY.

The following is a valid testamentary disposition, in which the condition, "to be distributed as he sees fit among my people in Ireland and for the further education of Thomas Regan," is, as to the validity of the bequest, reputed not written, viz.: "And the balance of whatever I may die possessed of I give and bequeath unto Bishop Thomas Heslin, to be distributed as he sees fit among my people in Ireland and for the further education of Thomas Regan, hereby instituting Bishop Heslin my sole heir and universal legatee."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. §473.]

3. PERPETUITIES §4—BEQUESTS—VALIDITY—SUBSTITUTION.

The essential elements of the prohibited substitution are that the donee or legatee is charged to keep the property during his lifetime for another person to whom it is to be delivered at the death of the first donee or legatee. Such a disposition is null even with regard to the donee or legatee.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. §4; Trusts, Cent. Dig. §§ 3, 4.

For other definitions, see Words and Phrases, First and Second Series, Substitution.]

4. PERPETUITIES §6—BEQUESTS—PROHIBITED SUBSTITUTION.

The prohibited substitution is an attempt on the part of a donor or testator to vest the title in his donee or legatee without the right of alienation or testamentary disposition or the capacity to transmit it to his heirs.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. §6.]

5. PERPETUITIES §6—BEQUESTS—PROHIBITED SUBSTITUTION.

The objection to the substitution is that, during the lifetime of the donee or legatee, neither he nor the person designated to acquire the title at the death of the donee or legatee could alienate the property; and the law prohibits keeping property out of commerce indefinitely and complicating the simple tenures by which alone its ownership is permitted.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-47, 49-53, 56; Dec. Dig. §6.]

6. WILLS §473—TRUSTS—PARTIAL INVALIDITY—FIDEI COMMISSUM.

In the fidei commissum, whereby the donee or legatee is invested with the title and directed to convey it to another person or to make a designated disposition of the property, the direction as to the disposition of the property is illegal and is reputed not written, but it does not affect the validity of the bequest to the donee or legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. §473.

For other definitions, see Words and Phrases, First and Second Series, Fidei Commissum.]

7. OBJECTION TO BEQUEST.

The objection, that a bequest to a legatee, with the direction to distribute it as he sees fit among persons of a designated class, violates the provisions of article 1573 of the Civil Code, prohibiting the making of a testament by an agent or commissary, is of no importance, in view of the fact that such a condition either creates a substitution and thereby annuls the entire bequest, or creates only a fidei commissum, in which the condition or direction is reputed not written.

8. WILLS §473—BEQUESTS—VALIDITY.

In so far as an attempt of a testator to confer upon his legatee the authority to select

another person as the beneficiary of his legacy contravenes article 1573 of the Civil Code, prohibiting the making of a will through an agent or commissary, the clause purporting to delegate such authority is an illegal condition, which, by article 1519 of the Civil Code, is reputed not written, and therefore cannot annul the bequest to the legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. § 473.]

9. PERPETUITIES § 8 — BEQUESTS — VALIDITY — DELEGATION OF TESTAMENTARY CAPACITY.

It is only in a bequest for a pious use, or to the poor of a community, or to a trustee for a charitable or educational or literary institution existing or to be organized, that a testator's attempt to delegate the authority to his legatee or trustee to select the beneficiary or beneficiaries of his legacy annuls the testamentary disposition; because, in all other cases, the bequest of a legacy to one person to be given by him to another is either a prohibited substitution, which is null even as to the donee or legatee, or it is only a fidei commissum, in which the stipulation in favor of the third person is reputed not written.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 57-66; Dec. Dig. § 8.]

10. DESCENT AND DISTRIBUTION § 74 — TITLE AND RIGHTS OF HEIR — "SUCCESSION" — ACQUISITION.

A succession is acquired by an instituted heir or universal legatee, by the operation of law, at the instant of the death of the testator, without the necessity of any legal proceedings or taking of possession.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 227, 228, 237-242, 260-262; Dec. Dig. § 74; Executors and Administrators, Cent. Dig. §§ 629, 630.]

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

In the matter of the succession of John Reilly. Suit to annul a bequest, by collateral heirs of John Reilly against the brothers and sisters of Bishop Thomas Heslin, deceased, wherein Thomas Regan, executor, was nominally a codefendant. From judgment for plaintiffs decreeing the bequest void, defendants appeal. Reversed and rendered.

Dart, Kernan & Dart, of New Orleans, for appellants Heslin heirs. Frank Wm. Hart, of New Orleans, for appellant Thomas F. Regan, dative testamentary executor. Rice & Montgomery, of New Orleans, for appellees Mrs. John P. Prunty and others. Woodville & Woodville, of New Orleans, for appellees absent heirs.

O'NIELL, J. In the will of John Reilly dated the 10th of April, 1908, after numerous special legacies to his collateral relations in this country, appears the following bequest, viz.:

"And the balance of whatever I may die possessed of I give and bequeath unto Bishop Thomas Heslin, to be distributed as he sees fit among my people in Ireland and for the further education of Thomas Regan, hereby instituting Bishop Heslin my sole heir and universal legatee."

The testator died at his domicile in New Orleans on the 26th of December, 1908, and

his will was admitted to probate on the 14th of January, 1909.

Bishop Thomas Heslin died in February, 1911, while the succession of John Reilly was yet under administration by Maurice P. Woulfe as testamentary executor. This executor died in February, 1912. James J. Woulfe was appointed to succeed him as dative testamentary executor of the will of John Reilly, and continued the administration.

This suit to annul the bequest above quoted was filed on the 19th of February, 1913, by the collateral heirs of John Reilly, residing in this country, against the executor and the attorney appointed to represent absent heirs and the tutors of certain minor heirs. James J. Woulfe resigned, and Thomas Regan was appointed to succeed him as dative testamentary executor on the 4th of April, 1913. Thereafter, by supplemental petition of the plaintiffs, Thomas Regan, as testamentary executor, was made defendant in this suit.

In their answer the tutors of the minors, made defendants, admitted all of the material averments of the plaintiffs' petition and joined in the prayer that the above-quoted bequest under a universal title be decreed null.

Thomas Regan answered individually and as executor, denying that the bequest in favor of Bishop Thomas Heslin was null for any reason, alleging that it was a valid testamentary disposition in favor of Bishop Thomas Heslin as universal legatee, and praying that it be so decreed.

The nearest relations and sole surviving heirs of Bishop Thomas Heslin are his two brothers, Rev. Patrick Heslin and James Heslin, and a sister, Mrs. Maria Heslin Igoe.

James Heslin filed suit on the 19th of November, 1913, against Thomas Regan, executor, and against the sureties on the bond of the former executor, James J. Woulfe, for a final account of the administration of the succession of John Reilly, and for judgment recognizing him to be the owner of a third of the residue of the estate as one of the three heirs of the deceased universal legatee.

By supplemental petition of the plaintiffs in the original suit, the two surviving brothers and the sister of the deceased Bishop Thomas Heslin were made defendants.

In this suit therefore the collateral heirs of John Reilly are the plaintiffs or contestants, and the brothers and sister of the deceased Bishop Thomas Heslin are the defendants. Thomas Regan, executor, is nominally a codefendant. Judgment was rendered in the district court in favor of the plaintiffs, decreeing the bequest null and void; and the defendants have appealed.

The education of Thomas Regan was completed from a special legacy bequeathed to him for that purpose, and he is not claiming the benefit of the stipulation, for his further

education, in the bequest to Bishop Thomas Heslin, but, as appellant, he contends that the stipulations in the contested bequest are nothing more than suggestions or recommendations which do not affect the validity of the legacy in favor of Bishop Thomas Heslin as universal legatee.

The contestants allege that the bequest is vague, uncertain, and meaningless; that it contains a substitution and *fidel commissum*; and that it contravenes article 1573 of the Revised Civil Code, prohibiting testamentary dispositions to be made through the medium or choice of an agent or commissary.

The defense is that the provision in the bequest, "to be distributed as he sees fit among my people in Ireland, and for the further education of Thomas Regan," does not make a substitution, because the legatee is not charged to preserve the property during his lifetime and transmit it to a designated person or persons; that these stipulations in the bequest make it only a *fidel commissum*, in which the recommendations or stipulations, in favor of the testator's people in Ireland and for the further education of Thomas Regan, are to be regarded as not written, but do not affect the validity of the bequest.

Opinion.

[1, 2] The only vagueness or uncertainty in the bequest is in the testator's reference to his people in Ireland, in which he does not designate them even as his kinsmen. If this uncertainty renders that stipulation in the bequest meaningless, it is an impossible condition, the legal consequence of which is found in the provision of article 1519 of the Civil Code, that impossible conditions, in a disposition *inter vivos* or *mortis causa*, are reputed not written. And if this stipulation violates article 1573 of the Civil Code, abolishing the custom of willing by the interposition of a commissary or attorney in fact, it is an unlawful condition, and article 1519 of the Civil Code also provides that conditions which are contrary to the laws or morals are reputed not written.

Our conclusion, however, is that article 1573 of the Civil Code need not be considered in the determination of the question of validity or invalidity of the bequest in contest. This article is in a section of the Code which treats only of the form or confection of wills, and not of the substance; whereas articles 1519 to 1522, of the Code, treating of prohibited substitutions and *fidel commissum*, are in another section, dealing with the substance, not the form, of donations *inter vivos* and *mortis causa*. There are only four articles in section 1 of chapter 6, Of Dispositions *Mortis Causa*. Article 1570 provides that a disposition *mortis causa* shall not be made otherwise than by last will or testament, but that the name given to the instrument or manner of disposing, whether by instituting an heir or naming legatees, and whether an

executor be appointed or not, are matters of no importance. Article 1571 is the definition of a testament; 1572 prohibits the making of a testament by two or more persons by one and the same act, either reciprocally or for the benefit of a third person; and article 1573 abolishes the custom of delegating the authority to make a will to an agent or attorney in fact, viz.:

"The custom of willing by testament by the intervention of a commissary or attorney in fact is abolished.

"Thus the institution of heir and all other testamentary dispositions committed to the choice of a third person are null, even should that choice have been limited to a certain number of persons designated by the testator."

This article appeared as number 88 of the "Digest of the Laws in force in the Territory," in the act of March 31, 1808, abrogating the French and Spanish laws. In the Code of 1825 it appeared as article 1566, and it was retained in the revision of 1870 as article 1573, under the brief section treating generally of the forms of testaments. In the French law prevailing here until 1768 when Gov. O'Reilly took actual possession of the colony for Spain, no mention had been made of delegating to an agent or commissary the authority to make a testament. Gov. O'Reilly promptly abolished the French laws; and in the Digest of Laws prepared under his direction, under the section treating of testaments, appeared the provisions reciting that, as it often occurred that persons, unable or unwilling to make their own testaments, desired to authorize others to do so for them, such authority had to be given under certain prescribed formalities and restrictions, etc.

From the history and etymology of article 1573 and from its position in our Civil Code, it seems that the only purpose of embodying this provision in the Digest of 1808 was to leave no doubt of the abolishment of the right or custom of making wills by proxy.

Until the passage of the Act 124 of 1882, permitting donations *inter vivos* or *mortis causa* to be made to trustees for educational or charitable or literary institutions, it was never necessary to invoke the provisions of article 88 of the Digest of 1808, 1566 of the Civil Code of 1825, or 1573 of the revision of 1870, to determine the validity or invalidity of a fiduciary bequest. We have not been referred to, nor have we found in our jurisprudence, a case where a will or testamentary disposition was made by proxy or by an agent or commissary or attorney in fact. The only cases in which there was an attempt to enforce or exercise the delegated authority to select a beneficiary of a testamentary disposition were those in which it was attempted under the Act 124 of 1882, for the benefit of a charitable, educational, or literary institution. Except in the case of a gift to a religious, charitable, educational, or literary institution, or for pious uses, or to the poor of a community, a fiduciary be-

quest to a trustee for the benefit of a third person is prohibited by article 1520 of the Civil Code, whether the testator attempts to designate the beneficiary or to confer upon the trustee the right of selecting him. Therefore a bequest to one person for the benefit of another embodies either a substitution, which annuls the entire bequest, or only a *fidel commissum*, in which the stipulation *pour autrui* is reputed not written. In either case, the testator's attempt to confer upon the donee the right to select another person as the beneficiary of the legacy can have no effect one way or the other.

In the case of *Fink v. Fink*, 12 La. Ann. 320, the contested bequest of the residue of the testator's estate for the erection of an asylum for the Protestant widows and orphans of New Orleans, concluded with this delegation of authority:

"And I do hereby request and authorize my friend, Diederich Bullerdieck, after my decease, to name and appoint three worthy and responsible persons as trustees, to carry out my said intentions respecting the aforesaid asylum."

Our predecessors, through Mr. Justice Buchanan, decided that the disposition was valid under article 1536 of the Civil Code (article 1549, R. C. C.), as a bequest to the poor of a community, and said of the delegation of authority to select the three administrators or trustees:

"Were we compelled to give an interpretation of this clause of the will, in reference to the object of the proposed appointment of trustees, we would undoubtedly feel bound to understand this disposition in a sense in which it could have effect, if possible, rather than one in which it could have none. C. C. art. 1706. But no interpretation of this disposition is necessary. On its face, it is a delegation by the testator to a third person of the choice of administrators of a portion of the estate; and, as such, by article 1566 of the Code (article 1573, R. C. C.), is a mere nullity, and, under article 1506 (article 1519, R. C. C.), must be considered as not written."

This reasoning and doctrine is applicable to any and every case where there has been no attempt to enforce or exercise the delegated right to select a beneficiary of the will in contest.

In the Succession of Mrs. Honoria Burke Ringrose, 51 La. Ann. 538, 25 South. 387, the clause in the will, which was said to violate article 1573 of the Civil Code, did not contain a testamentary disposition or bequest, but was only a request to the executors, or an expression of the desire of the testatrix, regarding the disposition of the residue of her estate, viz.:

"Now, after these bequests have been made, the remainder of my estate I desire my executors to use for any charitable institution they may select, or think of benefiting, to perpetuate my memory."

In the opinion delivered on application for rehearing, referring to the clause above quoted, we find:

"It was contested upon the grounds: (1) That it was merely a direction to the executors named * * * to use the remainder of the estate for

some unknown and indefinite object or person; (2) that same was not a bequest, within the meaning of the law, under which the executors could claim title to the property; (3) that it was meaningless, and in direct contravention of the prohibitory provisions of the law, and must be reputed not written."

The executors of the will were the only defendants. They contended that the clause in contest was a bequest to a charitable institution to be selected by them, and they relied upon the Act No. 124 of 1882, legalizing donations to trustees for charitable, educational, or literary institutions, whether already existing or to be organized by the trustees.

The district court and this court recognized that the clause in contest was not a bequest at all, but was only a suggestion or request to the executors, to use the residue of the estate for some charitable purpose to perpetuate the memory of the testatrix.

It was intimated very plainly in the opinion by Chief Justice Nicholls, and was virtually conceded, that, if the testatrix had instituted her executors as her universal legatees or bequeathed to them the residue of her estate, with the charge to use it for any charitable institution they might select or think of benefiting to perpetuate her memory, the bequest to the executors would have been valid and the charge or direction, to use the legacy for some charitable institution to perpetuate the testatrix's memory, would have been reputed not written. It was stated in the opinion that the executors repudiated the idea that the title of the residue of the estate had been given to them. 51 La. Ann. 544, 25 South. 390. And it was said:

"The testatrix did not designate any one as her residuary legatee, but left the selection of the legatee to the choice of her executors. This she could not validly do."

John Reilly did designate Bishop Thomas Heslin as his residuary legatee, and left it to the legatee to distribute the estate among the testator's people in Ireland as the legatee might see fit, and to further educate Thomas Regan. The delegation of authority to select the ultimate beneficiary or beneficiaries is not all there is in the clause contested in the present suit, nor is there any attempt to enforce or exercise the delegated right of selecting the ultimate beneficiary or beneficiaries, as was the case in the Succession of Mrs. Honoria Burke Ringrose.

This court also regarded article 1573 of the Civil Code inapplicable and not to be considered in deciding the contest of the will of Francois Meunier, 52 La. Ann. 79, 26 South. 776, 48 L. R. A. 77. The testator bequeathed all of his property in the city of New Orleans to his native city, Carouge, in Switzerland; he directed that the property be sold, and that the city of Carouge "shall place the said sum at interest, and with the interest shall endow each year two poor girls, and shall give a pension to ten old persons of

both sexes, without any distinction of religion."

The legal heirs of Francois Meunier contested the will, alleging that the bequest was a prohibited substitution, and also that it was an attempt to will the estate to indefinite persons, two poor girls and ten old persons, through the interposition of a commissary or attorney in fact. But the court said:

"This argument would prevail if it were the only interpretation of which the will is susceptible. But there is another view to be taken of the will, and we think a legal one."

It was observed then that the executors had sold the property as directed and the residue of the estate consisted of the proceeds derived, less the debts of the succession; and that therefore the testament could not indefinitely tie up the property and keep it out of commerce, or complicate the simple tenures by which alone our system of laws permits the ownership of property. Hence it was not a substitution.

"The title intended," said the court, "is one to the city of Carouge in full ownership, with a destination to pious or charitable uses. * * * This direction is, we think, more to be regarded as in the nature of a request to the legatee. It was the expression of a wish, a desire. It was not a disposition. It was advice and recommendation. C. C. art. 1713, we think, authorizes this meaning to be given to the words. [State v. McDonogh Ex'rs] 8 La. Ann. 237. * * * The terms of the will are terms of disposal. They express the transfer of ownership from the * * * testator to the legatee. The disposition and control of the fund after it is placed in the city's hands would be in virtue of ownership, not trusteeship."

It was intimated that one reason why the testament of Francois Meunier was not a *fidel commissum* was that he had not named or designated the individuals who might be the ultimate beneficiaries of his will. Quoting Domat's definition of "*fidel commissum*," as a disposition *mortis causa* by which the legatee is directed to give the property to another person, it was said:

"By 'another person' is meant a person or institution so named or indicated as to individualize him or her or it. That is not the case here. This bequest is to the city of Carouge, and to it alone. * * * It was in no sense a legacy to any other person."

There is considerable logic in this, that if the direction to the legatee, to distribute an estate among a class of persons whose individuality is not indicated and to distribute it as the legatee sees fit, violates article 1573 of the Civil Code, because it is an attempt to make a testamentary disposition through an agent, it is simply an illegal condition, which, under article 1519 of the Civil Code, and under the doctrine expressed in *Fink v. Fink*, must be considered as not written; it can have no effect upon the validity of the bequest, and no interpretation of it is necessary.

A will containing a clause very similar in its legal (or illegal) aspect to the one in the will of Mrs. Honoria Burke Ringrose was that of Mrs. Alice B. McCloskey, 52 La. Ann.

1122, 27 South. 705. The clause which was pronounced invalid was as follows:

"And my trustees shall hold the residue of moneys forming portion or arising from the sale, calling in, collection or conversion of my American property in trust, to apply such an amount as they shall think fit in the erection of a stained-glass memorial window in St. Patrick's Church, Donegall Street, Belfast, in memory of the late Rev'd Michael Cahill, C. C., formerly of St. Patrick's Church aforesaid, and in trust to pay and apply any surplus of the said such residue for such charitable uses and purposes in Ireland as they in their discretion shall think fit. * * * And in case any of the charitable or other legacies hereinbefore bequeathed, or of which I shall bequeath by any codicil to this my will, shall be or become void at law or shall otherwise lapse or fail to take effect, then I bequeath all such legacies which shall be or become void unto my said trustees absolutely and direct that all such legacies as shall lapse or fail to take effect shall form part of my residuary estate."

Such an indefinite disposition to trustees in trust for indefinite charitable purposes was declared a void legacy, not saved by the provisions of Act 124 of 1882; and, invoking the doctrine prohibiting wills by proxy, it was said:

"It is obvious that this is not a valid disposition by will under our law. The institution of heir or other testamentary disposition committed to the choice of a third person is null by the express language of the law. C. C. art. 1573. * * * The same is, besides, too uncertain and vague to enable any one to take under the terms thereof. The bequest is not to the parties named therein as trustees in their individual capacity, but to them as trustees. It cannot be said with certainty that the testatrix intended the parties named as trustees to take as individuals. It is clearer that she meant for them to take in their capacity as trustees. If the latter was her intention, then must she be considered as vesting her trustees with title to the residuum in order to carry out her thereinbefore mentioned purpose, viz., its application to such charitable uses in Ireland as they might determine. And to this end and in furtherance of this purpose, the concluding words of the clause under consideration contain the direction that the legacies which lapsed or failed to take effect were to form part of her residuary estate. Now, it was this residuary estate, or the proceeds thereof, which was to be applied to charitable uses in Ireland. It was willed to certain persons as trustees who had previously, in the will, been given directions as to how it was expected they were to apply it. It is the same thing as bequeathing it to them in trust for the purpose. It comes within the prohibitions of the law and is void. Had the bequest been made to the parties named as trustees in their individual capacity, a different rule might apply. * * * Here no legatee is named, the amount is left uncertain, and the disposition is to trustees who are directed to apply it to charitable purposes as they in their discretion may think fit."

In John Reilly's Will, the bequest is made, not to a trustee, but to the legatee in his individual capacity, as sole heir and universal legatee; and a different rule must apply. That rule is that the words, "to be distributed as he sees fit among my people in Ireland, and for the further education of Thomas Regan," which the plaintiffs characterize as vague, indefinite, and meaningless, and which, in part, are said to vi-

olate article 1573 of the Civil Code, are to be considered as not written, or as mere suggestions or requests addressed to the legatee, not valid or binding in law, nor of any legal effect upon the bequest to the universal legatee. This is the rule which the court said might have applied to the will of Mrs. McCloskey, "had the bequest been made to the parties named as trustees in their individual capacity."

The residuary bequest in contest in the Succession of Villa, 132 La. 714, 61 South. 765, was declared valid because a majority of the judges of this court construed the bequest to be, not to Dr. Barr, but to the Presbyterian Church of New Orleans, and therefore a gift to a pious use.

The bequest was in these words:

"The balance of my estate to be given to Rev. J. C. Barr of the Presbyterian Church, in New Orleans, to be used for the benefit of said church and any other good work Dr. Barr may see fit to use it for."

Invoking the prohibition in article 1573 of the Civil Code, the court held that the expression, "and for any other good work Dr. Barr may see fit to use it for," was an attempt to make a bequest through an agent or commissary, was therefore invalid, and was to be considered not written.

Counsel for the contestants in the present case say, in their brief, that, as the court did not hold "that whatever amount might have gone to 'any other good work Dr. Barr might see fit to use it for,' should be given to Dr. Barr as legatee," the court should not now strike out "the clause in regard to the distribution among the relations in Ireland," without annulling the main part of the bequest, viz.:

"And the balance of whatever I may die possessed of, I give and bequeath to Bishop Thomas Heslin, * * * hereby instituting Bishop Heslin my sole heir and universal legatee."

The reasoning in the decision in the Succession of Villa leaves no doubt that, if the testator had said, "And the balance of whatever I may die possessed of, I give and bequeath to Rev. J. C. Barr, to be used for any good work he may see fit to use it for, hereby instituting Rev. J. C. Barr my sole heir and universal legatee," so as to embrace all that is claimed to be valid in the will of John Reilly and all that was found invalid in the will of Raphael G. Villa, the invalid portion would not have affected the validity of the bequest to Rev. J. C. Barr as the instituted sole heir and universal legatee.

But Mr. Villa did not use such an expression as "I give and bequeath to Rev. J. C. Barr * * * instituting him my sole heir and universal legatee." He said, "The balance of my estate to be given to Rev. J. C. Barr of the Presbyterian Church," etc. And the decision turned entirely on the construction and conclusion of the majority of the judges of this court that the bequest was made, not to Rev. J. C. Barr, but to the Pres-

byterian Church; and, applying the doctrine of accretion, it was said:

"The legacies to the Presbyterian Church in New Orleans and to 'any other good work Dr. Barr may see fit to use it for,' being made conjointly (Civil Code, art. 1707), and the latter legacy being null, accretion takes place for the benefit of the other legatee—the Presbyterian Church in New Orleans."

What the result and decision would have been if the valid portion of the bequest had been made to Rev. J. C. Barr may be inferred from the court's recognition of this doctrine (132 La. 718, 61 South. 767), viz.:

"It is only so far as a condition, charge, or mere right, might be impossible or contrary to law, that said charge or condition would be considered as not written. If it is compound, and legally possible in one part and impossible in another, this latter part only will be rejected, but what is possible must stand good as a legal volition legally expressed."

To apply the above formula to the testament of John Reilly would put an end to the present contest and relieve us of the necessity of making an examination and comparison of the many other cases to which we have been referred.

However, in addition to the above-mentioned five decisions in which this court referred to the abolishment, by article 1573 of the Civil Code, of the right or custom of making wills by proxy, in the cases of *Fink v. Fink*, *Successions of Burke*, of *Meunier*, of *McCloskey*, and of *Villa*, counsel for the plaintiffs have also cited the decisions on the subject of prohibited substitutions and fidel commissa in the following cases: *Succession of Franklin*, 7 La. Ann. 395; *Succession of McCann*, 48 La. Ann. 150, 19 South. 220; *Succession of Kernan*, 52 La. Ann. 48, 26 South. 749; and *Dufour v. Deresheld*, 110 La. 344, 34 South. 469.

[3-5] In more than a century of jurisprudence on the subject of substitutions and fidel commissa, prohibited by article 1520 of the Civil Code, the distinction between them and the difference in their effect has been consistently observed. The essential elements of the prohibited substitution are that the immediate donee is obliged to keep the title of the legacy inalienable during his lifetime, to be transmitted at his death to a third person designated by the original donor or testator. Such a disposition is null even with regard to the original donee or legatee. In the fidel commissum, whereby the donee or legatee is invested with the title and charged or directed to convey it to another person or to make a particular disposition of it, only the charge or direction, as to the ultimate disposition of the donation or legacy, is null and is to be considered not written, leaving the donation or bequest valid as to the donee or legatee. A substitution is an attempt on the part of the donor or testator to make a testament for his donee or legatee along with his own will, and to substitute his own will for the legal order of succession from his donee or legatee. If permitted, the

effect of a substitution would be to tie up the title and keep it out of commerce during the lifetime of the first donee, during which time neither he nor the person designated to receive the title at the donee's death could alienate it. A substitution is necessarily a *fidei commissum*, but a *fidei commissum* is not necessarily a substitution. In the *fidei commissum* the title is not tied up or kept out of commerce; the direction or charge, as to its disposition, is to be regarded only as a precatory suggestion addressed to the conscience of the donee or legatee, which, being illegal, but harmless, can have no binding effect, and may be legally regarded as not written.

[8-10] Having these fundamental principles established, we have only to construe the language in the testament and decide whether it is a substitution or only a *fidei commissum*.

This test was given by Mr. Justice Rost as the organ of the court in the earliest case to which we have been referred by the plaintiffs' counsel (*Succession of Franklin*, 7 La. Ann. 414), viz.:

"When the words of the testamentary disposition are sufficient to vest a legal title in the legatee, and, the intention of the testator to create such a title for his benefit, to the exclusion of the heirs at law, and of all other persons, is ascertained, then, in furtherance of that intention, any impossible or illegal condition the disposition may contain is presumed to have been inserted inadvertently and is reputed, in law, not written; but where the title created by the will, as ascertained by the words used and the intention of the testator, is a tenure of property which our laws do not recognize, the attempt to change the nature of it and to convert it into a title valid under our laws would no longer be an interpretation of the will, but the making of a new will for the testator."

"I put this case upon the principle that, when the condition is of the essence of the title created by the bequest, and intended by the testator, so that the title cannot stand without it, if that title be one which the law does not recognize, courts of justice cannot replace it by another, and the disposition must fail."

In the *Succession of Franklin*, however, the bequest was made in trust, with the expressed intention of taking the property out of commerce and creating a common-law trust estate. The contention of the defendants was—and it was the only hypothesis on which the testament could have been held valid—that the words "in trust" should be reputed not written.

Paraphrasing the rule laid down in the *Franklin Case*, the words of the testament of John Reilly are sufficient to vest a legal title in the legatee; and the intention of the testator to create such a title in the legatee—with the direction to distribute the estate as he might see fit among the testator's people in Ireland, and also to use it for the further education of Thomas Regan—can only be ascertained from the plain language of the testator. He did not use the words "in trust," nor others of that meaning, but said,

in so many words, I give and bequeath the residue of my estate to Bishop Thomas Heslin, and I institute him my sole heir and universal legatee, and, having invested him with an absolute title, I direct that he shall use the estate for certain purposes, which direction, being regarded in law as not written, is to be carried out only as my legatee sees fit. The title thus conveyed to the legatee was "to the exclusion of the heirs at law, and of all other persons," except such other persons designated as the testator's people in Ireland, among whom the estate was to be distributed as the legatee saw fit. But even the testator's people in Ireland were excluded from any legal interest in the bequest, not only because the stipulation in their favor is vague and indefinite, but because the distribution among them was to be made only as the legatee should see fit; hence no one could sue to enforce it. It is presumed that the testator knew the law, or acted on legal advice, and knew that the conditions which he imposed upon his universal legatee would be reputed not written. And this legal presumption of the testator's knowledge of the consequence of what he was doing is strengthened into a presumption of fact by his use of the phrase "as he sees fit." Therefore it would only be in furtherance of the testator's intention, and would not be making a new will for him, to regard the illegal conditions in this will as if they had not been written, and carry out the testator's intention—expressed and repeated—to institute Bishop Thomas Heslin his sole heir and universal legatee. The conditions are not of the essence of the title conveyed before—and repeated after—the conditions, and the title can stand without them. There is nothing in the testament to indicate that it was the testator's intention that, if the conditions should be regarded as not written, the bequest to his instituted sole heir and universal legatee should also be regarded as not written. And that is not the legal consequence, unless the testamentary disposition can be construed as a prohibited substitution—not merely a *fidei commissum*.

In the *Succession of Mrs. McCan*, 48 La. Ann. 145, 19 South. 220, the testamentary disposition, which was decreed null because it was a prohibited substitution, bears no similarity whatever to the testamentary disposition which we are now considering. There, the testatrix bequeathed her entire estate to her five grandchildren, conditioned upon their attaining the age of majority and providing that, if any of them should die before attaining the age of majority, then the portion given to him or her should go to the survivors, with the same condition that they should attain the age of majority. The express purpose was to prevent the mother and stepfather of the children from having the administration of their estate; and, as the legatees were the legal heirs of the testa-

trix, the only effect of the will, if it had been valid, would have been to tie up the estate and render it inalienable during the minority of the youngest of the legatees and to substitute the will of the testatrix for the law of inheritance from her grandchildren. Finding this a genuine substitution, the court said:

"By such will against the text and spirit of our law, ownership, with its attributes of possession, enjoyment and power to sell * * * is suspended indefinitely, i. e., until the youngest child becomes of age; for the same period the property is stamped with inalienability and put out of commerce, and besides the testatrix undertakes to designate the heirs of those of the legatees who may die after her, while under the law her testamentary power is exhausted when the testatrix designates the heir living at her death."

The will of John Reilly has none of the features that stamped the will of Mrs. McCan as a prohibited substitution.

In the Succession of Kernan, 52 La. Ann. 48, 26 South. 749, a legacy similar to the one held valid in the Succession of Villa was declared invalid. It was obviously a gift to pious uses and was given in the manner sanctioned by the Act No. 124 of 1882, except perhaps that it was attempted to make the property inalienable, viz.:

"I give, devise, and bequeath to His Grace, Archbishop Janssens, now of this, the diocese of Louisiana, and to His Grace's successors, in fee and forever, all my right and interest in and to the following properties in this city, * * * all of which last mentioned properties, I, as aforesaid, give, devise and bequeath in fee and forever to His Grace, the said Archbishop Janssens, and to his successors, upon condition that out of the revenues or rents thereof an asylum or home for the poor of both sexes shall be founded, endowed, and maintained, similar, so far as possible, to that of St. Michael's, in * * * Rome, Italy."

In the opinion, pronouncing the bequest invalid, no reference at all is made to the Act 124 of 1882, which had been passed eight years before the decision was rendered; and the statute seems so applicable to the case that we are constrained to believe it was overlooked by the court. Without observing that the bequest was, as authorized by the statute of 1882, a bequest to a charitable institution to be organized, the court concluded by saying:

"If in this case we could perceive there was any intention on the part of the testator to vest ownership, in the sense of the law, in the archbishop or the church, our decree would give to one or the other the property in absolute ownership, and repute the condition not written."

The conditions in Mr. Kernan's will were, obviously and from their very nature, more of the essence of the title intended to be conveyed than are the conditions in Mr. Reilly's will; nor did Mr. Kernan leave Archbishop Janssens any such discretion as to how to use the legacy, as Mr. Reilly gave Bishop Heslin, to distribute it "as he sees fit." Yet this court would have given the Kernan estate to Archbishop Janssens in absolute ownership, and would have regarded

the conditions as not written, if it could have been perceived that the testator's intention was to put the title in the archbishop, subject to the conditions. It can be perceived that it was the intention of John Reilly to put the title in Bishop Thomas Heslin, subject to the conditions imposed, because the testator expressed that intention at the outset, by saying, "and the balance of whatever I may die possessed of, I give and bequeath to Bishop Thomas Heslin"; and, after imposing the condition which the law reposes not written, "to be distributed as he sees fit among my people in Ireland and for the further education of Thomas Regan," the testator concluded by repeating his determination, "hereby instituting Bishop Heslin my sole heir and universal legatee."

The decision in the case of Dufour v. Dershield, 110 La. 344, 34 South. 469, to which the plaintiffs' counsel have referred us, is entirely favorable to the defense of this will. The testamentary dispositions and the conclusions of the court are stated completely in the syllabus, viz.:

"After declaring that he had brought in marriage, \$6,500, the testator, asserting that he had neither ascendants nor descendants, instituted his wife universal legatee and bequeathed to her * * * all of his property. Then he declared it to be his desire that at the death of his wife what remained of his estate * * * should be divided equally between his natural heirs and hers, first deducting from such remainder a sum equal to what he had brought in marriage, * * * which sum should be paid to his natural heirs." Held, "not a disposition by which the legatee is charged to preserve for and return a thing to a third person or persons. * * *

"But if it be conceded that the clause referring to his natural heirs and hers be a fidei commissum, the only consequence would be the words importing the same must be reputed not written. * * * It is only in cases of substitution that the entire disposition of a will is null. In cases of fidei commissum, pure and simple, that clause alone creating the fidei commissum is null, * * * leaving unaffected the validity of the disposing clause or main donation."

In support of the last-mentioned doctrine, the court cited Beaulieu v. Ternoir, 5 La. Ann. 476; Michel v. Beale, 10 La. Ann. 352; Jacob v. Macon, 20 La. Ann. 162; Succession of Beauregard, 49 La. Ann. 1176, 22 South. 348; Succession of Hudson, 19 La. Ann. 79. And to them may be added: McCluskey v. Webb, 4 Rob. 201; Barnes v. Gaines, 5 Rob. 314; the McDonogh Will Cases, 8 La. Ann. 171; McDonogh v. Murdoch, 15 How. 367, 14 L. Ed. 732; Society for the Relief of Destitute Orphan Boys v. City of New Orleans, 12 La. Ann. 62; In re Billis' Will, 122 La. 539, 47 South. 884, 129 Am. St. Rep. 355; Steeg v. Leopold Weil Bldg. & Imp. Co., 126 La. 101, 52 South. 232; Brewer v. Y. & M. V. R. R. Co., 128 La. 544, 54 South. 987; and Succession of Villa, 132 La. 714, 61 South. 765.

The subsequent death of Bishop Thomas Heslin has had no effect upon the transmission of the estate of John Reilly to his in-

stituted sole heir and universal legatee at the testator's death. A succession is acquired by the instituted heir or universal legatee (though not by particular legatees) at the instant of the death of the testator, by the mere operation of law, and before the instituted heir or universal legatee takes any step to put himself into possession. R. C. C. arts. 940, 941, 942, 943, 944, 945. As was said in the Succession of McCan, 48 La. Ann. 160, 19 South. 220, it is the principle of our Code that the title in full ownership passes from the testator to the instituted heir or universal legatee living, at the last gasp of the testator.

We are not to be misled from the application of the law by a fear that the wishes of John Reilly may not be carried out since the death of Bishop Thomas Heslin. The conditions which were imposed upon him cannot be less binding upon his heirs than they were upon him, as to whom the conditions were no more binding and had no more legal effect than if they had not been written. Nor can any anxiety as to who may or may not be benefited by our maintaining the disposing clause of this will, as if the conditions had not been written, prompt us to destroy it, unless the law plainly directs that it must be destroyed.

"In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament." R. C. C. art. 1712.

"A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none." R. C. C. art. 1713.

Among many precedents for recognizing the validity of such a testamentary disposition as we have here, the most similar case, perhaps, is that of McCluskey v. Webb, 4 Rob. 201, the syllabus of which reads:

"A bequest of whatever may remain after the payment of debts to a sister of the testator, for the purpose of educating her children, and subsisting her and them, with power to her to make such other disposition of the property to their use and benefit as circumstances may require, and providing that his brother shall participate in such property, to a certain extent, should he consider himself in equal need with his sister's family, is not a substitution or a fidei commissum. The testator does not leave the property to his sister to preserve it for, and surrender it at any time to, her children. She has the entire control of it, to maintain herself and children, to educate them, and to do whatever she may think their interest requires. She may expend it all for such purposes."

To hold that the disposing clauses of this will are null, because the conditions imposed are not legal, would compel us to overrule a doctrine that has been recognized in our jurisprudence for more than a hundred years—that, in a fidei commissum pure and simple, illegal conditions are reputed not written—but they do not affect the validity of a testamentary disposition that would be a complete bequest without the conditions. This

doctrine is founded upon a very trite maxim by which the testator is presumed to have known or to have been advised of the effect of putting illegal conditions in his testamentary disposition.

For the reasons assigned, the judgment appealed from is annulled and reversed, and it is now ordered, adjudged, and decreed that the bequest in the last will and testament of the late John Reilly, whereby Bishop Thomas Heslin was instituted sole heir and universal legatee, is a valid testamentary disposition, entitling the defendants, as heirs of the deceased Bishop Thomas Heslin, to the possession of the residue of the estate of the deceased John Reilly; the plaintiffs are to pay the costs of this suit in both courts.

(126 La. 371)

No. 20930.

CITY OF SHREVEPORT v. KAHN.

In re KAHN.

(Supreme Court of Louisiana. Nov. 30, 1914.
Rehearing Denied Jan. 11, 1915.)

(Syllabus by the Court.)

1. LOTTERIES §2—VALIDITY OF STATUTE—"LOTTERY."

Act No. 169 of 1894 sufficiently defines the offense of conducting a lottery, and is not invalid because it does not define the word "lottery." This term has no technical meaning in the law distinct from its popular signification (quoting Words and Phrases, Lottery).

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 2; Dec. Dig. §2.]

2. LOTTERIES §3—PUNCH BOARD—GAMBLING DEVICE—"LOTTERY."

A "lottery" is a scheme for the distribution of prizes by chance. *Held*, that the gambling device commonly called a "punch board" is a lottery (citing Words and Phrases, Lottery).

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 3; Dec. Dig. §3.]

3. LOTTERIES §2—VALIDITY OF STATUTE—GRADING OFFENSES.

Held, that section 12 of Act No. 107 of 1902, grading the offense of conducting a lottery business and fixing the minimum and maximum penalties therefor, is in accord with the direction to the General Assembly contained in article 155 of the Constitution of 1898.

[Ed. Note.—For other cases, see Lotteries, Cent. Dig. § 2; Dec. Dig. §2.]

4. STATUTES §118—TITLE AND SUBJECT-MATTER—LOTTERIES.

Held, that Act No. 280 of 1914, amending and re-enacting section 12 of Act No. 107 of 1902, has not two distinct objects, and therefore does not violate article 31 of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. §118.]

Rafe Kahn was convicted of violating a city ordinance, his conviction was affirmed by the district court, and he applies for writs of certiorari and prohibition. Writ recalled, and application dismissed.

Looney & Wilkinson, of Shreveport, for applicant. W. A. Mabry, Dist. Atty., and Scheen & Blanchard, all of Shreveport, for respondent.

LAND, J. The relator was charged in the city court of the city of Shreveport on affidavit, as follows:

"Did unlawfully sell or otherwise dispose of and offer to sell or otherwise dispose of and have in his possession with intent to sell or otherwise dispose of lottery tickets, lottery policy, or combination or device or other writing, token or certificate, or token, pretending or intending to entitle the holder or bearer to a premium or prize drawn or to be drawn."

The bill of particulars reads as follows:

"The device, lottery tickets, policy, or token certificate entitling the holder to a premium or prize being a certain board perforated with holes, which holes are covered with paper, and in each hole is deposited a number or ticket, there being 600 holes containing said numbers, or tickets upon said board, and in addition thereto on said board are 12 prizes, being gold finished pencils, of the value of \$2.50 each, and on said board opposite each of said prizes is a number corresponding with some concealed number in the holes aforesaid; and any person by paying five cents to punch in any hole selected by him secures the number or ticket in such hole, and, if the ticket or number there drawn by him from said hole should correspond with the number on said board set opposite said prize or gold finish pencil, he gets the pencil free without further costs, and, if his said number does not so correspond, he in that event gets a package of chewing gum which retails for five cents."

The prosecution was instituted under Act No. 280 of 1914, to amend and re-enact section 12 of Act No. 107 of 1902, entitled an act to grade misdemeanors, etc., which said section graded the offense of conducting a lottery business, except in those cases provided for in section 1 of Act 169 of 1894. Section 1 of said act provides a penalty for establishing or conducting a lottery in this state, and section 2 provides a penalty for selling, or otherwise disposing of, any lottery ticket, policy, combination, device, writing, certificate, or token purporting or intended to entitle the holder, bearer, or any other person, to any prize or premium, or share or interest therein, drawn or to be drawn, etc.

The defendant moved to quash the affidavit and charge on the following grounds:

(1) That the affidavit does not state the facts on which the charges are based.

(2) That the affidavit and bill of particulars "does not show any crime known to the laws of Louisiana."

(3) That if said prosecution is based on section 12, Act 107 of 1902, then said section is unconstitutional, in that the title thereof purports to grade misdemeanors, and that there are no graduations in so far as the offense relative to lotteries is concerned, and moreover is unconstitutional for the reason that it is an attempt to amend Act 169 of 1894, which in itself is unconstitutional.

(4) That if the prosecution is based on Act 280 of 1914, then the same is unconstitution-

al because the matter attached thereto is not cognate to section 12 of Act 107 of 1902, is upon an entirely different subject-matter, and is not covered by the title as required by article 31 of the Constitutions of 1898 and 1913.

(5) That if the prosecution is based on Act 169 of 1894, then the same is unconstitutional, because it provides two punishments for the same offense, does not define the crimes to be denounced, and that the acts here charged are not covered by the title of said act; that said act violates articles 15 and 16 of the Constitution of 1879, articles 16 and 17 of the Constitutions of 1898 and 1913, in that it does not define the crimes sought to be punished, and places the court in a position to be required to perform legislative functions, and that for the same reason section 12 of Act 107 of 1902 and Act 280 of 1914 are unconstitutional.

In a supplemental motion to quash, the defendant pleaded that Act No. 169 of 1894 is unconstitutional because its title embraces more than one object, and denounces or attempts to denounce more than three separate and distinct offenses in violation of article 29 of the Constitution of 1879, and article 31 of the Constitutions of 1898 and 1913; that section 12 of Act 107 of 1902 and Act No. 280 of 1914, if considered as amendments to Act 169 of 1894, is unconstitutional, because said act is unconstitutional; but, if not so considered, then section 12 of Act 107 of 1902, is not covered by the title of said act as required by article 31 of the Constitutions of 1898 and 1913, and Act 280 of 1914 is likewise unconstitutional for the further reason that it attempts to amend and re-enact an unconstitutional statute.

The judge of the city court, for written reasons assigned, overruled the motion to quash; and on the trial of the case found the defendant guilty, and sentenced him to pay a fine of \$10 and costs or ten days in jail. Whereupon, the defendant took an appeal to the district court.

The district judge affirmed the judgment. Thereupon the defendant invoked the supervisory jurisdiction of this court.

It appears that the case was tried in the district court on the following statements of fact:

"The accused, Rafe Kahn, owns a cigar stand and operates with it a punch board perforated with holes, which holes are covered with paper, and in each hole is deposited a number, there being 600 holes in said board containing said numbers; that on said board there are 12 gold finished pencils of the value of \$2.50 each, and opposite such pencil is a number corresponding with some concealed number in the holes aforesaid. Any person buying five cents worth of cigars, chewing gum, pencils, or other goods, kept at the cigar stand, has the privilege of punching one of these holes and taking the number therefrom. If such number corresponds with one of the numbers opposite the gold finished pencil, the purchaser then and there receives such pencil; but, if the number does not correspond with the one opposite the pen-

cils, the purchaser only receives the goods bought by him."

The respondent judge, in answer to the contention that under the facts the defendant violated no law of this state, says, in part, as follows:

"It is contended by the defendant that this law was only aimed at lotteries like the old State Lottery Company, which issued tickets signed by them, and which on its face entitled the holder to a chance in some prize to be drawn; but the reading of the statute very clearly shows that it was intended to and does cover any kind of ticket or token that entitles or is intended to entitle the holder to (a) premium or prize."

"It is contended further that he does not sell or have for sale the ticket bearing a number, but that he only sells the right to punch out one of the numbers from this board; but it is clearly shown, and even admitted, that, if the number of the slip of paper thus punched out corresponds with the number opposite a pencil, the purchaser gets the pencil as a prize."

"Of course, this is merely a subterfuge to try to deceive some one into believing that the ticket with the number on it is not sold. Who would want a punch at the board except to secure the number, and who would want to secure the number unless there was an opportunity to win something by having it. That is the incentive to the whole, and that is what is paid for."

The respondent judge cites *State v. Bonell*, 42 La. Ann. 1110, 8 South. 298, 10 L. R. A. 60, 21 Am. St. Rep. 413, and *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 South. 532.

In the *Bonell* Case, a city ordinance made it unlawful for any person to sell or otherwise dispose of any lottery ticket, or token, policy, combination, device, or certificate, in any lottery drawn or to be drawn in or out of the city of New Orleans. The defendant in that case was engaged in selling "Enterprise Tea" inclosed in sealed envelopes. In addition to the tea, some of the envelopes contained a ticket naming and entitling the holder to some other article. The purchaser upon the payment of five cents was at liberty to select an envelope from any of the lot exposed on the counter; and, if the envelope contained besides the tea a ticket, the holder was entitled to the article mentioned upon it. The court, through Fenner, J., held that the scheme was undoubtedly a lottery. The court, in part, said:

"A lottery is a distribution of prizes and blanks by chance; a game of hazard, in which small sums are ventured for the chance of obtaining a larger value, either in money or in other articles." Worcester's Dict.

"A scheme for the distribution of prizes by lot or chance." Webster's Dict.

"Any scheme whereby one, on paying money or other valuable thing to another, becomes entitled to receive from him such a return in value or nothing, as some formula of chance may determine." Bishop, Stat. Crim. § 952"

The court in support of its position cited a number of cases, including one of "gift sales," and several of sales of "prize candy" in packages or boxes containing other articles or coupons calling for small sums of money.

In *City of New Orleans v. Collins*, 52 La. Ann. 973, 27 South. 532, the court reaffirmed *State v. Bonell*, and held further that the use of a slot machine, where an element of chance determines whether the prizes are to be given, brings such operation within the definition of a lottery.

In the case at bar the payment of five cents for a cigar or package of gum entitled the purchaser to a ticket, which he was at liberty to select from any one of the 600 holes of the punch board, and the ticket entitled him to a chance of drawing one of the golden pencils.

We are of opinion that the scheme of the defendant for the distribution of his pencils by chance constituted a lottery, and that he sold tickets entitling the holders to participation in the drawings. The question whether the affidavit and bill of particulars charge an offense against the statutes was properly raised in the city court by demurrer. For the purpose of this case there is no essential difference between the bill of particulars and the statement of facts on which the case was tried on appeal.

The objection of the defendant to the affidavit, accompanied as it was by the bill of particulars, was without merit.

[1, 2] Defendant's objection to Act 169 of 1894 may be briefly stated as follows:

(1) That it does not define the crime sought to be denounced.

(2) That the acts charged against relator are not expressed in the title of the act.

(3) That it embraces more than one object in its title.

Section 2, the only one which concerns the defendants, in plain language penalizes the sale or other disposition of lottery tickets, tokens, etc., intended to entitle any person to any prize or premium drawn or to be drawn, etc.

It is, however, argued by relator that Act 169 of 1894 is unconstitutional because it does not define or attempt to define "a lottery, lottery ticket, lottery token, lottery certificate, or lottery combination or another term used therein," and thereby contravenes articles 14 and 15 of the Constitution of 1879 and articles 16 and 17 of the present Constitution.

The articles mentioned appear under the head of "Distribution of Powers," and we suppose that the contention of relator is that the courts have no jurisdiction to determine the meaning of words used in laws and statutes, and that it is the exclusive function of the Legislature to define the meaning of words and terms used in the enactment. This contention is not serious. See *Words and Phrases Judicially Defined*, vols. 1-12; also, *Civil Code*, c. 4, relative to the "Application and Construction of Laws."

The term "Lottery" has been judicially defined as follows:

"The term 'lottery' has no technical meaning in the law distinct from its popular signifi-

cance. A lottery is a scheme for the distribution of prizes by chance."

"The word 'lottery' as used in the statute forbidding the same is used in its ordinary and popular sense. The statute aimed to prohibit that species of gambling."

See Words and Phrases, vol. 5, p. 4245.

The further contention that Act 169 of 1894 does not define the crime there sought to be created is without merit. The act makes it unlawful to establish or to operate lotteries, or to sell lottery tickets, or tokens, etc.

In *State v. Smith*, 30 La. Ann. 846, the court held that section 789 of the Revised Statutes of 1870, providing that "whoever shall commit the crime of incest shall, on conviction thereof, suffer imprisonment at hard labor for life," did not denounce any crime known to the common law, or defined by state statute; and the word itself did not have any fixed and definite meaning.

In *State v. Gaster*, 45 La. Ann. 636, 12 South. 739, section 869 of the Revised Statutes of 1870, denouncing any civil officer guilty of "any misdemeanor in the execution of his office," was held not to define any offense, and to impose on judges the legislative duty of declaring what acts shall be misdemeanors.

In *Town of Winnfield v. Grigsby*, 126 La. 935, 53 South. 53, the court held that a certain paragraph of Act 136 of 1898, giving municipal corporations the power to prohibit "the desecration of the Sabbath day," was too vague and uncertain to base a criminal prosecution upon.

In *State v. Comeaux*, 131 La. 930, 60 South. 620, the court held that Act No. 202 of 1912, providing a penalty for committing an indecent assault, was null, because there is no law defining the crime of indecent assault.

The above cases cited by the relator have no application to the act before us, which simply makes it unlawful to set up or operate a lottery, a well-known gambling device, or to sell lottery tickets, tokens, etc.

[3, 4] The second and third grounds of objection may be considered together. The title of Act 169 of 1894 would serve as a model. It expresses the purpose "to suppress lotteries," and sets forth the means provided in each section to effectuate that object.

In *State ex rel. Wynne v. Judge*, 106 La. 400, 31 South. 14, the court quoted from *Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809, as follows:

"The act in question has but one single object—the protection of the public from the con-

sequences of the practicing of medicine in its different branches by unskilled and incompetent persons. * * * The various sections of the act have all direct relation to the enforcement of the purpose announced by the act."

Act No. 280 of 1914, amended and re-enacted section 12 of Act 107 of 1902, grading misdemeanors and minor offenses pursuant to article 155 of the Constitution of 1898; said section relating to "the offense of conducting a lottery business." The new matter in the act of 1914 is a provision making the mere possession of a lottery ticket, device, token, etc., prima facie evidence of intent to sell or unlawfully dispose of the ticket, device, etc. Relator contends that the inclusion of said rule of evidence renders the said act unconstitutional. Relator cites *State v. Sugar Refining Company*, 106 La. 553, 31 South. 181, holding that an act to amend certain sections of a general law is limited in its scope to the subject-matter of the sections proposed to be amended. In that case a license tax was imposed on the business of the defendant by a proviso to a section not mentioned in the title of the amendatory act. The court held the proviso unconstitutional.

It is to be noted that Act 280 of 1914 does not amend any other section of Act 107 of 1912, and on the face of the act the most that can be said is that it embraces cognate matter not strictly within the text of the title. See *State v. Walters*, 66 South. 364, recently decided.

The matter being cognate, no two distinct objects or purposes are embodied in the statute. But conceding for argument's sake the unconstitutionality of Act 280 of 1914, then Act 107 of 1902 would be reinstated as the law of the land.

The contention of relator that section 12 of the latter act is unconstitutional, because it contains separate and independent legislation to the extent of creating offenses and providing for the punishment thereof, and because there is nothing in the title to indicate such a purpose, is without merit. Section 12 graded the offense of conducting a lottery business as denounced in section 2 et seq. of Act 169 of 1894, and affixed the minimum and maximum penalties therefor, as directed by article 155 of the Constitution of 1898. The title of Act 107 of 1902 is perfect.

Were this act also held to be unconstitutional, relator would fall within the grasp of Act 169 of 1894.

It is therefore ordered that the writ herein be recalled, and that relator's application be dismissed, with costs.

(68 Fla. 154)

OWENS v. STATE.

(Supreme Court of Florida. Nov. 6, 1914.)

*(Syllabus by the Court.)*1. CRIMINAL LAW \S 850—JURY—BAILIFF—WITNESS.

It is manifestly improper for one who is a material witness for the state, in a prosecution for murder, to have charge as bailiff of the jury impaneled to try the case, or to be with or have any communications with such jury. Especially is this true when such party continues to remain with such jury after he has been removed as such bailiff by the court, at the instance of the defendant on trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2033, 2034, 2038; Dec. Dig. \S 850.]

2. CRIMINAL LAW \S 855—TRIAL—IMPARTIAL JURY.

An impartial jury, selected and kept free from all outside or improper influences, is necessary to a fair and impartial trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2048-2053; Dec. Dig. \S 855.]

3. CRIMINAL LAW \S 1174—APPEAL—JURY—IMPROPER INFLUENCES—CONFLICTING EVIDENCE.

In a prosecution for crime which has resulted in a conviction, where it is made to appear that the jury was not kept free from outside or improper influences, and there is a sharp conflict in the evidence upon material points, the judgment may be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3170-3178; Dec. Dig. \S 1174.]

Error to Circuit Court, Alachua County; J. T. Wills, Judge.

H. M. Owens was convicted of manslaughter, and brings error. Reversed.

T. W. Fielding and Evans Haile, both of Gainesville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, C. J. H. M. Owens and Alex Powell were indicted and tried for murder in the first degree, which resulted in Alex Powell being acquitted and H. M. Owens convicted of manslaughter. Fifteen errors are assigned, but in view of the conclusion which we have reached, it will not be necessary to consider or discuss them all.

We turn to the motion for a new trial, which was overruled, and which ruling is assigned as error, and copy the following grounds, thereof, which we shall consider together:

"Fourth. Because one W. F. Beach, a material witness in behalf of the state of Florida, slept in and occupied the same room with the jury that had this defendant in charge.

"Fifth. Because one W. F. Beach, a material witness for the state of Florida, was left in sole charge of the said jury, and escorted said jury to and from supper in a restaurant some distance from the courthouse, and ate supper with said jury, and had escorted said jury to and

from their breakfast and dinner in said restaurant; and at the time of eating supper with said jury, said Beach was at the table with four of said jury, and talked with said four jurors during the time they were eating supper, and for the space of about 80 minutes.

"Sixth. Because W. F. Beach, who was a material witness for the state of Florida, was appointed and designated by P. G. Ramsey, sheriff of Alachua county, Fla., without the knowledge or consent of defendants, or any of his attorneys, to stay and sleep with the jury that tried this defendant, and the said Beach did stay and sleep with said jury during defendant's trial.

"Seventh. Because one W. F. Beach, a material witness for the state of Florida, during the night of the 29th of January, A. D. 1914, stayed with and slept in the same room with the said jury, and on that same night one F. M. Cellon was the bailiff over said jury.

"Eighth. Because one F. M. Cellon, being the same F. M. Cellon whom the judge trying the case removed on the second day of the trial, after he had slept with the jury trying this defendant the night before, assisted the prosecuting attorneys in selecting the jury that tried this defendant, and during the trial of this defendant, and while said Cellon was acting as bailiff to said jury, he assisted the attorneys prosecuting this defendant in the prosecution of this defendant, by suggesting questions to said attorneys to ask the witnesses who were testifying, and also assisted said attorneys in prosecuting this defendant by furnishing them with evidence by which they attempted to impeach a witness for this defendant.

"Ninth. Because the said F. M. Cellon stayed with and slept with the jury in the same room, and escorted the jury to and from their meals, before he was removed as bailiff of said jury by the judge.

"Tenth. The said F. M. Cellon was removed by the judge as bailiff over said jury because of his intense interest exhibited by him during the trial of the case against this defendant, but the said removal was not made until the said F. M. Cellon had already spent one night with said jury in the same room with them, and had escorted said jury to and from several meals, and had eaten with them.

"Eleventh. Because said F. M. Cellon, while Alex Powell was in jail, charged with this defendant for the killing of Splain, tried to extort a confession from said Alex Powell, a mere lad under 21 years of age, and tried to force said Alex Powell to make statements charging this defendant with the murder of Splain."

"Twenty-First. That because P. G. Ramsey, then the sheriff of said county, volunteered information to the state's attorney concerning one of the talesmen who was selected as one of the jurors and tendered the defendant by the state, in the presence of all the jurors, clearly showing to the jury his interest in the case against the defendant.

"Twenty-Second. Because P. G. Ramsey, sheriff, took an active part in the prosecution of this defendant, H. M. Owens, and so prejudiced this defendant by the appointment of his deputy, F. M. Cellon, as bailiff, and permitting W. F. Beach, a personal friend of W. E. Bell's, and from Bell's home, to sleep and eat with the jury trying the cause, as to prevent this defendant from having a fair trial.

"Twenty-Third. Because the sheriff and his deputies prevented this defendant from having a fair and impartial trial."

We shall not discuss these grounds in detail.

The transcript of the record shows that the trial of this case was begun on Thursday, the

29th day of January, 1914, and concluded on Saturday, the 31st day of January, when the verdict was rendered. The bill of exceptions discloses that the following proceedings took place:

"Mr. Williams, of counsel for defendants, here stated to the court that Mr. Cellon, who is the bailiff in charge of this jury, comes forward and whispers to Mr. Broome, who is assisting state's attorney, in the prosecution, during the trial of this case, and asked for an order of the court that he be removed, and another bailiff be appointed who is not taking an interest in this case. And thereupon state's attorney stated that Mr. Cellon had not spoken to him during the trial of the case; that if he had spoken to Mr. Broome, it had not been communicated to him. Whereupon Mr. Broome stated that Mr. Cellon had spoken to him with reference to the case. Motion granted, and the court ordered Mr. Bruton to take charge of the jury."

It would seem that Mr. Cellon was removed as such bailiff on the second day of the trial, though the record is not entirely clear upon that point. We also find the following proceedings in the bill of exceptions:

"Here, during the second day's trial of the defendants, the attorneys for the defendants, in open court and during the progress of the trial, called the court's attention to the fact that one W. F. Beach was the bailiff to the petit jury that had these defendants in charge, and that was trying these defendants; that said W. F. Beach was acting in a manner extremely hostile towards the defendants, and then and there the attorneys for said defendants moved the court to remove the said W. F. Beach as bailiff to said petit jury, and to place some impartial bailiff in charge of said jury, and thereupon the court granted the motion of the attorneys for the defendants, and removed the said W. F. Beach as bailiff to said petit jury."

[1-3] Just how Mr. Beach came to act as bailiff we are not advised, but presumably by order of the sheriff, since the sheriff alone had authority to so order. See *Nicholson v. State*, 38 Fla. 99, 20 South. 818. It is further disclosed that W. F. Beach, who was a deputy sheriff, was called as a witness by the state in rebuttal, and gave material testimony against the two defendants. It further appears, not only from the affidavits filed by the defendant, H. M. Owens, on behalf of his motion for a new trial, but from the examination of Mr. Frank E. Cellon, Mr. W. F. Beach, and Mr. W. T. Bruton, all of whom were deputies of the sheriff, that both Beach

and Cellon were in charge of the jury on the night of the 29th of January, and that both Beach and Bruton had charge of the jury on the following night, being the only two nights the jury was out during the trial. It also appears that Beach went with the jury to supper on each night, the first night with Cellon and the second night with Bruton, and ate with them, the second night, when he had been removed as bailiff, still being at supper and eating with them. Still other facts and circumstances are made to appear, which we do not deem it necessary to set forth. It is sufficient to say that, while it is not affirmatively made to appear that either Beach or Cellon did actually attempt to influence the jury in any way, and, as a matter of fact each one positively denies having done so, yet it plainly appears that each one had the opportunity of so doing. It was manifestly improper for Beach, who was a material witness for the prosecution, to have charge of or to be with the jury. See *People v. Knapp*, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, and appended note. We would also refer to *Madden v. State*, 1 Kan. 340; *State v. Snyder*, 20 Kan. 306; *Galney v. People*, 97 Ill. 270, 37 Am. Rep. 109; *Rickard v. State*, 74 Ind. 275. We shall not undertake to express any opinion concerning the evidence. Suffice it to say that there is a conflict therein upon material points. This being true, and it plainly appearing that some of the deputies of the sheriff had acted in an irregular and improper manner while in charge of the jury and, it would seem, were overzealous for the prosecution, we think that the ends of justice would be best subserved by another trial. As was said in *Buxton v. State*, 89 Tenn. 216, text 217, 14 S. W. 480:

"An impartial jury, selected and kept free from all outside or improper influences, has always been regarded by our courts as necessary to a fair and impartial trial."

The other errors complained of need not arise upon another trial; therefore we shall not discuss them.

Judgment reversed.

TAYLOR, COCKRELL, HOOKER, and
WHITFIELD, JJ., concur.

(68 Fla. 202)

TODD v. LOUISVILLE & N. R. CO.
(Supreme Court of Florida. Nov. 6, 1914.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS §125—DEFECTS AS TO PARTIES.

Where T., who is agent of M., brings an action in tort in his own name for injury to freight belonging to M., and after the statute of limitations has run M. asks to be substituted as plaintiff, the referee will not on the facts of this case be held in error for refusing to permit such a substitution of plaintiffs.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 542; Dec. Dig. § 125.]

Error to Circuit Court, Duval County; H. B. Phillips, Referee.

Action by W. M. Todd against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

For rehearing opinion, see 67 South. 84.

C. M. Cooper and Chas. P. & J. J. G. Cooper, all of Jacksonville, for plaintiff in error. John E. Hartridge, of Jacksonville, for defendant in error.

WHITFIELD, J. Todd brought an action in tort to recover from the railroad company damages for injuries to horses in transportation. At the trial before a referee it developed that the horses were the property of S. J. Melson. The referee over objection permitted a plea to be filed denying that the ownership of the horses was in Todd as alleged, and averring that the ownership of the horses was in S. J. Melson. After taking further testimony, the plaintiff rested, and the defendant moved for judgment in its favor on grounds that the action is in tort and the evidence did not warrant a finding and judgment for the plaintiff Todd; that plaintiff had no general or special property in the horses, but was acting as the mere agent of Melson in making the shipment. Plaintiff then asked "leave to amend the declaration and the entire pleadings therein by substituting as plaintiff" S. J. Melson in the place of W. M. Todd, on grounds that the additional plea permitted to be filed during the trial makes the amendment to the declaration necessary; that the evidence shows a meritorious case against defendant in favor of S. J. Melson; that the evidence shows Todd was agent for Melson; that substantial justice requires the amendment; that plaintiff could have had and had no knowledge that defendant would make objection to the recovery by plaintiff until the filing of the additional plea, the action being for the benefit of Melson and with his assent; that, if this amendment is denied, the statute of limitations would bar a recovery by Melson. The motion to amend the declaration was denied, and judgment was rendered for the defendant.

On writ of error the plaintiff contends that the referee erred in permitting the additional plea to be filed as to the ownership of the horses; in refusing to permit the declaration to be amended; in rendering judgment for the defendant; and in denying a motion for new trial.

As the order denying the motion for new trial was not excepted to, it will not be considered here.

It is contended that if the action had been in contract Todd could have recovered; and, Todd being the agent of Melson, the plea denying Todd's ownership of the horses should have been denied; and that after the plea was filed the amendment of the declaration should have been allowed to meet the plea; because substantial justice would be done by allowing a recovery by either Todd the agent, or Melson the principal; and that, if the declaration is not amended after the filing of the additional plea, Melson the principal and owner of the horses would be barred by the statute of limitations.

In view of the liberal statute relative to amendments, it does not appear that the court abused its discretion in permitting the plea denying the alleged ownership of the plaintiff to be filed; and as the plaintiff must have known of his rights when he brought the action and did not ask to amend until after he had submitted his case on all the pleas, and after the defendant had asked for judgment on the case made by the plaintiff, there was no error in denying the motion to amend the declaration, or in rendering judgment for the defendant. The relation of principal and agent between Todd and Melson was known to both of them, and the failure of Melson to ask for an amendment of the declaration until he was barred by the statute of limitations cannot fairly be charged to the defendant, who had a right to defend against the action as brought by the plaintiff.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 194)

CHARBONIER v. ARBONA.

(Supreme Court of Florida. Nov. 6, 1914.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER §184—CONTRACT—WARRANTY—BREACH—LIENS.

Where a contract for the sale of land clearly contemplates "a warranty deed conveying a good clear title" to the property, "at any time during the life" of the option given, the warranty is not broken by a failure of the vendor to pay off a lien imposed by law upon the property for street improvements after the price was agreed on, though the title was not passed till afterwards.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 250-254, 258; Dec. Dig. § 184.]

(Additional Syllabus by Editorial Staff.)

2. VENDOR AND PURCHASER \S 57 — CONSTRUCTION OF CONTRACT—"ANY TIME DURING LIFE OF OPTION."

The phrase "at any time during the life of this option," in a contract to convey land, means during the time in which the contract of sale was to be consummated by a conveyance for a stated price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 87; Dec. Dig. \S 57.]

Error to Court of Record, Escambia County; E. D. Beggs, Judge.

Action by Joseph Arbona against Mary Dolores Charbonier. Judgment for plaintiff, and defendant brings error. Reversed.

E. C. Maxwell, of Pensacola, for plaintiff in error. Blount & Blount & Carter, of Pensacola, for defendant in error.

WHITFIELD, J. The plaintiff in error made the following contract for the sale of land:

"State of Florida, County of Escambia.

"Received of Mr. Jos. Arbona the sum of one hundred dollars (\$100.00) the receipt of which is hereby acknowledged for which I grant him an option to purchase my property situated on the northwest corner of Terrago and Intendencia streets, upon which is my building (two-story brick) now occupied by him. Said option to hold good for a period of six (6) months from date hereof, and I hereby promise and agree to convey the said property to him at any time during the life of this said option upon the further payment to me in cash of forty-nine hundred (\$4,900.00) dollars, guaranteeing to give him a warranty deed conveying a good clear record title to said property.

"Witness my hand and seal this 2d day of March, A. D. 1910.

"[Signed] Miss M. D. Charbonier. [Seal.]
"Signed, sealed and delivered in the presence of:
"Emil E. Pfeiffer.
"S. J. Isaacs."

Miss Charbonier resisted the enforcement of the contract on the ground of the inadequacy of the purchase price and her inexperience in business. But specific performance was decreed to be enforced. Charbonier v. Arbona, 63 Fla. 384, 57 South. 887. The decree for specific performance was treated as a conveyance under the contract to sell and convey. Subsequently Arbona brought an action against the vendor to recover, as for a breach of warranty of title, certain paying expenses imposed as a lien upon the property between the making of the contract of sale and the actual passing of title under the decree of specific performance. There was judgment for the vendee, and the vendor took writ of error.

[1, 2] The contract clearly contemplated "a warranty deed conveying a good clear record title to said property," "at any time during the life of this said option," meaning during the time within which the contract of sale was to be consummated by a conveyance

for a stated price, which had no reference to later improvements enforced by law. The claim here asserted is for an improvement to the property put upon it by operation of law after the price was agreed on, and does not come within the intent of the contract as shown by its terms, and is not included within the warranty of title. Equity courts take this view. See Gotthelf v. Stranahan, 138 N. Y. 345, 34 N. E. 286, 20 L. R. A. 455. Law courts may enforce the intent of a contract, as shown by its terms and the circumstances under which it was made.

The judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 153)

ROLAND v. STATE.

(Supreme Court of Florida. Nov. 6, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW \S 1160—APPEAL—VERDICT—EVIDENCE.

When the trial court concurs in the verdict rendered by a jury by denying the motion for a new trial, and there is evidence to support it, appellate courts should refuse to disturb it, in the absence of any showing that the jurors must have been improperly influenced by considerations outside of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3084; Dec. Dig. \S 1160.]

Error to Circuit Court, Duval County; Geo. Cooper Gibbs, Judge.

Lonnie Roland, alias Lonnie Roling, was convicted of murder in the first degree, and brings error. Affirmed.

Francis P. L'Engle, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, C. J. Lonnie Roland, alias Lonnie Roling, was tried and convicted of the crime of murder in the first degree.

Three errors are assigned, all of which are based upon the overruling of the motion for a new trial, and all question the sufficiency of the evidence to support the verdict. It would be a fruitless task to set out the evidence. Suffice it to say that we have carefully read all the evidence adduced, and are clear that it is amply sufficient to support the verdict, and we are of the opinion that the trial judge was fully warranted in overruling the motion. We must concur with him in refusing to disturb the verdict. See Bexley v. State, 59 Fla. 6, 51 South. 278.

Judgment affirmed.

TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 239)

WILLIAMS v. STATE.

(Supreme Court of Florida. Nov. 10, 1914.)

*(Syllabus by the Court.)***CRIMINAL LAW §566—APPEAL—EVIDENCE.**

When the evidence wholly fails to identify the accused as the person committing the crime, a conviction will be reversed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1273-1275; Dec. Dig. § 566.]

Error to Circuit Court, Citrus County; W. S. Bullock, Judge.

Henry Williams was convicted of aggravated assault, and brings error. Reversed.

B. G. Langston, of Inverness, and Fred R. Hocker, of Ocala, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. The indictment makes out a case of aggravated assault, and was good, therefore, as against a motion to quash, based upon the sole ground that it stated no offense under the laws of Florida. The attack upon the supposed irregularity in its presentment should have been raised by plea in abatement.

We shall not undertake to point out the many defects in the indictment in falling short of an indictment for attempted robbery, for the reason that the state so signally failed to identify Henry Williams as the man who committed the assault. Mrs. Smith, who was alone when the robbery was committed, testifies that she does not identify Williams as the man, nor does any one else pretend to identify him. Mrs. Smith thinks she would recognize the pocketbook that was taken, but, when shown one taken from Williams several months after the robbery, fails to identify it. The bill of exceptions discloses no other fact or circumstance looking towards identification.

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 240)

DEDGE v. STATE.

(Supreme Court of Florida. Nov. 10, 1914.)

*(Syllabus by the Court.)***1. JURY §53 — JURORS — QUALIFICATIONS — PREVIOUS SERVICE.**

Previous jury service within the year is now a disqualification, and not a privilege personal to the venireman.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 259, 341; Dec. Dig. § 53.]

2. CRIMINAL LAW §438 — EVIDENCE — PHOTOGRAPHS.

Trifling changes in physical conditions do not render photographs inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 893; Dec. Dig. § 438.]

3. WITNESSES §390 — IMPEACHMENT — CONTRADICTORY STATEMENTS—ACCUSED.

An accused, upon voluntarily becoming a witness, may be impeached by proper proof of contradictory statements previously made, not amounting to a confession of guilt, illegally obtained.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1247; Dec. Dig. § 390.]

4. CRIMINAL LAW §1093—APPEAL—BILL OF EXCEPTIONS—REQUISITES.

If error be predicated upon the bill of exceptions, it must appear affirmatively, and not by a forced inference.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2828-2833, 2919, 2920; Dec. Dig. § 1093.]

5. HOMICIDE §342—APPEAL — VERDICT — EVIDENCE.

The evidence warranting a verdict for murder in the first degree, a conviction of murder in the second degree will not be disturbed.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. § 342.]

Error to Circuit Court, Duval County; Geo. Cooper Gibbs, Judge.

John L. Dedge was convicted of murder in the second degree, and brings error. Affirmed.

A. G. Hartridge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. Under an indictment for murder in the first degree, John L. Dedge was convicted of murder in the second degree and sentenced to life imprisonment.

The court properly excused sua sponte three veniremen who stated they had conscientious scruples against the infliction of the death penalty. The indictment submitted an issue to them involving that penalty, and the state was entitled to a jury that left to the Legislature the determination of that question of state policy. The judge, in so rejecting a talesman, does not express his opinion of the weight of the evidence that may thereafter be submitted to the jury for its determination.

[1] Previous jury service within the year is now a disqualification, and not a personal privilege, as the statute was when the case of Yates v. State, 43 Fla. 177, 29 South. 965, was decided.

[2] There was no error in admitting in evidence photographs of the scene of the homicide. The physical changes that took place between the time of the killing and the time of the trial were trifling, and were accounted for, and, as the jury visited the premises, the admission of the photographs became as evidence well nigh negligible.

[3] That Dedge actually killed William H. Warren was abundantly proved, and Dedge upon the stand admitted that fact. In his testimony as a voluntary witness he stated that he fired the first shot from the bathroom window, near which shots from Warren's gun were found, and that his second and

third shots were fired from the porch. For the purpose of adducing impeaching testimony, and after being warned that he need answer nothing that would tend to incriminate him, he was asked if he had not stated to a deputy sheriff who arrested him very soon after the killing that he fired all three shots from the porch. Upon his denial that he had so stated, the deputy was permitted to contradict him. It is contended that this was error; that through the guise of impeaching testimony the state was able to get before the jury a confession that was incompetent because obtained under duress.

We can readily see much force in the contention, if we admit that the statement could, in law, be considered a confession of guilt; but it bears none of the earmarks of such confession. If, for example, the accused upon his arrest should say that he was in Pensacola when a homicide was committed in Tallahassee, and upon the trial testify that he was at the time in Jacksonville, such inconsistency would go to his credibility as a witness, and not to his guilt. We think the inconsistency in the statements before us goes no further. He first states that he fired the shot from one place, and then testifies he fired from another place. We have frequently held that the accused, when voluntarily becoming a witness, is subject to cross-examination and impeachment as any other witness. While this holding does not admit evidence otherwise incompetent, we are clear that the testimony here complained of is within the rule. In *Daniels v. State*, 57 Fla. 1, 48 South. 747, we decided that statements other than confessions of guilt of a crime are, in general, admissible in evidence against the party making them as other admissions against interest, recognizing as an exception only such statements as may be drawn out by a committing magistrate under the pains and penalties of perjury when the party examined is not warned of his rights. The other cases in our reports involved the admission of illegal confessions of guilt.

[4] It is urged that the view of the premises should not have been permitted because the locus had been changed. All the changes were trifling, and had been fully gone into by witnesses. These views are largely discretionary, and the granting of the instant one was well within the court's power. It is also urged that the record does not show the presence of the accused at the view. We are advised that a view took place only in the bill of exceptions, which is very meager in its statement, and is wholly silent as to the presence or absence of the accused. We have been careful to hold the court and its clerk to a strict showing upon the record proper of all the necessary steps in criminal cases, and we have also held counsel for the plaintiff in error to a strict accountability for what appears in the bill of exceptions. If

error is predicated upon the bill of exceptions, it must appear affirmatively, and not by a forced inference. Assuming that the presence of the accused was necessary at the view, and presuming that the judge acted correctly, in the absence of a showing to the contrary, we cannot hold him in error for an omission of which he may be entirely innocent.

The court charged correctly and fully upon the defense of the accused's home being his castle of defense, and the special instruction upon that defense requested by the plaintiff in error was properly refused.

[8] The evidence for the state would have warranted a verdict of murder in the first degree, and, under our statute, we will not interfere with the verdict for a lower degree. Judgment affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 196)

ABERSON v. ATLANTIC COAST LINE
R. CO.

(Supreme Court of Florida. Nov. 6, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐874—SCOPE OF REVIEW—GRANTING NEW TRIAL.

On writ of error to an order granting a new trial, only the order and the motion on which it is predicated can be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3478, 3480, 3481, 3484, 3530-3540; Dec. Dig. ⇐874.]

2. NEW TRIAL ⇐68—DIRECTING VERDICT.

The principles that govern in directing verdicts and in granting new trials after verdict are not the same.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 135-140; Dec. Dig. ⇐68.]

3. NEW TRIAL ⇐72—DENIAL OF DIRECTED VERDICT.

There may be no inconsistency in granting new trial in a case in which a request for a directed verdict was denied. An order granting a new trial may be sustained by the appellate court when a directed verdict would not be approved.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. ⇐72.]

4. NEW TRIAL ⇐72—TRIAL ⇐139—GROUNDS—DIRECTED VERDICT.

A verdict on the evidence should be directed for one party only when the evidence would not be legally sufficient to sustain a verdict for the opposite party. A new trial may be granted on the evidence when, in the opinion of the court, the verdict is contrary to the manifest probative force of the evidence and the justice of the cause.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. ⇐72; Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇐139.]

5. NEW TRIAL ⇐72—DENIAL OF DIRECTED VERDICT.

After verdict rendered, the trial court may, for good cause, set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial

should not be confounded with the more limited authority to direct a verdict for one party only when a finding for the opposite party should be unlawful.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. ☞72.]

6. NEW TRIAL ☞72—GROUNDS—INSUFFICIENCY OF EVIDENCE.

After a verdict is duly found, it should not be disturbed by the trial court, on the ground that the evidence is insufficient to support it, unless it appears from the entire case that the verdict is against the manifest probative force of the evidence and the legal rights of the parties, thereby showing that the jury were not governed by the evidence or misapplied the law in making the finding.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. ☞72.]

7. APPEAL AND ERROR ☞933—NEW TRIAL ☞6—DISCRETIONARY RULING—PRESUMPTION.

A motion for a new trial is addressed to the sound judicial discretion of the court; and, where a trial court grants such a motion, the action in doing so is presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3425, 3426, 3772-3776; Dec. Dig. ☞933; *New Trial*, Cent. Dig. §§ 9, 10; Dec. Dig. ☞6.]

8. APPEAL AND ERROR ☞977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

An order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ☞977.]

9. APPEAL AND ERROR ☞977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

There are so many matters occurring in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause, to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice, or that the law has been violated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ☞977.]

10. APPEAL AND ERROR ☞977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ☞977.]

11. APPEAL AND ERROR ☞856—GRANTING NEW TRIAL—AFFIRMANCE.

Where the trial court grants a new trial, containing several grounds, without stating any ground upon which the ruling was based, the order will be affirmed, if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the

court based the order on the ground that warrants it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3406-3424, 3429-3434; Dec. Dig. ☞856.]

12. APPEAL AND ERROR ☞1015—DISCRETIONARY RULING—GRANTING NEW TRIAL.

Where the evidence on a material issue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3876; Dec. Dig. ☞1015.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Charles E. Aberson against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, new trial granted, and plaintiff brings error. Affirmed.

H. S. Phillips and H. S. Hampton, both of Tampa, for plaintiff in error. Sparkman & Carter, of Tampa, for defendant in error.

WHITFIELD, J. The plaintiff in error brought an action against the railroad company under the statute to recover damages for the alleged wrongful death of his minor child, who was struck, while on the railroad right of way, by the locomotive of a passing train. At the trial the court denied a motion for a directed verdict in favor of the defendant. A verdict was rendered for the plaintiff, and the court granted a motion for a new trial. The plaintiff took writ of error under the statute.

[1-3] On writ of error to an order granting a new trial only the order and the motion on which it is predicated can be considered. The principles that govern in directing verdicts and in granting new trials after verdict are not the same. There may be no inconsistency in granting new trial in a case in which a request for a directed verdict was denied. An order granting a new trial may be sustained by the appellate court when a directed verdict would not be approved.

[4, 5] A verdict on the evidence should be directed for one party only, when the evidence would not be legally sufficient to sustain a verdict for the opposite party. A new trial may be granted on the evidence when, in the opinion of the court, the verdict is contrary to the manifest probative force of the evidence and the justice of the cause. *Florida East Coast Ry. Co. v. Hayes*, 66 Fla. 589, 64 South. 274; *Ruff v. Georgia, S. & F. Ry. Co.*, 67 Fla. 224, 64 South. 782.

The authority to direct a verdict should not be so exercised as to deny to any one the organic right to a jury trial. If a verdict is directed for one party when, under the pleadings and evidence, the jury may legally find for the opposing party, the right to a jury trial secured by the Constitution

may be thereby invaded. After verdict rendered, the trial court may for good cause set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial should not be confounded with the more limited authority to direct a verdict for one party only when a finding for the opposite party should be unlawful.

[8] After a verdict is duly found, it should not be disturbed by the trial court, on the ground that the evidence is insufficient to support it, unless it appears, from the entire case, that the verdict is against the manifest probative force of the evidence and the legal rights of the parties, thereby showing that the jury were not governed by the evidence or misapplied the law in making the finding. If the concrete finding of the verdict is clearly against the manifest probative effect of the evidence and contrary to the rights and liabilities of the parties under the law applicable to the case, thereby showing that the jury were not governed by the evidence or else misapplied the law of the case, it is not only within the province, but it is the duty of the trial court in appropriate proceedings to grant a new trial, in order that the rights of the parties may be duly determined by an impartial, competent jury, as contemplated by the Constitution.

[7, 8] A motion for a new trial is addressed to the sound judicial discretion of the court; and, where a trial court grants such a motion, the action in doing so is presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record. An order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion or that some settled principle of law has been violated. *Zackary v. Georgia, F. & A. R. Co.*, 62 Fla. 419, 56 South. 686.

[9] There are so many matters occurring in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause, to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice, or that the law has been violated.

[10] A stronger showing is required to re-

verse an order allowing a new trial than to reverse one denying it.

[11] Where the trial court grants a new trial containing several grounds without stating any ground upon which the ruling was based, the order will be affirmed, if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the court based the order on the ground that warrants it.

[12] Where the evidence on a material issue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error. *Ruff v. G. S. & F. Ry.*, *supra*.

The motion for new trial that was granted contained grounds that the verdict is contrary to the evidence, and the court did not indicate on which ground of the motion the new trial was granted.

Under the statute the proof of an injury by the running of the locomotive and cars of the defendant railroad company raises a presumption of negligence on the part of the defendant, rendering the defendant liable in damages for the alleged injury, "unless the company shall make it appear that its agents have exercised all ordinary and reasonable care and diligence" to avoid the injury. In this case the defendant company produced evidence to "make it appear that its agents did exercise all ordinary and reasonable care and diligence," under the circumstances, to avoid the injury. One witness for the plaintiff and one for the defendant saw the child struck by the engine, and the testimony of these witnesses conflict as to whether the agents of the company did exercise due care and diligence, under the circumstances, to avoid the injury. The physical facts in evidence do not so conclusively substantiate the testimony for the plaintiff as to make the evidence so preponderate in favor of the plaintiff that an abuse of discretion is shown or that any principle of law was violated by the trial court in granting a new trial. The action of the trial judge in granting a new trial indicates that he regarded it as necessary in order to do substantial justice between the parties; and this court, upon a consideration of the entire record, does not hold the granting of a new trial to be erroneous, this apparently being the first verdict.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 234)

ATLANTIC COAST LINE R. CO. v. LEVY.

(Supreme Court of Florida. Nov. 10, 1914.)

*(Syllabus by the Court.)*1. TRIAL \S 258—INSTRUCTIONS—MATERIALITY—REQUESTS.

Only such instructions should be requested by either the plaintiff or defendant as bear upon the law of the case and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error, and are burdensome to the courts. When a large number of instructions are given, they are also well calculated to confuse and mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 646, 647; Dec. Dig. \S 253.]

2. APPEAL AND ERROR \S 882—INVITED ERROR—ESTOPPEL.

Contradictory charges or instructions should not be given, as their tendency necessarily is to confuse and mislead the jury; but, where the complaining party is chiefly or largely responsible for such a state of affairs, the judgment will not be reversed upon that ground alone.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3591-3610; Dec. Dig. \S 882.]

3. APPEAL AND ERROR \S 979—DISCRETIONARY RULING—DENIAL OF NEW TRIAL—EVIDENCE.

In passing upon an assignment based upon the ruling of the trial court in denying a motion for a new trial, which questions the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3871-3873, 3877; Dec. Dig. \S 979.]

Error to Circuit Court, Pinellas County; F. M. Robles, Judge.

Action by Philip Levy against the Atlantic Coast Line Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Sparkman & Carter, of Tampa, for plaintiff in error. John U. Bird, of Clearwater, for defendant in error.

SHACKLEFORD, C. J. Philip Levy brought an action against the Atlantic Coast Line Railroad Company for the recovery of damages for personal injuries received by him, and also for the destruction of his buggy, in which the plaintiff was riding at the time, which injuries were alleged to have been occasioned by the negligence of the defendant corporation. The declaration contains two counts, to which the defendant filed three pleas; the first being not guilty, and the second and third setting up contributory negligence of the plaintiff. No point is made on the pleadings; therefore we do not copy any of them. The plaintiff joined issue upon

all these pleas, and a trial was had before a jury, which resulted in a verdict and judgment for the plaintiff in the sum of \$750.

[1, 2] Seventeen errors are assigned, all of which, with the exception of the first, which is based upon the overruling of the motion for a new trial, are predicated upon the giving of certain instructions, at the request of the plaintiff, or the refusal of certain instructions, requested by the defendant. If the trial court gave any charge to the jury of its own motion, the transcript of the record fails to show; but it does appear that the plaintiff requested 14 separate instructions, of which 11 were given and 3 refused, and that the defendant requested 8 separate instructions, of which 3 were given and 5 refused. The defendant excepted to every instruction given at the instance of the plaintiff and also to every instruction requested by it which was refused. Although the issues in the instant case were few and simple, the trial court was called upon to pass on 22 separate instructions, of which 14 were given to the jury. We can see no sound reason for so many requested instructions. Again and again we have expressed our strong disapproval of the practice of requesting an unnecessarily large number of instructions. See *Gracy v. Atlantic Coast Line R. Co.*, 58 Fla. 350, 42 South. 903; *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318; *McCall v. State*, 55 Fla. 108, 46 South. 321; *Farnsworth v. Tampa Electric Co.*, 62 Fla. 166, 57 South. 233; *Dunnellon Phosphate Co. v. Crystal River Lumber Co.*, 63 Fla. 121, text 135, 58 South. 786, text 788; *Wood Lumber Co. v. Gipson*, 63 Fla. 316, text 322, 58 South. 364, text 366; *Atlantic Coast Line R. Co. v. Whitney*, 65 Fla. 72, 61 South. 179. As we held in *Farnsworth v. Tampa Electric Co.*, supra:

"Only such instructions should be requested by either the plaintiff or defendant as bear upon the law of the case and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error, and are burdensome to the courts. When a large number of instructions are given, they are also well calculated to confuse and mislead the jury."

This admonition has not been heeded to the extent which we had hoped, so we now think it advisable to emphasize the importance of observing it. We would call attention to the fact that the Missouri courts have held, when an unnecessarily large number of instructions is requested, that of itself would justify the court in refusing them all. See *Crawshaw v. Sumner*, 56 Mo. 517; *Desberger v. Harrington*, 28 Mo. App. 632; *City of Hannibal v. Richards*, 35 Mo. App. 15; *Kinney v. City of Springfield*, 35 Mo. App. 97; *McAllister v. Barnes*, 35 Mo. App. 668; *Doan v. St. Louis, K. & N. W. Ry. Co.*, 43 Mo. App. 450; *Barrie v. St. Louis Transit Co.*, 119 Mo. App. 38, 96 S. W. 233. Other courts have

also held to the same effect. This would seem to be a correct holding, and we may have to give it our sanction, unless the abuse of too many requests for instructions is remedied. As was said in *City of Hannibal v. Richards*, supra:

"To require the judge, in the limited time allowed for a trial, to pass upon a great number of requests for instructions, at the peril of having any judgment reversed which may be rendered, * * * is an abuse which ought not to be tolerated."

See, also, the discussion in the following cases as to requests for instructions: *Bergerman v. Indianapolis & St. L. Ry. Co.*, 104 Mo. 77, 15 S. W. 992; *Haney v. Caldwell*, 43 Ark. 184; *Hanger v. Evins & Shinn*, 38 Ark. 334; *Dunn v. People*, 109 Ill. 635; *City of Salem v. Webster*, 95 Ill. App. 120; *Indiana & I. S. Ry. Co. v. Wilson*, 77 Ill. App. 603; *Chicago City Ry. Co. v. Sandusky*, 99 Ill. App. 164; *Brown v. McCord & Bradfield Fur. Co.*, 65 Mich. 360, 32 N. W. 441; *Kimball & Austin Mfg. Co. v. Vroman*, 35 Mich. 310, 24 Am. Rep. 558.

We thoroughly approve of the following statement in the last-cited case:

"We deem it proper to suggest, as has been done before on several occasions, that the multiplication of points and requests, in cases where the issues are not complicated, is of injurious tendency and calculated to confuse both courts and juries, and impede the administration of justice. The jury must act in their deliberations on the understanding which they derive from a single hearing of the charges and requests. Unless made plain to their understanding and expressed in such language as requires no interpretation to the laity, there is much danger that they will either be misled or disregard the instructions altogether and decide the case on what they conceive to be its general equities."

We think that both the plaintiff and defendant requested too many instructions in the instant case. We have carefully examined all of the instructions given, as well as those refused, and are of the opinion that none of those given at the request of the plaintiff constitute reversible error. They could have been condensed with advantage

and some of them could have been more carefully and skillfully prepared, but we think that they state the law applicable to the issues with reasonable fairness and correctness. We are clear that no error has been made to appear in any of the instructions requested by the defendant which were refused. In fact, the requested instructions which the court gave at the instance of the defendant might properly have been refused, as the manner in which these instructions were framed tended to bring about the confusion and contradiction of which the defendant complains. We fully approve of our holding in *Farnsworth v. Tampa Electric Co.*, supra, that "contradictory charges or instructions should not be given, as their tendency necessarily is to confuse and mislead the jury;" but where, as in the instant case, the complaining party is chiefly or largely responsible for such a state of affairs, we will not reverse the judgment upon that ground alone. We do not copy the instructions upon which the assignments are predicated or discuss them in detail, as we see no useful purpose to be accomplished by so doing.

[3] The only remaining assignment is the first, which is based upon the overruling of the motion for a new trial. This motion contains 19 grounds, but the only grounds urged before us are those which question the sufficiency of the evidence to support the verdict; the other grounds relating to the given and refused instructions, which we have considered in treating the other assignments. Applying our usual test as to whether or not the jurors, acting as reasonable men, could have found this verdict from the evidence adduced, we must hold that they could have so done; therefore we cannot hold the trial court in error for overruling the motion. See *Wilson v. Jernigan*, 57 Fla. 277, 49 South. 44, and *Pensacola Electric Co. v. Bissett*, 59 Fla. 360, 52 South. 387.

Judgment affirmed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(108 Miss. 548)

HOWARD v. TOWN OF NEWTON.

(No. 17616.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

CRIMINAL LAW §1043—APPEAL—QUESTIONS NOT RAISED AT TRIAL.

Where a general objection to the introduction of a city ordinance was made at the trial, accused could not claim, for the first time on appeal, that the ordinance was not proven in the proper manner, in that it should have been proven, either by a certified copy, or the book containing it should have been identified by the city clerk, its legal custodian.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Anse Howard was convicted of petty larceny, and he appeals. Affirmed.

W. I. Munn, of Newton, for appellant. Jesse Jones, of Newton, and Fulton Thompson, of Jackson, for appellee.

SMITH, C. J. Appellant was convicted in the court of the mayor of the town of Newton of the crime of petit larceny as defined by an ordinance of that town, and was again convicted on appeal to the circuit court.

The marshal of the town of Newton was introduced as a witness and identified the ordinance book of that town, whereupon the ordinance in question contained therein was introduced in evidence. An objection to this evidence, and the ruling of the court thereon, which is here assigned for error, appears in the record following its introduction in the following language:

"Objection by counsel for defendant. Objection overruled by the court, and the defendant then and there excepted to the ruling of the court."

Conceding for the sake of the argument that this ordinance was not properly proven, the ruling of the court below on the objection thereto cannot be availed of here, for the reason that it was general when it should have been specific. In the brief of counsel for appellant it appears that the ground of the objection to this evidence, here made specific for the first time, is that the ordinance was not proven in the proper manner, the contention being, as we understand the brief, that the ordinance should have been proven either by a certified copy thereof, or the book containing it should have been identified by the clerk of the city, its legal custodian. It will be observed that this objection goes not to the admissibility of the ultimate fact sought to be proven, that is, the ordinance itself, but simply to the method by which the ordinance was proven. Had the objection to the method of proving the ordinance been pointed out in the court below, it may be that counsel for appellee could have met it by making the proper

proof; and the rule was long since settled in this state that:

"When an objection is made to evidence which in its nature is such as may be obviated, it must be specific, so as to allow the party offering an opportunity to supply its place if the objection is sustained, and where this is not done, it will not be noticed in the appellate court." Heard v. State, 59 Miss. 545; Morris v. Henderson, 37 Miss. 492; Wealing v. Noonan, 31 Miss. 599.

The full rule relating to this question of practice is set forth in 1 Wigmore on Evidence, § 18, c. (1), as follows:

"The cardinal principle (no sooner repeated by courts than it is forgotten by counsel) is that a general objection, if overruled, cannot avail. * * * The only modification of this broad rule is that if on the face of the evidence, in its relation to the rest of the case, there appears no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to have been sufficient. * * * But when a general objection is sustained by the trial court, it may be presumed that the reasons were apparent to all parties without statement; and, as the exception is here to be taken by the proponent of the evidence, it is fair to require him to make clear therein the basis of his claim for its admissibility, if he had rested on any specific ground; hence the general objection will suffice, if on the face of the evidence and the rest of the case there appears to be any ground of objection which might have been valid (or, otherwise stated, if there is any purpose for which the evidence would conceivably be inadmissible)."

The other assignment of error relates to the exclusion of certain hearsay testimony, and is therefore without merit.

Affirmed.

(108 Miss. 550)

CHRISMAN v. MAGEE. (No. 16804.)†

(Supreme Court of Mississippi. Jan. 18, 1915.)

1. WILLS §560—CONSTRUCTION—SALE OF DEVISED PROPERTY—PROCEEDS—NOTES.

Testator bequeathed to his son all land which testator owned in C., and, after describing several parcels, declared that he had contracted to sell one 40-acre tract, and, if the sale was made complete, the son was to receive the notes given for the purchase money, or the money paid for it, and so as to any of the land in C. if sold before testator's death, etc. Held, that it was testator's intention that the son should receive such land as testator owned in C., and such amounts as might have been derived from notes given to evidence the purchase price of the land, and hence such notes taken by testator for such land passed to the son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1216-1220; Dec. Dig. § 560.]

2. WILLS §587—CONSTRUCTION—RESIDUARY ESTATE.

Where notes were given to evidence the purchase price of land sold by testator in his lifetime, and not mentioned in his will, they passed as residuary estate to the residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.]

3. WILLS §573—CONSTRUCTION—LEGACIES.

Where testator bequeathed to D., in trust for testator's daughter, certain bonds specifically described, the daughter was entitled to have all interest received from the bonds, and all interest payments, issues, and proceeds

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

67 SO.—4

† For opinion on suggestion of error, 67 South. 901.

arising therefrom during the continuance of the trust, at the end of which they were to be delivered to her, or at her death to be divided as set forth in the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1246-1251; Dec. Dig. ¶573.]

4. WILLS ¶490—PAROL EVIDENCE—DESCRIPTION.

Where the description of certain land in a devise is clear and definite, parol evidence is inadmissible to show that the testator did not intend to pass the land described, but another parcel.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1047-1057; Dec. Dig. ¶490.]

5. WILLS ¶449—LAND NOT DEVISED—RESIDUARY ESTATE.

Where certain land belonging to testator was not disposed of or attempted to be disposed of by any specific clause of the will, and there was nothing in any of the clauses to prevent it from being embraced in the residuary clause, it passed thereunder to the residuary devisees, and not to testator's heirs as intestate estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 965; Dec. Dig. ¶449.]

6. WILLS ¶490—PAROL EVIDENCE—DESCRIPTION—MISTAKE.

Where testator's description of certain land in B. county in a provision of his will was an impossible one, because of a mistake in the statement of the township in which the land was located, but the property was identified by a further statement that testator had contracted to sell it, parol evidence was admissible to further identify the property, and apply the devise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1047-1057; Dec. Dig. ¶490.]

Appeal from Chancery Court, Madison County; G. G. Lyell, Chancellor.

Petition by Mrs. Ada Magee against J. J. Chrisman. From a decree in favor of petitioner for part of the relief demanded, defendant appeals, and petitioner prosecutes a cross-appeal. Reversed and remanded.

Thos. S. Owen, of Cleveland, Miss., for appellant. Chas. Scott, of Memphis, Tenn., and Somerville & Somerville, of Cleveland, Miss., for appellee.

REED, J. Appellee, Mrs. Ada Magee, filed her petition in the chancery court asking for a construction of the will of the late Judge J. B. Chrisman, and praying the court to decree that she owned a half interest in certain notes and proceeds therefrom, and in certain lands which were the property of the testator and were not disposed of in his will. Appellee is the daughter of Judge Chrisman. She made appellant, J. J. Chrisman, her brother, a party to her petition. In his answer appellant denied that appellee was entitled to the interest in the property which she claimed. He made his answer a cross-petition, and prayed the court to decree him to be entitled to a one-half interest in the proceeds of certain levee bonds bequeathed by Judge Chrisman to appellee and in certain notes. Appellee answered the cross-petition, and denied that appellant was entitled to

any interest whatever in the bonds given her and in the notes.

Judge Chrisman made and executed his will on January 1, 1910. He died on January 8, 1910, and his will was duly probated and admitted to record in the chancery court of Madison county. He made specific bequests and devises to his two children, appellee and appellant. He left legacies to various relatives, and then gave the rest and residue of his estate to appellant and appellee, and appointed them executors of his will.

The chancellor, upon final hearing, construed the will in accordance with appellee's claim, except as to one parcel of land which the chancellor decided was rightfully owned by appellant. The chancellor also decreed that another parcel of land in controversy was not devised in the will, and descended to the heirs at law of Judge Chrisman, and not to the residuary devisees. From this decree appellant has prosecuted his appeal, and appellee has made a cross-appeal, claiming error on the part of the chancellor in decreeing that the land not disposed of in the will became the property of the heirs at law of Judge Chrisman, and in decreeing that appellant was the owner of the parcel of land referred to.

Concerning the notes in controversy: There is in the record an agreed statement of facts, and from this we quote as follows, to show all the facts relating to these notes:

"It is agreed that on August 12, 1908, the testator sold to M. R. Davis the northwest quarter of the northeast quarter of section 24, township 22, range 6, and at the time of the death of the testator there were two notes for \$266.66 each, dated August 12, 1908 and due, respectively, September 1, 1910 and 1911, and bearing 8 per cent. interest per annum from date. No mention was made of said notes or said land specifically in said will. The said notes have been paid to Joe J. Chrisman, one of the executors, and he now holds the funds arising therefrom."

"It is further admitted that on the 12th day of July, 1909, the testator sold to W. G. Howard block 19 in the town of Cleveland, and at the time of his death two notes, dated July 12, 1909, one for \$168, and one for \$168, both bearing 8 per cent. interest from date, and payable 12 and 24 months from the date thereof, which notes went into the hands of the executors and were collected by Joe J. Chrisman, one of the executors, who now holds said funds and claims the same."

"It is further agreed that on the 3d day of May, 1909, J. B. Chrisman conveyed to J. L. McLean that part of the northwest quarter of the northeast quarter of section 21, township 22, range 5 east of Chrisman street, in the town of Cleveland, Bolivar county, Miss., estimated to contain 27.76 acres. It is further agreed that the said lands are within the corporate limits of the town of Cleveland, but are not platted into blocks and lots. It is further admitted that the consideration for the said deed was \$2,082, one-half of which was paid in cash, and the remaining \$1,041 was evidenced by two notes, one due January 1, 1910, and one January 1, 1911, with 8 per cent. interest from date. It is admitted that these two notes were paid after the death of the said J. B. Chrisman, and one-half of the

same was received by Ada C. Magee, and one-half by J. J. Chrisman."

To show the adjudication of the chancellor regarding these notes, we quote from his decree as follows:

"That the proceeds of money received from the notes of W. C. Howard and of M. R. Davis & Sons to J. B. Chrisman are a part of the residuary estate; hence Ada C. Magee and Joe J. Chrisman are each entitled to one-half thereof, and for that half due Ada C. Magee it is hereby ordered that Joe J. Chrisman shall pay the sum of (\$716.19) seven hundred sixteen and 19/100 dollars to Ada C. Magee. Further, the court finds the proceeds received from the notes of J. L. McLean to J. B. Chrisman are rightfully a part of the residuary estate, and Ada C. Magee was entitled to the one-half thereof paid her by Joe J. Chrisman, and it is decreed that she shall retain same as her share of such."

It will be seen that the notes of Howard and McLean were given to evidence the purchase price of lands in the town of Cleveland which were owned and sold by Judge Chrisman. In his will he specifically devised to appellant, his son, all land which he owned in Cleveland. We quote from the will:

"And the lots in the town in Cleveland, owned by me in the town of Cleveland in section 21."

Then follows the mention of several parcels of land which he designated by giving description in accordance with the government survey, and, after the mention of a certain quarter section, the will continues:

"I have contracted to sell this last forty acres and if the sale is made complete, my son is to receive the notes given for the purchase money or the money paid for it, and so as to any of the above lands if sold before my death. They are his patrimony or a part thereof, which I nevertheless reserve the right to sell and convey if a favorable opportunity presents itself, but the proceeds thereof, whatever it may be in notes or money will be delivered by my executors to my son in case I sell."

[1] We get from these extracts from his will a view of the testator's intention relative to the notes given to evidence the purchase money for the land which he had mentioned in his will and had been sold. Appellant claims the right to these notes which evidence the purchase price, under these provisions of the will. It is evident that Judge Chrisman intended his son to have the land which he owned in Cleveland. The sales were made to both Howard and McLean before his death. The lands were disposed of, and in their place and stead stood the notes evidencing the purchase price thereof. We believe from a consideration of the clauses in the will we have just quoted, and from a view of the whole instrument in connection with the surrounding circumstances, that it was the testator's intention that his son should receive such land as he owned in Cleveland, and such amounts which may have been derived from the notes given to evidence the purchase price of land he had owned in that town and sold. The testator did have, when he made his will, an interest in the land in Cleveland, because he was

the holder of the notes evidencing the unpaid purchase price, and because he had the right, as such holder, to enforce a vendor's lien for their collection. We conclude, therefore, that the notes evidencing the purchase price of the land in Cleveland sold to Howard and to McLean should be given to appellant. The chancellor was in error in holding the contrary.

[2] Now we find that the land sold by Judge Chrisman to M. R. Davis, for which the notes were given to evidence the purchase price, is not mentioned in the will. It cannot be said from the will and the facts in the record that the testator intended that appellant should receive this land, or, in its stead, the purchase price. Neither the land nor the notes evidencing the purchase price were disposed of at all in the will. Therefore, under the residuary provision, the proceeds of these notes evidencing the purchase price became the property of appellant and appellee, each owning a half interest, and the chancellor was correct in so holding.

[3] Concerning the levee bonds: We quote from item 3 of the will of Judge Chrisman, in which he gave to his daughter, Mrs. Ada Magee, certain personal property, as follows:

"In addition I give and bequeath to my friend Z. D. Davis, of the Capital National Bank of Jackson, Miss., and his successors in office for the term of ten years, in trust for my daughter, Ada Magee, the following bonds:

Five (5) thousand dollars in Yazoo Miss. delta 4%, they are each of the denomination of \$1,000.00, and are numbered respectively, 480, 481, 482, 483, and 484....	\$5,000.00
Also the following Miss. levees 5%, numbers 746, 747, each \$1,000.00	2,000.00
Also the following Miss. levee district refunding bonds, 4½%, numbers 1 and 2.....	2,000.00
Also same same same, No. 42.....	1,000.00

Total in bonds, ten thousand dollars \$10,000.00"

In the beginning of his will Judge Chrisman stated that:

"The levee bonds bequeathed are at this date in the custody of Z. D. Davis, of the Capital National Bank, Jackson, Miss."

The chancellor decided in reference to these bonds, quoting from his decree, as follows:

"Regarding the bonds of the commissioners of the Mississippi levee board and of the commissioners of the Yazoo Mississippi levee board, referred to bequeathed and held by Ada C. Magee, under 'item 3' of said will, the same and each of the ten and their interest are found to belong to Ada C. Magee. She was entitled to have all interest received therefrom, and is entitled to all the interest payments, issues, and proceeds thereof hereafter arising, according to the terms of said will and conditions thereupon imposed."

The chancellor was correct in this decision. The bonds were sufficiently described. As stated in the will, they were all in the possession of Z. D. Davis, who was to hold them in trust for the benefit of Mrs. Magee for the period of ten years, at the end of

which period they were to be delivered to her, or, in the event of her death, to be divided as set forth in the will. She is entitled to the full interest in the bonds given her by the will.

Concerning the southwest quarter of the northwest quarter of section 31, township 22, range 5: The agreed statement of facts contains the following information regarding this land:

"It is admitted that at the time of the death of J. B. Chrisman he owned the southwest quarter of the northwest quarter of section 31, township 22, range 5, in Bolivar county, Miss., which was the only land owned by him, at that or any other time, in that section. It is admitted that this land was not specifically described in the will, but the will does mention the southwest quarter of the northeast quarter of section 31, township 22, range 5. After the death of said J. B. Chrisman, Joe J. Chrisman went into possession of the southwest quarter of the northwest quarter of section 31, township 22, range 5, and remained in the undisputed possession of the same until the filing of the amended petition herein."

We quote from the chancellor's decree to show his holding as to this quarter section:

"The court finds that the southwest quarter of the northwest quarter (S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) in section 31, township 22, range 5 west, in Bolivar county, Miss., was not devised by said will to Joe J. Chrisman, and he was not entitled to receive or enjoy any rents, issues, or profits therefrom for the years 1910, 1911, or 1912, or hereafter, except as to his part thereof—to wit, one-third. The court doth order and decree the heirs at law of J. B. Chrisman to be entitled to an undivided one-third each in said lands, and Joe J. Chrisman shall account to them and pay to them their one-third portion of all rents, issues, and profits received therefrom by him, and, unless the parties can agree upon a commissioner to ascertain the same, an order will be entered within ten days herefrom appointing such commissioner to ascertain the reasonable rental value of said property, what rents have been received, and what the extent of the occupancy and use by J. J. Chrisman, and upon the coming in of the report of said commissioner, further order will be made."

[4] Appellant contends that the mention in the will of the southwest quarter of the northeast quarter of section 31, township 22, range 5, was a mistake in description, and that the testator intended to devise the southwest quarter of the northwest quarter of section 31, township 22, range 5, in Bolivar county. He further contends that oral evidence should be admitted to explain or identify the property, which, he says, is defectively described in the will. It will be seen that the description of the quarter section of land in the will is clear and definite. Where such description is accurate as that contained in the will now before us, oral testimony will not be admitted to show that the testator did not intend to devise the land described, but another parcel of land. Appellant cites *Patch v. White*, 116 U. S. 210, 6 Sup. Ct. 617, 710, 29 L. Ed. 860, and relies upon the holding of the court in that case and the holdings of courts in cases which seem to follow that case, to sustain his view that oral testimony should be admitted to correct descriptions in

cases like that at bar. It cannot be stated, however, that the quarter section of land was defectively described. The description in the will of the land was sufficient for identification thereof. We think that this question is fully settled in this state by the decision in *Ehrman v. Hoskins*, 67 Miss. 192, 6 South. 776, 19 Am. St. Rep. 297, wherein it was decided that:

"Where the owner of several lots devises one of them by an accurate description, parol evidence is incompetent to show that he intended to devise a different lot, and that by mistake the wrong lot was described."

We quote in full the opinion of the court in that case delivered by Judge Campbell:

"The effect of the testimony admitted by the court over the objection of the appellants was to substitute for the will made by the testator that which the witnesses endeavored to show he really intended to make, and as to which he failed by mistake of the drawer of the will. It is not allowable to do this, as to which all the books agree. The case which goes farthest towards abrogating the settled rule on this subject is *Patch v. White*, 117 U. S. 210,¹ and even that does not sustain the admissibility of the evidence in this case. The dissenting opinion of four of the justices in that case is a sufficient answer to it, if the facts of this case were the same as in that, but they are not. Here the testator devised to the appellee a parcel of land by an accurate description, except as to the initial point, and parol testimony was received to show that he really intended to give her, not what is described in the will, but another parcel of land. This was not to apply the will made, but to make one different from that made."

The chancellor was correct in holding that the southwest quarter of the northwest quarter, section 31, township 22, range 5 west, in Bolivar county, was not devised to appellant, Joe J. Chrisman. He erred, however, in holding that the land descended to the heirs at law of Judge Chrisman. We learn from the brief of counsel for appellee and cross-appellant that this finding of the chancellor was based on the case of *Gordon v. Perry*, 98 Miss. 893, 54 South. 445. In that case there was a specific devise of the property in the will which was avoided by the renunciation by the widow of the testator. The court held that, where there was such a specific devise, and it did not take effect "either from the incompetency of the devisee to take, from a partial revocation of the will, a lapse by the death of the devisee in the lifetime of the testator, or from the contingency not happening upon which, as a condition precedent, the devise was made, or was to take effect, it descends to the heir, as property undisposed of by the will, and does not go to the residuary devisee under the general residuary clause." It will be noted that in that case is the further holding that:

"If the real estate be not attempted to be disposed of specifically by the will, it will pass to the general residuary devisee, unless restricted by other clauses of the will; for, not being disposed of, nor attempted to be disposed of, it must be taken to have been intended to be embraced in the positive disposition of the residuary clause. 1 Jarman on Wills (1st

¹ 6 Sup. Ct. 617, 710, 29 L. Ed. 860.

Am. Ed.), 588-590. In such a case it would be doing violence to the express disposition of the will to say that, as to such real estate, the testator intended to die intestate."

[5] The land now under consideration was not disposed of nor attempted to be disposed of. There was nothing in any of the clauses of the will to prevent it from being embraced in the disposition of the residuary clause. The chancellor, therefore, should have given it to the residuary devisees, the appellant and appellee, one-half to each.

[6] Concerning the southeast quarter of the northwest quarter, section 24, township 22, range 6: The agreed statement of facts gives the following information touching this land:

"It is admitted that at the time of the death of J. B. Chrisman, and at the time of the making of his will, he owned the southeast quarter of the northwest quarter of section 24, township 22, range 6, which was the only land owned by him in that section, and which was the only land owned by him in any section 24 in Bolivar county, Miss. It is further admitted that several years prior to the death of J. B. Chrisman, and prior to the making of his will, he contracted in writing with Madison M. Brown to sell to the said Madison M. Brown, the southeast quarter of the northwest quarter of section 24, township 22, range 6, and that since the death of the said J. B. Chrisman Joe J. Chrisman executed a deed to the said Madison M. Brown for the consideration of \$— being \$1,000 that the said Madison M. Brown was to pay to the said J. B. Chrisman for the said land, with \$— interest and \$— taxes paid by J. J. Chrisman. It is further agreed that there is no section 24, township 6, range 5 in Bolivar county, Miss., and it is further agreed that J. B. Chrisman never owned any lands in any section 24, township 6, range 5."

We quote from item 2 of the will, in which Judge Chrisman made specific bequests and devises to his son, appellant, as follows:

"The S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ sec. 24, township 6, range 5, west. I have contracted to sell this last forty acres and if the sale is made complete, my son is to receive the notes given for the purchase money or the money paid for it, and so as to any of the above lands if sold before my death. They are his patrimony or a part thereof, which I nevertheless reserve the right to sell and convey if a favorable opportunity presents itself, but the proceeds thereof, whatever it may be in notes or money will be delivered by my Executors to my son in case I sell."

The following from the decree of the chancellor shows the disposition of this land:

"The court finds the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) in section 24, township 22, range 6 west, in Bolivar county, Miss., to be devised to Joe J. Chrisman by said will, and by this he is declared to be the rightful owner of same. To which ruling of the court the petitioner then and there excepted, and prayed an appeal therefrom, the same being granted, and petitioner allowed 30 days hereafter within which to file a bond in such amount and terms as the clerk of this court shall ratify and approve, and the filing of said bond shall act as a supersedeas to appeal this part of said cause to the Supreme Court of the state of Mississippi."

The defect in this description is the erroneous statement of the township. Judge Chrisman in his will declares that all of the lands

devised by him are situated in Bolivar county. There is no section 24 in township 6 in that county. This is not an accurate description of a tract of land. It is an impossible description. No tract of land could be located by the description. The property intended to be devised cannot be identified by the description by numbers on the government survey. There are, however, further words in the will to identify the tract. The testator states that he has contracted to sell the very 40 acres which he attempted to describe by numbers on the survey. Therefore there is a devise of a certain 40 acres in a certain section and range in Bolivar county, which the testator has contracted to sell. We think this is sufficient to admit parol evidence to further identify the property, as has been done in this case through the agreed statement of facts; so that we conclude that the chancellor was correct in decreeing this land to appellant.

Reversed and remanded.

(108 Miss. 571)

BROOKS v. STATE. (No. 17865.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

CRIMINAL LAW \S 595, 1166—CONTINUANCE—ABSENT WITNESS.

A subpoena for defendant's wife as a witness was issued, which was returned by the sheriff as served on the witness personally by him; the return being false. A second subpoena was issued to Jeff Davis county and returned "not found," with a letter from the sheriff saying the witness could be found in Lawrence county. When the case was called for trial, defendant filed a written application for a continuance alleging that process to Lawrence county, which he had asked for, had not been issued. Held that, the wife being a material witness, the continuance should have been granted, and for want of it the conviction should be set aside.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1311, 1323-1327, 3100-3102, 3107-3113; Dec. Dig. \S 595, 1166.]

Appeal from Circuit Court, Leake County; C. L. Dobbs, Judge.

Rubert Brooks was convicted of murder, and he appeals. Reversed and remanded.

Crawley & Glass, of Kosciusko, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

COOK, J. Appellant was convicted of murder, and sentenced to confinement in the penitentiary for the term of his natural life. It appears from the record that the homicide was the culmination of the estrangement of appellant and his wife. The wife had left the home of appellant and had gone to the home of deceased, who was the husband of her mother. When the case was called for trial, defendant filed a written application for a continuance on account of the absence of his wife. It appears that a subpoena had been issued by the clerk for the wife, and was returned by the sheriff as executed per-

sonally on the witness. Investigation developed that this subpoena had been returned by a deputy sheriff, who was the son of deceased. It was also developed that the return was false, and that Mrs. Brooks had never been served with process. A second subpoena was issued to Jeff Davis county, which subpoena was returned "not found," and was accompanied by a letter from the sheriff of Jeff Davis county, giving the information that the witness could be found in Lawrence county. Defendant then asked for process for this witness directed to the sheriff of Lawrence county. The application for continuance avers that this process had not been issued. The witness was never subpoenaed, and defendant was deprived of her evidence. It seems to have been the idea of the court that the witness could be obtained before she was needed, and, acting upon this theory, the defendant's motion for a continuance was overruled, and he was put upon trial with the result stated.

The application for a continuance says that this witness would have testified that she was persuaded by deceased to leave her husband, the defendant; that he had attempted to seduce her, and had threatened to kill the defendant; that he (defendant) had visited her at the home of deceased the night before the homicide, and that then and there deceased had threatened to kill defendant if she left his home; that, after defendant left the home of deceased, deceased told her that he had it in for defendant and would kill him if he ever crossed his path again. The motion also said that defendant's wife, if present, would swear that deceased went armed in anticipation of a deadly encounter with defendant.

It seems to us that the wife would have been a material and valuable witness for defendant, if the motion for a continuance is to be believed, and it was not traversed. There was one eyewitness to a part of the encounter which resulted in the homicide, but he did not see what transpired, or hear what was said immediately preceding the fatal shot. The defendant took up the thread where the state witness dropped it, and his version as to what was said and done is not contradicted by the state's witness. The defendant admitted all the state's witness said—his story was exactly the same as the story recited by the state's witness—but supplemented what was heard and seen by the state's witness with what afterwards occurred. If his version is true, he was justified in slaying deceased. If his story is rejected, and that part of the state's witness is adopted as being all that was said and done at the time of the homicide, the defendant was properly convicted.

It is argued that the position of the deceased's body and the surrounding physical circumstances—the dumb witnesses—demonstrate the falsity of defendant's testimony.

We do not concur in this theory. The theory is strongly supported by the evidence, but it falls short of demonstration.

Defendant's version of the *res gestæ* is not necessarily in conflict with the physical facts, and, if we accept as a part of the pertinent facts what defendant said in his motion for a continuance his wife would have testified, a new light would have been thrown upon the scene, and would, if believed by the jury, have given an entirely different color to the probable attitude of mind and acts of the principals in the tragedy.

We believe defendant was deprived of material and substantial evidence, and for this reason the case is reversed and remanded.

Reversed and remanded.

(108 Miss. 574)

ILLINOIS CENT. R. CO. et al. v. HARRIS.
(No. 16787.)

(Supreme Court of Mississippi. Dec. 14, 1914.
Suggestion of Error Overruled
Jan. 25, 1915.)

1. MASTER AND SERVANT ⇨ 100—COMPARATIVE NEGLIGENCE—ASSUMPTION OF RISK—EFFECT OF CONTRACT.

A contract which railway employes were required to sign before they could secure employment, by which they agreed to assume all risks of the service and obey all rules to which their attention was called in an attached notice warning them of the dangerous character of numerous devices frequently resorted to by employes, as well as all other rules in force, and to save the company harmless from all liability because of any such risks, whether arising wholly or partly from acts or omissions of co-employes, or of those not so employed, or in consequence of any failure or neglect on their part to obey the directions contained in such notice, or any of the rules of the company, was invalid, and did not relieve the company of liability under the comparative negligence section of the Code for injuries resulting from the negligence of an engineer and the negligence of an injured brakeman in adjusting couplings with his foot, which acts of negligence concurred to cause the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. ⇨ 100.]

2. TRIAL ⇨ 191—ASSUMPTION OF FACTS.

In a railway brakeman's action for injuries to his foot, which was mashed while he was making a coupling, an instruction that the only question was whether defendant could have prevented the injury by ordinary care, that if it could not it was not liable, that if it could then defendant's negligence was, in law, the sole cause of the injury, whether plaintiff used his foot or his hand in making the coupling, but that, if plaintiff was also negligent, such damages as the jury would have awarded had plaintiff been free from negligence should be diminished in proportion to the negligence attributable to plaintiff, criticized as assuming knowledge by defendant or its engineer that plaintiff was going to use his foot in attempting to make the coupling, was not erroneous.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. ⇨ 191.]

Appeal from Circuit Court, Madison County; W. A. Henry, Judge.

Action by G. L. Harris against the Illinois Central Railroad Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

This is an appeal from a judgment for personal injuries. The opinion states the facts. The instruction referred to in the opinion is as follows:

(5) "In this cause you are instructed that, under the law, the only question for you to consider is whether the defendants could have prevented the injury to Harris by the use of ordinary care. If defendants could not have prevented the injury to Harris by ordinary care, defendants are not liable. But if defendants could have prevented the injury to plaintiff by the use of ordinary care, then the defendants' negligence is, in law, the sole cause of the injury, regardless of whether Harris used his foot or his hand in kicking back the drawhead knuckle. But if you further find from all the evidence that Harris, the plaintiff, was also negligent, then such damages as you would have awarded plaintiff had he been free from negligence should be diminished by the jury in proportion to the amount of negligence attributable to Harris, if any."

R. V. Fletcher, of Chicago, Ill., and Mayes & Mayes, of Jackson, for appellants. T. S. Ward and H. B. Greaves, both of Canton, for appellee.

COOK, J. This was a suit for damages brought against the defendant by the appellee in the circuit court of Madison county, based on an injury received by him while engaged in his employment as a brakeman, in the yards of the railroad company at Canton. His foot was mashed while he was making a coupling. The issues were made up, and the case was tried in the usual manner, with the result that the jury brought in a verdict for the plaintiff in the sum of \$5,000, on which a judgment was rendered accordingly, and from such judgment this appeal is taken.

Three reasons are given why this case should be reversed, viz.: (1) The injury to appellee was caused by a mere accident; (2) the alleged negligence of the railroad company was not the causa causans of the injury; (3) appellee, when he entered the service of the company, signed an agreement that he would not undertake to make couplings by the use of his foot, and, if he received an injury by reason of his failure to comply with this agreement, he would save the company harmless from all liability for such injury.

In summing up his contention, appellant puts the case this way:

"We claim:

"First. That for any one of the three foregoing reasons the court should have given the peremptory instruction requested by the defendant below.

"Second. That for the third reason given above the court erred in granting the second instruction to the plaintiff, to the effect that it is against the public policy of this state for the railroad company to contract with its employes so as to exempt itself from liability because of its own negligence, or that of its servants. This was not such a contract, and the principle invoked in that instruction had noth-

ing to do with the contract that was made and offered in evidence.

"Third. That the third instruction given in behalf of the plaintiff was erroneous: First, because of the violation of the plaintiff's contract, as shown above; and, secondly, and independently, because it violates the rule that, where an instruction undertakes to detail the facts of a case, it must detail all the material facts, and violates that rule in this, that it entirely ignores the proposition that plaintiff's foot got caught as the result of a mere accident, the jury not being permitted to pass on that question at all.

"Fourth. The fifth instruction given to the plaintiff was erroneous, because the jury are expressly instructed that: 'The only question for you to consider is whether defendants could have prevented the injury to Harris by the use of ordinary care.' That was not the only question. It clearly excluded from the jury the consideration whether the injury was caused by a mere accident, and also it excluded from the jury all consideration of the violation by Harris of his contract, and also it assumes knowledge by the defendant, or by the engineer, of the fact that Harris was going to use his foot in attempting to make the coupling, which would call upon him to exercise any sort of care to protect him."

In regard to the first reason given for reversal, we believe the entire record shows that the injury did not result from a mere accident. If the testimony for plaintiff is to be believed, the injury resulted from the failure of the engineer to obey the signal to stop his engine. If the testimony of the engineer is to be believed, the injury was caused solely by the negligence of plaintiff. In either event it cannot be said that the injury was caused by a mere accident. It seems to us that the evidence tends to show that, properly speaking, the alleged negligence of the railroad company was the primary cause of the injury. But, if this be not true, it is certain that the alleged negligence of the engineer and the alleged negligence of the plaintiff concurred to produce the injury. In other words, according to plaintiff's version, the engineer did not obey his signal to stop his engine, and but for this fact he would not have been injured, in spite of the alleged negligence of himself in attempting to adjust the alignment of the coupler on the locomotive to the coupler on the caboose, with his foot.

We think, therefore, that there is no merit in the second reason for reversal.

[1] The third reason given for reversal is unique, in that the books of this state do not contain a precedent for the plea. It appears that the vice president and general manager of the railroad company addressed an open circular letter to the employes of the company, calling their attention to the manifold dangers incident to the operation of the trains of a great railroad system, and also warning the employes of the dangerous character of the numerous devices frequently resorted to by the operatives in the discharge of their duties. Following this letter, and as a part of the same paper, is attached a printed contract which all employes are required to sign before they can secure employment.

The plaintiff in this case signed this contract, and thereby agreed:

"In consideration of my employment by said company, I hereby agree to assume all risks of the service of the company, and to obey all rules to which my attention is called in the foregoing notice, as well as all other rules now in force, or that may be made by said company for the government of its employés, and that I will save said company harmless from all liability for injury that may come to me because of any such risks, whether the same arise in whole or in part, from acts or omissions of my coemployés in the same branch of the service, or employés in a different branch of the service, or from those not so employed, or in consequence of any failure or neglect on my part to obey the directions contained in said notice, or any of the rules now or hereafter made by the company for government of its employés as aforesaid."

It is contended that plaintiff, when he signed the contract, bound himself to assume all risks incident to the service, and the risk of consequences of the negligence of all other employés, and particularly did he assume the risk of coupling cars, or adjusting couplers with his foot, which act, it is claimed, was the causa causans of his injuries. If this contract is valid and binding on the employés of railroads, it will have the effect of repealing some of the statutes of this state. It will nullify the so-called comparative negligence section of our Code, so far as railroad employés are concerned. The contract invoked in this case, if valid, releases the company from every conceivable act of negligence of any employé of the company no matter how gross. We believe the policy of the state, reflected in its laws, cannot be bargained away in this manner. There has been a practical abolishment of the common-law fellow servant doctrine in this state, so far as it may affect the servants of a railroad company of the class to which plaintiff belonged. This was done for broad reasons of public policy, and we do not believe that the policy can be nullified by contracts like the one here discussed.

We adopt the reasoning of Judge Smith in *Little Rock R. R. Co. v. Eubanks*, 48 Ark. 460, 468, 8 S. W. 808, 810 (3 Am. St. Rep. 245), when he said:

"But surely the state has an interest in the lives and limbs of all its citizens. Laborers for hire constitute a numerous and meritorious class in every community. And it is for the welfare of society that their employers shall not be permitted, under the guise of enforcing contract rights, to abdicate their duties to them. The consequence would be that every railway company and every owner of a factory, mill, or mine would make it a condition precedent to the employment of labor that the laborer should release all right of action for injuries sustained in the course of the service, whether by the employer's negligence or otherwise. The natural tendency of this would be to relax the employer's carefulness in those matters of which he has the ordering and control, such as the supplying of machinery and materials, and thus increase the perils of occupations which are hazardous, even when well managed. And the final outcome would be to fill the country with

disabled men and paupers, whose support would become a charge upon the counties or upon public charity."

[2] We find no merit in the criticism of the instruction given the jury at the request of plaintiff.

Affirmed.

(108 Miss. 586)

JEFFCOOT v. STATE. (No. 17287.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

WITNESSES — §414 — CORROBORATION — PRIOR TESTIMONY.

It is error to permit the state to corroborate its witnesses by proof that they had given the same testimony in other trials.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1287, 1288; Dec. Dig. §414.]

Appeal from Circuit Court, Montgomery County; J. A. Teat, Judge.

Chester Jeffcoat was convicted of a crime, and he appeals. Reversed and remanded.

Thompson & Witty, of Winona, and J. T. Dunn, of Eupora, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, J. There are several assignments of error in this case, none of which will be considered save one.

This court has uniformly held that it is error to permit the state to bolster and corroborate its witnesses by showing that they had testified the same way in other trials. This was done in the trial of appellant.

In *Alf Brown v. State*, 66 South. 975, decided January 11th of this year, the principle was reaffirmed. In all the cases the admission of this sort of proof has been condemned, and it is to be hoped that in the future like errors will not be made.

Reversed and remanded.

(108 Miss. 580)

FELDER v. STATE. (No. 17884.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

1. CRIMINAL LAW — §1159 — APPEAL — REVIEW — QUESTIONS OF FACT.

Though the Supreme Court will set aside a verdict of guilty if it appears that no rational man could have found in the evidence proof of guilt, it will not do so merely because it may have reached a different conclusion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. §1159.]

2. WITNESSES — §305 — PRIVILEGE — WAIVER BY ACCUSED.

On a trial for homicide, defendant's voluntary testimony before the coroner's jury, at a time when he was not charged with the crime, was properly admitted, where he did not claim his privilege to refuse to answer questions, as by failing to do so he waived his privilege if he had any.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1053-1057; Dec. Dig. §305.]

Appeal from Circuit Court, Amite County; R. E. Jackson, Judge.

A. G. Felder was convicted of murder, and he appeals. Affirmed.

Price & Price, of Magnolia, and R. S. Stewart, of Liberty, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

COOK, J. Appellant was convicted upon an indictment charging him with the murder of his brother. The proof of his guilt depended upon circumstantial evidence alone.

Three reasons are assigned for a reversal, viz.: (1) The evidence did not warrant the verdict. (2) The court erred in permitting the state to prove the statements of defendant, under oath, made as a witness before the coroner's jury investigating the homicide. (3) Refusal of the court to give instructions requested by defendant.

[1] In regard to the first point, we will say that the appellate court cannot overturn the verdict of a jury merely because the court may have reached a different conclusion. If it appears to the court that no rational man could have found in the evidence proof of defendant's guilt, the court would set aside the verdict. We cannot say this in the present case. The jury, in our opinion, was warranted by the evidence in finding a verdict of guilty as charged.

[2] Appellant was sworn as a witness and voluntarily testified before the coroner's jury. He did not object to answering the questions propounded to him. He was not then charged with the crime, and, so far as the record shows, there is no reason to assume that the officers of the law at that time suspected that defendant was guilty of the murder of his brother. Be that as it may, it is certain that he was not charged with the crime when he testified at the inquest, and it is also sure that he did not claim his privilege to refuse to answer questions, and in failing to do so he waived his privilege, if he had any. We think the point made here has been settled by this court against the contentions of appellant. See *Steele v. State*, 76 Miss. 387, 24 South. 910, and cases therein cited.

There was no error in permitting the state to prove what the defendant said in his testimony before the coroner's jury.

The third point must be overruled, because the jury was properly and clearly instructed upon the rule which should govern the jury in the consideration of circumstantial evidence. Affirmed.

(108 Miss. 538)

HUNT v. STATE. (No. 17717.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

CRIMINAL LAW §1159—APPEAL—REVIEW—VERDICT.

Where the circumstantial evidence fails to show that a crime was committed, a conviction for murder will be reversed and the defendant discharged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.]

Appeal from Circuit Court, Bolivar County; W. A. Alcorn, Jr., Judge.

Will Hunt was convicted of murder, and he appeals. Reversed, and defendant discharged.

Appellant was convicted of the murder of his wife, and sentenced to the penitentiary for life. There were no witnesses to the killing except the defendant himself. Immediately after the gunshot appellant gave the alarm that his wife had shot herself. She was found with the wound entering her head, the shot having taken an upward range. The appellant testified that his wife was drunk or drug-crazed, and had quarreled with him and gotten a shotgun and was attempting to shoot him, and as he was trying to take the gun away from her it fell to the floor and was discharged, and that the killing was accidental. The jury returned a verdict convicting appellant on circumstantial evidence, and he appeals.

M. L. Kaufman, of Rosedale, D. J. Allen, Jr., of Cleveland, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

COOK, J. We have carefully gone over all the evidence in this case, and we can find no single circumstance that points to the defendant's guilt with that degree of certainty which the law demands. Taking all of the circumstances together, there is no legal proof of guilt. The most that can be said for the state's case is that there were some suspicious circumstances proven against the defendant.

It is not the policy of the law to punish individuals for crime when the evidence fails to prove that a crime was committed. The evidence here fails in this particular, and the judgment of the trial court is reversed and the defendant discharged.

§ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(108 Miss. 539)

**ALLIANCE INS. CO. OF PHILADELPHIA
v. PRODUCERS' COTTON OIL CO.**
et al. (No. 16812.)

(Supreme Court of Mississippi. Jan. 18,
1915.)

**1. INSURANCE — 470—MARINE INSURANCE—
ABANDONMENT—EFFECT OF ACCEPTANCE—
ACTS CONSTITUTING ACCEPTANCE.**

An insurer's express or implied acceptance of the abandonment of a vessel precludes it from insisting that she was not damaged or destroyed by reason of a peril insured against, or that she was not either an actual or constructive total loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1192-1227; Dec. Dig. 470.]

**2. INSURANCE — 470—MARINE INSURANCE—
DUTIES OF OWNER AFTER LOSS—PROVISION
OF POLICY.**

Under a policy providing that upon loss insured should endeavor to safeguard and recover the vessel insured, and upon recovery should repair her, and, upon insured's failure to do so, insurer's repair of the vessel should not be a waiver or acceptance of an abandonment, the insurer was not authorized to raise the vessel and tender her to insured in her wrecked and damaged condition and claim the benefit of such provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1192-1227; Dec. Dig. 470.]

**3. INSURANCE — 470—MARINE INSURANCE—
ACCEPTANCE OF ABANDONMENT.**

An offered abandonment may be accepted, even when insured has no right to abandon.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1192-1227; Dec. Dig. 470.]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action by the Producers' Cotton Oil Company and others against the Alliance Insurance Company of Philadelphia. Judgment for plaintiffs, and defendant appeals. Affirmed.

McLaurin & Armistead, of Vicksburg, for appellant. Hirsh, Dent & Landau and Henry & Canizaro, all of Vicksburg, for appellees.

SMITH, C. J. The steamer Henry Sheldon, of which appellees were the owners, and the value of which was \$10,500, was insured in several marine insurance companies for sums aggregating \$7,000, one of the policies having been issued by the defendant herein, and was for the sum of \$1,000. George W. Neare, Gibbs & Co. were the general agents of all of these companies, and represented them in the matters covered by this litigation. On September 30, 1910, at 4 o'clock a. m., this steamer, while lying anchored in the canal at Vicksburg, sank in several feet of water. A few hours thereafter appellees' superintendent telegraphed Neare, Gibbs & Co. as follows:

"Steamer Henry Sheldon sank this morning at city landing about seven feet water in board fifteen feet out board I think she can be raised wire instructions immediately."

The answer to this telegram was in the following language:

"Telegram received. We wired agents Barnwell & Barbour Yazoo City to instruct owners

to proceed to raise Sheldon as though boat were not insured. Please be guided accordingly."

A few days thereafter George H. Wilson, an agent of appellant, or rather a joint agent of all of the insurance companies interested, appeared on the scene, and, in connection with appellees, attempted to raise the vessel. There seems to have been no special agreement between appellees and Wilson in this regard, but appellees contributed toward the expense incurred; the work being done under the direction of Wilson. Before the vessel was raised, the river commenced to rise, and it became impossible to proceed with the undertaking; consequently it was abandoned, and Wilson left Vicksburg. In consequence of this rise in the river the vessel became practically submerged; whereupon, appellees, being of the opinion that they were entitled so to do, under the policy, served notice on Neare, Gibbs & Co. that they had abandoned her, and would claim payment under the policy as for a total loss. To this notice Neare, Gibbs & Co. replied, on October 15, 1910, as follows:

"Your favor of the 10th inst., inclosing alleged notice of abandonment for the several companies having policies on the steamer Henry Sheldon, received. As at present advised, we do not consider that the several companies are liable for the loss under their respective policies. If the loss has occurred by reason of any of the perils insured against, we shall expect you to conform to the conditions of the several policies so that we may be placed in full possession of all the facts as to the cause of such alleged loss in order that we may finally determine whether the respective companies are liable or not. The clause in the respective policies under sections five and eight clearly provide as to the obligation of the assured in case of loss and as to abandonment. We shall expect you to comply with the several provisions of the policies and cannot accept an alleged abandonment of the vessel, as at present advised, and must decline so to do. We beg to return the papers herewith which you sent us, and also the papers sent us by you through Messrs. Barnwell & Barbour, of Yazoo City, Mississippi."

On November 4th they again wrote plaintiffs that:

"Relative to the alleged loss of the steamer Henry Sheldon, we beg to say that, as the river is now very low, there must be some chance to raise and recover her. You have undertaken to abandon her, which we think you have no right to do, and have so advised you, and the companies have refused to accept such abandonment, and have also denied your claim for a total loss. We think, without prejudice to our respective positions, that joint action can be taken in an effort for the safeguard and recovery of the vessel. The policy makes this your duty, and in case of your neglect or refusal to do so, the insurers are authorized to recover and repair said vessel for your account. Any attempt of either party in so doing, the policy provides, shall not be considered a waiver, or acceptance of an abandonment, or an acknowledgment of liability by the companies. In view of these provisions, we think such joint action should be taken by the assured and the companies, the same to be done without prejudice to the rights of their party. We think this is a sensible business proposition, and make the suggestion with the hope that by so doing,

trouble will be avoided to all concerned. Will you kindly let us hear from you as to your willingness to join us in such actions?"

Appellees having declined to participate further in any attempt to raise the vessel or to have anything further to do therewith, Wilson, acting for and on behalf of all the insurance companies, including appellant, returned to Vicksburg during the latter part of November, and succeeded in raising her. She was then placed by him in the possession of a dock company. On November 28th Neare, Gibbs & Co. tendered the vessel to appellees by means of the following letter:

"After having made an attempt to recover the steamboat Henry Sheldon you neglected and refused to use any further effort for her safeguard and recovery. We therefore were compelled, solely for the purpose of raising the boat, to continue the effort without prejudice to the position we originally took, and in accordance with the conditions of our policies. The boat has been raised and is now in possession of the dock company at Vicksburg being held subject to your order and attention. You are responsible to us, as is the vessel, for the expense incurred in raising her. We expect to render you an account of the same and to have you make payment thereof. We have also heretofore and again, now advise you that we have nothing to do with the abandonment of the boat and that we are not in any way liable under our policy for the loss of this vessel. You are also further aware that it has been clearly shown by an examination of disinterested and competent men that the boat sank by reason of her unseaworthy condition."

Appellees declined to receive the vessel or to pay the dock company's fees, which company, probably at the suggestion, and certainly with the approval, of Neare, Gibbs & Co., had her libeled and sold for its fees; the dock company becoming the purchaser thereof at the sale, for the sum of \$525. These insurance companies expended something like \$3,500 in raising the vessel and delivering it to the dock company. After purchasing the vessel, this dock company had her repaired and somewhat remodeled, at an expense of \$4,200.

The case was submitted to a jury, which returned a verdict for appellees, and there was a judgment accordingly.

The foregoing is a sufficient statement of the facts for an understanding of the points decided.

Appellant very earnestly insists that the evidence demonstrates that this steamer sank, not by reason of any peril insured against, but solely by reason of her unseaworthy condition. Appellees while denying this contention, insist that inquiry relative thereto is foreclosed for the reason that the steamer was abandoned by them, and this abandonment was accepted by the insurance companies. If this is true, then appellees were entitled to a peremptory instruction, and therefore the judgment rendered is correct without reference to any errors which the court below may have committed in the granting and refusing of other instructions.

[1] The acceptance by an insurer of the abandonment of a vessel covered by his poli-

cy precludes him from insisting that she was not damaged or destroyed by reason of a peril insured against, or that she was not either an actual or a constructive total loss. It is not necessary for this acceptance to be in express language, but it may result from the conduct of the insurer. *Insurance Co. v. Copelin*, 9 Wall. 461, 19 L. Ed. 739; *Richelleu v. Boston Insurance Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398; *Northwestern Transportation Co. v. Continental Ins. Co.* (C. C.) 24 Fed. 171; *Peele v. Insurance Co.*, 19 Fed. Cas. 98; *Northwestern Transportation Co. v. Thames & Mersey Ins. Co.*, 59 Mich. 214, 26 N. W. 836; *Richelleu v. Thames & Mersey Ins. Co.*, 72 Mich. 571, 40 N. W. 758; *Peele v. Suffolk Ins. Co.*, 7 Pick. (Mass.) 254, 19 Am. Dec. 286; *Reynolds v. Ocean Insurance Co.*, 1 Metc. (Mass.) 160; *Marmaud v. Melledge*, 123 Mass. 176. Such an acceptance may result from the conduct of the insurer, even though he did not intend thereby to accept the abandonment, but, on the contrary expressly refused so to do. *Reynolds v. Ins. Co.*, supra; *Northwestern Transportation Company v. Continental Ins. Co.*, supra; *Peele v. Insurance Co.*, 19 Fed. Cas. 98; *Gloucester v. Younger*, 10 Fed. Cas. 495; *Hume v. Frenz*, 150 Fed. 502, 80 C. C. A. 320.

[2] There is no contention on the part of appellees that there was any express acceptance of the abandonment of this vessel; their contention being that a constructive acceptance results from the acts of appellant in raising and tendering her to appellees without repairing and putting her in the condition she was before she sank. The provision of the policy by virtue of which appellant raised the vessel is as follows:

"In case of loss resulting from any peril covered under this policy, the assured shall use every effort for the safeguard and recovery of said vessel, by employing such means as can be obtained for that purpose, and, if recovered, shall cause the same to be forthwith repaired; and in case of neglect or refusal on the part of the assured, or the agents or assigns of the assured, to adopt prompt and efficient means for the safeguard and recovery of said vessel, or to repair said vessel when recovered, then the said insurers are hereby authorized to interpose and have said vessel repaired if she has been recovered, or to recover said vessel and cause the same to be repaired for account of assured, to the cost of which, after making any and all deductions referred to in clause 6 of the printed part of this policy, said company will contribute in proportion as the sum herein insured bears to the agreed value stated in this policy; and the surplus (if any) paid and incurred by said assurers (with premium notes if unpaid) shall be a lien upon, and shall be recoverable against the said vessel or any part thereof, or against the assured, at the option of the assurers, and any acts of the assured or assurers, or of their joint or respective agents in preserving, securing, saving, or repairing the property insured, shall not be considered or held to be a waiver or acceptance of an abandonment or of acknowledgment of liability by the assurers."

Under this provision of the policy, when the vessel sank it became the duty of appellees to promptly recover and repair it, and

upon their failure so to do such right accrued to appellant. This right it could exercise or not according as it should deem best; but, when it elected to exercise it, it thereby became its duty to do that which the assured had failed to do; that is, to recover the vessel and cause it to be forthwith repaired. See authorities *supra*.

Taking possession of the vessel for any purpose other than that of recovering and repairing it was not authorized, nor was there any authority given appellant to recover the vessel and tender it to appellees in its wrecked and damaged condition; the only authority given it being to recover the vessel "and cause the same to be repaired." Since appellant did not repair the vessel after recovering her before tendering her to appellees, it thereby failed to discharge its full duty under the policy, and consequently it is not entitled to the protection of the provision here in question. Neither the law nor this provision of the policy contemplates that the insurer "can take possession of the ship and decide for the owner what shall be done with her" (*Peele v. Insurance Co.*, 19 Fed. Cas. 98); but, on the contrary, when the insurer takes possession he is under the duty of disposing of the vessel in the manner provided by the policy, and, in default thereof, is held to have accepted the abandonment.

It follows from the foregoing views that appellant's conduct with reference to the vessel can be justified only on the theory that the abandonment had been accepted; for it is well settled that "any act of the underwriters in consequence of an abandonment, which could be justified only under a right derived from it, may be decisive evidence of an acceptance." *Richelieu v. Insurance Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398, *Peele v. Insurance Co.*, 19 Fed. Cas. 98; *Gloucester Ins. Co. v. Younger*, 10 Fed. Cas. 495.

The case of *Richelieu v. Insurance Co.*, 136 U. S. 408, 10 Sup. Ct. 934, 34 L. Ed. 398, so much relied on by appellant, is not in conflict with the views herein expressed. In that case the refusal of the lower court to grant the plaintiff's instructions relative to alleged acceptance of the abandonment was approved, for the reason that these requested instructions were not supported by evidence, the court saying that:

"As it is not contended that there was any evidence of actual acceptance, and as it clearly appeared that the rescuing expedition was sent before the telegraphic notice of abandonment was given, and as the evidence did not tend to show that that expedition was sent with the intention of rescuing 'and repairing' the *Spartan*, or that the insurers brought the *Spartan* to Detroit (if they did bring her), with the intention of 'repairing her,' each one of the requested instructions was objectionable."

The court further said with reference to the repairing of the vessel after her recovery:

"The plaintiff insists that, although the captain moved the *Spartan* to Detroit and placed

her in the dry dock, and to some extent, if not wholly, superintended the repairs, the plaintiff was not bound by his action, because he was not employed by it, but by the charterers, and that the master, after abandonment, becomes the agent of the insurers."

We have examined all the cases relied on by appellant, and do not think that any of them, except probably the case of *Sheppard v. Henderson*, 7 Appeal Cases, 49, support its contention. If *Sheppard v. Henderson*, an English case, is in conflict with the views herein expressed, it is not in accord with the American authorities.

The particular clause of the provision of the policy here in question relied on by appellant as preventing its acts in raising the vessel and tendering her to appellees in her wrecked and damaged condition from resulting in a constructive acceptance of the abandonment is that:

"Any acts of assured or assurers or of their joint or respective agents, in preserving, securing, saving, or repairing the property insured, shall not be considered or held to be a waiver or an acceptance of an abandonment or of an acknowledgment of liability by the insurers."

In *Northwestern Transportation Co. v. Insurance Co.* (C. C.) 24 Fed. 177, it was pointed out that this clause was added to marine insurance policies because of the holding of Mr. Justice Story in *Peele v. Insurance Co.*, 19 Fed. Cas. 98, that the mere act of the insurer in taking possession of an abandoned vessel operated *ipso facto* as an acceptance of the abandonment. It was there said that:

"In consequence of the decision of Mr. Justice Story, the policies were amended so as to provide that the acts of the insured or insurers in recovering, saving, and preserving the property should not be considered a waiver or acceptance of the abandonment. * * * The object of the clause in the policy was to prevent the mere act of taking possession and rescuing the property being treated as *ipso facto* an acceptance of the abandonment. The companies wished to reserve the right to raise, repair, and restore the vessel within a reasonable time. But in the *Peele* Case it was held that they were not at liberty to touch her in any way without being held as accepting the abandonment. The policies now not only give them the right to interpose to recover the vessel, but in case the owner should do this, and then refuse to repair, the underwriters may then, after recovery, cause the same to be repaired for account of the insured; but, having once made their election to raise the vessel, we do not understand that they are at liberty to stop short of full performance, or to tender her back to the owners without complete indemnity for the loss."

Moreover, this clause was contained in the policies sued on in most of the cases hereinbefore cited, that were decided after the decision of the *Peele* Case.

"The defendant claims," however, in the language of one of the briefs of its counsel, that "it was too late for the plaintiffs to abandon after they had joined with the underwriter in attempting to raise the vessel, and where such attempt has induced the underwriter to expend a considerable sum of money in such effort." In support of this we are referred to the case of *Peele v. In-*

insurance Co., 19 Fed. Cas. 112, where it was said by Mr. Justice Story:

"Let me add, also, that according to my impression of the established law, if the abandonment had not been made at this time, but had been postponed until the vessel had become a technical wreck, or had been got off at an expense exceeding three-fourths of her value, the plaintiffs could not then have elected to abandon, for they would not have had a right to lie by and speculate upon events. The delay to abandon would have been fatal. [Cases cited.] So that the plaintiffs must either have abandoned at the time when they had notice of the loss, or they would have been forever concluded."

We are also referred to the case of *Smith v. Insurance Co.*, 4 Mass. 669, wherein it was said by Mr. Justice Parsons that:

"The owner must abandon within a reasonable time after notice. He shall not delay for the purposes of speculation, or wait for further intelligence to guide him in his speculations. What is a reasonable time must depend on facts. When the facts are agreed or found, it is a question of law."

[3] Conceding, for the sake of the argument, that the rule announced in these cases is correct, appellant can receive no benefit therefrom, for the reason that it relates only to the right to abandon, and not the effect, or what constitutes an acceptance, thereof. "It is well settled, * * * that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences." *Phenix Ins. Co. v. Copelin*, supra.

It follows from the foregoing views that the court below should have granted the peremptory instruction requested by appellees.

Affirmed.

(108 Miss. 600)

WATSON et al. v. VINSON et al.
(No. 16857.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

1. TAXATION \Leftrightarrow 734 — TAX TITLE — DEFECTS IN ASSESSMENT.

Where the rolls for the taxes of 1875 were not returned by the assessor to the supervisors within the time required by Laws 1875, c. 26, or within the additional time granted by Laws Called Sess. 1875, c. 3, and the roll was never approved by the board of supervisors as required by those acts, a sale of lands for the nonpayment of taxes was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. \Leftrightarrow 734.]

2. TAXATION \Leftrightarrow 727 — TAX TITLE — CURATIVE STATUTE.

The defects in those sales were not cured by Laws 1876, c. 149, empowering the board to make a new assessment or to correct and equalize the incorrect assessment, where there is no evidence that the supervisors did either.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. \Leftrightarrow 727.]

3. TAXATION \Leftrightarrow 805 — TAX SALES — LIMITATIONS.

Where one who purchased land at a void tax sale thereafter bought in the name of his wife the outstanding title to settle a suit against him to set aside the tax sales, before

such action was barred by the three-year statute of limitations (Rev. Code 1880, § 539), the husband did not thereafter hold the land adversely to his wife, so that the rights of the children as her heirs were barred by that statute.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1593-1597; Dec. Dig. \Leftrightarrow 805.]

4. TENANCY IN COMMON \Leftrightarrow 19 — PURCHASE OF ADVERSE INTEREST.

Where a husband who had joined with his wife in giving a trust deed on her land, after her death, and while their children were all minors, purchased the land in his own name at a sale on foreclosure of the trust deed, his purchase inured to the benefit of his children, who were co-owners with him.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 55-59; Dec. Dig. \Leftrightarrow 19.]

5. TENANCY IN COMMON \Leftrightarrow 15 — ADVERSE POSSESSION — COTENANTS — OUSTER.

Nor did he secure the entire title by adverse possession against the children, where they continued to live with him until their maturity, and there was no evidence that he ever repudiated his joint tenancy with them or in any manner ousted them therefrom.

[Ed. Note.—For other cases, see *Tenancy in Common*, Cent. Dig. §§ 42-52; Dec. Dig. \Leftrightarrow 15.]

6. ESTOPPEL \Leftrightarrow 70 — ESSENTIALS — KNOWLEDGE OF FACTS — TITLE OF GRANTOR.

Where the children did not know that certain land was owned by their mother at her death, so that they were entitled to an interest therein as her heirs, they were not estopped by their silence from asserting their claim against grantees under deeds of trust executed by their father.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 183-187; Dec. Dig. \Leftrightarrow 70.]

Appeal from Chancery Court, Holmes County; J. F. McCool, Chancellor.

Partition by A. I. Vinson and others against Fannie M. Watson and others. From a decree ordering a sale for partition, the defendants appeal. Affirmed.

W. A. Pierce, of Lexington, and Watson & Perkins, of Memphis, Tenn., for appellants. Noel, Boothe & Pepper, of Lexington, for appellees.

REED, J. This case involves the title to section 34, township 16, range 2 west, in Holmes county. In 1875 the land was owned by James T. Williams. In that year it was assessed to him. On March 4, 1878, it was sold by the sheriff and tax collector of Holmes county for the nonpayment of taxes for 1877, and purchased by R. H. Watson. On October 5, 1878, R. H. Watson conveyed it to Dr. J. H. Watson. On February 7, 1880, James T. Williams, who owned the bottom title to the land, conveyed it to Peter Simmons. On March 3, 1880, Mr. Simmons conveyed an undivided one-half interest therein to W. A. Drennan. Messrs. Simmons and Drennan then brought suit to recover the land from Dr. J. H. Watson. This case appears to have been compromised, and on November 22, 1881, Messrs. Simmons and Drennan conveyed the land to Mrs. Abbie

T. Watson, the first wife of Dr. J. H. Watson, for the consideration of \$640. On December 15, 1881, Mrs. Watson and her husband executed a deed of trust on the land to secure a loan of \$640, "money advanced for the purchase price" thereof.

Dr. J. H. Watson married Miss Abbie Vinson, his first wife, in January, 1880, and she died in January, 1884, leaving surviving her three infant children, the oldest being about three years old, and the youngest about one week. In 1886 Dr. Watson remarried; his second wife being Miss Fannie Smith. On February 17, 1887, there was a sale of the land under foreclosure of the deed of trust, and it was purchased by Dr. Watson, who took the title in his own name. In 1878 the land was uncleared. Soon after the conveyance to him of the tax title, Dr. Watson began to clear and improve it. He continued in the use and control of the land till his death, which occurred July 11, 1912. For a time he resided on the land. This property was devised by him to his second wife, Mrs. Fannie M. Watson, who survived him.

Appellees, who are the children of Mrs. Abbie T. Watson, the first wife, knew nothing of the deed from Messrs. Simmons and Drennan to their mother till after the death of their father. Soon after acquiring this information, they brought suit in chancery seeking to be declared owners, each of one-fourth undivided interest in the land and praying for partition.

Dr. Watson had from time to time executed deeds of trust on the land to secure loans. At the time of his death several of these were unpaid, among them the deeds of trust in favor of appellants William Wormack and the Colonial & United States Mortgage Company.

[1] The Chancellor upon hearing sustained the bill of complaint, decreed a sale for partition, and restricted the incumbrances to the one-fourth undivided interest which it was held was the share of Dr. Watson. The chancellor held that the tax deed to R. H. Watson was void. This appellants claim to be error. The tax sale was made under the assessment in 1875. By act of the Legislature approved March 6, 1875 (chapter 28, Laws of Mississippi of 1875), the tax assessors of the several counties were required to return their assessment books to the clerks of the board of supervisors on or before the 1st day of June, 1875, and annually thereafter. The tax assessor of Holmes county failed to comply with this law in 1875. There was a second session of the Legislature in 1875 which was convened on July 27, 1875. By act approved July 31, 1875 (chapter 3, Laws of Mississippi Called Session 1875), the tax assessors in the counties where the assessment rolls had not been received and approved were required to file such rolls with the chancery clerk on or before the fourth Monday of August, at which time the board of supervisors were required to meet to receive, revise, correct, and equalize the rolls,

and that certified copies be forwarded to the auditor on or before the last Monday in September, 1875. This statute was not complied with. The land rolls in Holmes county were not received by the board until the September meeting, 1875. Then the fourth Monday of September was set as the time to hear objections and equalize the assessments. The land roll was sent to the auditor and filed with him in two parts, the first containing lands in town following the September hearing, and the second purporting to contain the balance of the lands in December, 1875. There was no approval by the board of supervisors of the land roll in 1875 or 1876.

[2] It is contended by the appellants that an act of the Legislature passed February 26, 1876 (chapter 149 of the Laws of Mississippi of 1876), cured the errors in the 1875 assessment. This act was for the purpose of authorizing the making of corrections on assessment rolls because they were "full of errors, informalities and improper assessments." The board was empowered to order a new assessment of the real estate, or could make corrections and equalizations on the rolls then in use. No new assessment was ordered in Holmes county in 1876, and the roll of 1875 was not approved. The only information we have of the board doing any thing with land assessments in that county in 1876, the courthouse of the county and all records therein having been destroyed by fire in 1893, is from several loose sheets in the state auditor's office which contain a certificate by the chancery clerk that they constitute a copy of the changes and reductions in land assessments made by the board at the July term, 1876. There is nothing to show on these sheets that the board held a meeting at the time specified for the purpose of correcting the roll and equalizing the same. On the sheets referred to it is only shown that certain reductions were made in certain individual assessments. The dealing with the roll in 1876, as shown in this case, is not curative of the errors in 1875. There is nothing on these sheets to show approval of the roll: This should be done by order of the board of supervisors, and there is no order. It is in proof that no order of approval was made in either 1875 or 1876. The errors in the assessment of 1875 have not been cured.

We do not see any error of the chancellor in holding that the tax deed failed for the reason that, quoting from the final decree:

"The land tax roll upon which said sale was based was not filed and approved in the manner provided by law." *Stovall v. Conner*, 58 Miss. 138; *Fletcher v. Trewalla*, 60 Miss. 963; *Mitchum v. McInnis*, 60 Miss. 945; *Carlisle v. Chrestman*, 69 Miss. 392, 12 South. 257; *Carlisle v. Goode*, 71 Miss. 455, 15 South. 119; *Preston v. Banks*, 71 Miss. 602, 14 South. 258.

[3] Appellants claim that appellees are barred by the three-year statute of limitations (section 539, Rev. Code 1880). The statute did not begin to run until one year from the

day of the sale, which put it in operation March 4, 1879. Before the expiration of the three years the deed had been made to Mrs. Abbie T. Watson, the first wife of Dr. Watson, by which she was conveyed the legal title to the land by the owners thereof. This conveyance followed, and apparently was in settlement of an action brought by such owners to recover the land from Dr. Watson. It is shown that the transaction whereby the legal title was vested in his wife was conducted and consummated by Dr. Watson. Surely it was his purpose to make his wife the legal owner of the land. He may have gone into possession and claimed the land under the tax title which he at the time believed to be good; but it is clear that, when it became necessary to purchase the good title to the land, it was taken in the wife's name, and from then on the holding and occupation was properly under her title. Only a few days after the conveyance to Mrs. Watson, her husband joined her in executing a deed of trust on the very land to secure a loan for the purchase money paid Simmons and Drennan, the grantors. Under the facts of this case it cannot be said that Dr. Watson was holding and claiming the land adversely and against his wife. The three years' actual occupancy was interrupted when Dr. Watson purchased the land for his wife, and the title became vested in her.

[4] Dr. Watson did not acquire full title to the land at the sale in foreclosure of the deed of trust given by his former wife, then deceased, and himself. When Mrs. Watson died in 1884, intestate, her three children, all very young, and her husband, were her heirs at law, and they together inherited the land, each receiving an equal interest. His purchase of the land under the deed of trust inured to the benefit of all the cotenants. The title remained in the four as before the sale.

[5] Dr. Watson did not obtain entire title through adverse possession against his cotenants. These cotenants were his own children. When they, with their father, acquired title upon the death of their mother, they were mere babies. They were still very young when their father remarried, and still in early childhood when he attempted to obtain title by purchase in his own name at a foreclosure sale. They were certainly for some years after this in his household, subject to his control, under his care, and entitled to his support and guidance. There could be no running of the statute of limitations against them until they reached their majority. Then because of the relation of cotenancy, there must be proof of an ouster. We do not find this. In the beginning the father's holding was certainly for his children as well as himself. We do not find it shown that there was any change in the manner of his possession and use. It was the same after his children grew up as when they were young. He never told his children that the legal title to the

land was in their mother when she died. It has not been shown that the father at any time, by notice or act, expressed to his children that he was claiming exclusive possession, and denying their right to any interest. There is no proof of repudiation or disavowal by Dr. Watson of the relation of cotenancy with his children. No hostile occupancy has been shown. The facts in this case do not show that Dr. Watson, the parent, secured for himself the whole title to the land by adverse possession against his children.

[6] It is claimed that appellees are estopped from questioning the rights of the loan holders to subject the entire title in the land to the collection of their indebtedness secured by deeds of trust executed by Dr. Watson. Appellees were in complete ignorance of their rights. They did not know, until after their father's death, of the conveyance to their deceased mother, and that they inherited interests in the land from her and were cotenants with their father. The decision of this case as to this point is controlled by the holding of the court in the case of *Mortgage Co. v. Bunckley*, 88 Miss. 641, 41 South. 502. In that case it was claimed that one of the parties was estopped by conduct, because he was at the home of his father when the agent of the mortgage company was there to inspect the land for a loan of money to the father, who claimed to own all of the title thereto, and that he knew of the proposed loan, and was silent as to any claim of his own to the land. Deciding that this did not constitute an estoppel, the court, speaking through Special Judge Campbell, said:

"The question is: Is he estopped by his silence? The truth is he did not know that he had any interest in the land. As stated by counsel for the mortgage company, 'It was not considered in the family at that time, nor until after 1893, that the children of Nathan had any interest whatever in the property in controversy.' His ignorance of his rights precludes the claim of estoppel by his mere silence. 11 Am. & Eng. Ency. Law, 433, 434b, and cases cited; *Pomeroy, Eq. Jur.* § 805; *Houston v. Witherspoon*, 68 Miss. 190, 8 South. 515; *Hignite v. Hignite*, 65 Miss. 447, 4 South. 345, 7 Am. St. Rep. 673; 7 Ballard on Real Property, p. 40. Apart from this, it is by no means certain that he knew of the loan being effected, and if he did, he was under no legal obligation to assert his claim, to interfere with the success of his father's application for a loan."

Appellants rely upon the case of *Smith v. McWhorter*, 74 Miss. 400, 20 South. 870, to sustain their position concerning the estoppel of appellees. It was therein decided, quoting from the headnote, that:

"A tenant in common who purchases the joint estate under a deed of trust will hold the same as trustee for all the tenants; but adult cotenants, with knowledge or sufficient information to charge them with knowledge, must elect within a reasonable time to hold the purchaser as a trustee; otherwise those who acquire rights in the property from him in good faith will be protected."

In that case it appears that the parties were all of age when the arrangement was made by which the one tenant in common

took the title in her name. In the case at bar appellees, the cotenants, were minors of tender years when the title by purchase at the trustee's sale became vested in their father and cotenant.

Following the decision in the case of Mortgage Co. v. Bunckley, supra, we hold that appellees are not estopped.

Affirmed.

DUNCAN v. STATE. (No. 17852.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

Appeal from Circuit Court, Lowndes County; T. B. Carroll, Judge.

Lindsey Duncan was convicted of manslaughter, and appeals. Affirmed.

Geo. T. Mitchell, of Tupelo, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

FALKNER v. STATE. (No. 17864.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

Appeal from Circuit Court, Leake County; C. L. Dobbs, Judge.

Le Roy Falkner was convicted of murder, and sentenced to life imprisonment, and he appeals. Affirmed.

Wells, May & Sanders, of Jackson, and J. L. McMillon, of Carthage, for appellant. W. C. Eastland, Dist. Atty., of Forest, and Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

EMINENT HOUSEHOLD OF COLUMBIAN WOODMEN v. WARRINGTON.

(No. 16850.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

Appeal from Circuit Court, Yazoo County; W. A. Henry, Judge.

Action between the Eminent Household of Columbian Woodmen and J. B. Warrington, Guardian. From the judgment, the Eminent Household of Columbian Woodmen appeals. Affirmed.

Barnett & Perrin, of Yazoo City, for appellant. Barbour & Henry, of Yazoo City, for appellee.

PER CURIAM. Affirmed.

TREXLER LUMBER CO. v. POLK et al.

(No. 17776.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

Appeal from Chancery Court, Jefferson Davis County; D. M. Russell, Chancellor.

Action between the Trexler Lumber Company and Jake Polk and others. From the judgment, the Lumber Company appeals. Appeal dismissed.

J. E. Parker, of Prentiss, for appellant. O. E. Thompson, of Prentiss, for appellees.

PER CURIAM. Motion to dismiss sustained, and appeal dismissed.

SMITH v. STOCKTON. (No. 17983.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

Appeal from Chancery Court, Monroe County; J. Q. Robins, Chancellor.

Action between L. F. Smith and W. L. Stockton. From the judgment Smith appeals. Motion to docket and dismiss sustained.

Leftwich & Tubbs, of Aberdeen, for the motion. W. H. Clifton, of Aberdeen, opposed.

PER CURIAM. Sustained.

HAMPTON et al. v. STATE. (No. 17683.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

Appeal from Circuit Court, Kemper County; T. B. Carroll, Judge.

Jim Hampton and Cap Hampton were convicted of manslaughter, and sentenced to 15 and 5 years, respectively, and they appeal. Affirmed.

John A. Clark, of De Kalb, and Whitfield & Whitfield, of Jackson, for appellants. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. PHILLIPS.

(No. 16685.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and E. B. Phillips. From the judgment, the Railroad Company appeals. Affirmed.

Maynard & Fitz Gerald, of Clarksdale, for appellant. Mayes & Mayes, of Jackson, for appellee.

PER CURIAM. Affirmed.

SOUTHERN RY. CO. IN MISSISSIPPI v. WILLIAMS. (No. 16865.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

Appeal from Circuit Court, Sunflower County; Monroe McClurg, Judge.

Action between the Southern Railway Company in Mississippi and Mrs. Mary B. Williams. From the judgment, the Railway Company appeals. Affirmed.

Catchings & Catchings, of Vicksburg, for appellant. Walter S. Chapman and Jas. L. Williams, both of Indianola, and Whitfield & Whitfield, of Jackson, for appellee.

PER CURIAM. Affirmed.

G. W. O'BANNON & SON v. HARTFORD FIRE INS. CO. (No. 16701.)

(Supreme Court of Mississippi. Jan. 25, 1915.)

Appeal from Circuit Court, Oktibbeha County; T. B. Carroll, Judge.

Action between G. W. O'Bannon & Son and the Hartford Fire Insurance Company. From the judgment, G. W. O'Bannon & Son appeal. Affirmed.

L. M. Adams, of Ackerman, and B. F. Bell, of Starkville, for appellants. McLaurin & Armistead, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

BROWN v. STATE. (No. 17711.)

(Supreme Court of Mississippi. Jan. 18, 1915.)

Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Columbus Brown was convicted of murder, and sentenced to 15 years' imprisonment, and he appeals. Affirmed.

Crowley & Glass, of Kosciusko, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

(136 La. 380)

No. 20892.

BROOKS v. BROUSSARD et al.

(Supreme Court of Louisiana. Dec. 14, 1914.

Rehearing Denied Jan. 11, 1915.)

*(Syllabus by the Court.)***1. VENDOR AND PURCHASER — SALES — REDEMPTION — FAILURE TO EXERCISE.**

A sale with the right of redemption becomes absolute, if such right is not exercised within the time agreed on by the vendor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. ¶ 18.]

2. APPEAL AND ERROR — JUDGMENT — CONFLICTING EVIDENCE — VENDOR AND PURCHASER.

Where the question whether there was a verbal agreement, between the vendor and the vendee at the time of the sale, that the transfer should be considered merely as a security, hinges on their conflicting testimony, a judgment in favor of the vendee will not be disturbed, when his version is corroborated by a counter letter stipulating an option in favor of the vendor to repurchase, before a certain date at a higher price.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. ¶ 1002.]

3. VENDOR AND PURCHASER — SALES — CONSIDERATION — SUFFICIENCY.

A price which equals at least half the value of the property cannot be considered as vile or insignificant.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 14; Dec. Dig. ¶ 13.]

4. VENDOR AND PURCHASER — TITLE OF PURCHASER — NONPAYMENT OF DEBT ASSUMED — EFFECT.

The nonpayment of a small debt assumed by the vendee cannot affect the vendee's title to the property conveyed, in the absence of any demand for the nullity of the sale for nonpayment of the price.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 170-174; Dec. Dig. ¶ 101.]

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

Action by George Howard Brooks against Homer Broussard and others. From judgment for plaintiff, defendants appeal. Affirmed.

Philip S. Pugh and L. H. Pugh, both of Crowley, for appellants. Smith & Carmouche, of Crowley, for appellee.

LAND, J. This is a suit to eject the defendants from a certain tract of land con-

taining some 233 acres, purchased by plaintiff from Homer Broussard on January 2, 1913. The petition alleged that the consideration, as expressed in the act of sale, was the payment of two mortgages and a judgment, then resting on said property, and aggregating the sum of \$5,498.23; that the mortgages contained a waiver of the homestead signed by the wife of said Broussard in favor of any holder of the notes described in the acts of mortgage; that shortly after the said purchase, petitioner executed a counter letter, in which he obligated himself to reconvey the said tract of land to the said Broussard for the price of \$6,000 cash; that said contract or option was to expire on November 1, 1913; that the said Broussard did not pay said sum, or any other sum, before or since said date, and that therefore said option has become null.

The petition further represented that under said agreement the right was reserved to said Broussard to reside on the premises during the year 1913, and to cultivate the land free of rent; that the petitioner paid said mortgages and judgment, and also the taxes due on said tract of land for the year 1912; that the said Broussard caused said counter letter to be recorded, and on October 29, 1913, he and his wife made and caused to be recorded an affidavit giving notice that they claimed 160 acres of the tract as a homestead; that the consideration of the act of sale from Broussard to Brooks was not more than \$4,000; that said pretended sale was a mere security or pignorative contract, and a counter letter to that effect was to be given to the said Broussard; that the counter letter as executed did not contain the true agreement between the parties; that the value of the property on the date of sale was fully \$9,000; that by the failure of Mrs. Broussard to sign the act of sale they were entitled to a homestead; that the pretended sale and counter letter were nothing but a mortgage, and they were entitled to said homestead or to \$2,000 out of a forced sale thereof.

Petitioner alleged that the recorded affidavit constituted a cloud on his title, and was without foundation in truth or in fact and, with the counter letter, should be canceled and erased from the records.

Plaintiff prayed for judgment recognizing him as the owner of the tract of land, and ordering him to be put in possession of the same, and further ordering the cancellation and erasure of the said counter letter and affidavit.

The answer contains a duplication of the statements of the affidavit, coupled with averments that Broussard was an ignorant unlettered man, not conversant with the English language; and that the act of sale was never explained or read to him, but he was told that the same contained all the verbal

agreements made between him and Brooks; and that he signed the same by reason thereof; and that as a matter of fact he did not owe the indebtedness assumed by Brooks.

The case was tried, and there was judgment in favor of the plaintiff as prayed for in his petition. The defendants have appealed.

On January 26, 1910, Homer Broussard mortgaged the premises in question to A. C. Lormand to secure a debt of \$3,500, represented by three notes of Broussard to his own order and by him indorsed in blank. In the act of mortgage Broussard and his wife waived their homestead rights in favor of Lormand, or any future holder of said notes.

On February 23, 1912, Broussard mortgaged the said premises to G. Howard Brooks to secure a debt of \$1,400, represented by the note of Broussard to his own order and by him indorsed in blank. This act of mortgage also contained a similar waiver of homestead rights.

On January 1, 1913, these four notes were due and unpaid, and also a judgment in favor of one Kaplan against Broussard for \$165, with interest and costs, less a credit of \$50.

On January 2, 1913, Homer Broussard by notarial act sold and delivered to George Howard Brooks the tract of land in controversy, for the consideration of the purchaser obligating and binding himself to pay and cancel the incumbrances then resting on said land, consisting of the mortgages and judgment aforesaid, and the taxes on the property for 1912, aggregating \$5,498.23. The vendor, not knowing how to write, signed the act with his ordinary mark.

In a subsequent act without date, but filed and recorded on May 15, 1913, Brooks bound himself to sell and transfer the same property to Homer Broussard "and no other," and "not subject to transfer under any circumstances whatsoever;" for the price of \$6,000 cash, subject to the following condition:

"This option and contract is to expire if the said purchase and payment is not made before November 1st, 1913, after which date the said appearer will be under no obligation to sell the said property to the said Homer Broussard on any terms or conditions whatever."

The act contained a further stipulation as follows:

"Appearer further declares that he is to allow the said Homer Broussard to reside on said place for the year 1913 and cultivate same free of any rent to be paid to the said appearer. This includes only rent as all supplies purchased from appearer by the said Homer Broussard are to be paid for the same as if this contract was not in existence."

[1, 2] The transaction on the face of the acts was a sale, with the privilege or option of repurchasing within a limited period of time, and for a higher price. In a sale with the right of redemption, the vendor reserves

to himself the power of taking back the thing sold by returning the price paid for it. Civil Code, 2567. If such right is not exercised within the time agreed on by the vendor, the purchaser's title becomes absolute. *Id.*, 2570. Hence, even considering the transaction as a sale with the right of redemption, a perfect legal title vested in the plaintiff on November 1, 1913.

The purpose of the sale was to provide for the payment of all the incumbrances on the property, and to secure to the vendor a delay of nine months, within which to pay the sum agreed upon as the price of redemption, and also to secure to the vendor the free use of the premises during the year 1913. Billed down, the transaction was a transfer of property to pay the debts of the vendor, with a stipulation of the right of redemption. In a similar case this court held that an act ostensibly a sale, the purchase of which was to extinguish a real indebtedness, is not a mortgage, but a giving in payment. See *Keough v. Meyers & Co.*, 43 La. Ann. 952, 9 South. 913. In that case, as in this, the vendor remained in possession of the property.

After the sale, the plaintiff mortgaged the property, and with the money thus secured paid the mortgage notes for \$3,500. Plaintiff had previously paid the interest on these notes and the taxes. The counter letter was not recorded until after this mortgage debt was paid and canceled.

The Kaplan judgment primed plaintiff's mortgage, and he made an arrangement with Kaplan's attorneys for further time to pay this judgment.

The counter letter was delivered to Broussard, and if he could not read its contents, he had ample opportunity to have it translated and read to him by some person of his own selection.

On October 29, 1913, on the third day before the expiration of the delay fixed for the redemption of the property, Broussard and his wife appeared before a notary public and affixed their marks to a lengthy act, reciting their homestead claim on the premises, and the sale of January 2, 1913, to Brooks for the purpose of securing him "for the debts assumed by him and the amount due him," which, as a matter of fact, were not more than \$4,000. The act further recited that at the time said sale was made, it was understood and agreed between the parties that the same was a mere security, whereby the said Brooks was to retain the property as security until he was paid the amount due him; that the said Brooks failed to furnish Broussard with a counter letter of the date of said sale containing the verbal agreements between them, but in February or later the said Brooks delivered to said Broussard an undated promise to sell to him said property on or before November 1, 1913, for the sum of \$6,000 cash, said promise to sell, however,

not containing the aforesaid verbal agreement between them.

The act further recited "that the said counter letter was recorded by said Broussard on May 15, 1913, in Conveyance Book V 2, pages 148 and 149, of the records of Acadia parish," that the consideration of said pretended sale was vile and inadequate, as the property was worth at the time fully the sum of \$9,000, and that the transaction was really a mortgage, and as Mrs. Broussard did not sign the pretended act of sale, they were entitled to a homestead under the law.

The recitals of this act show that Broussard understood the contents of the act of sale of January 2, 1913, and of the subsequent counter letter, and that his sole complaint, as late as October 29, 1913, was that a certain verbal agreement between him and Brooks had not been incorporated in the counter letter. In the face of the recitals of the act of October 29, 1913, the plea that Broussard did not understand the contents of said act of sale and of said counter letter is not worthy of consideration. His testimony as to the verbal agreement is contradicted by Brooks, who is corroborated by the counter letter, which was received, held, and recorded by Broussard without objection or protest.

The judge below evidently gave credit to the testimony of the plaintiff, and we see no good reasons for disturbing his finding. See *Franklin v. Sewall*, 110 La. 292, 34 South. 448.

[3] The parties in dealing with the property did not fix its sale value at more than \$8,000, and if, as averred by defendant, it was worth \$9,000, it sold for nearly two-thirds of its value. In the *Franklin Case* (110 La. 299, 34 South. 451) the court said: "True, the price was less than half the value of the property, but it was not insignificant."

[4] We are satisfied from the evidence that the act of sale and the counter letter represented the true contract and agreement between the parties, and that the plaintiff, as a legal consequence of the failure of Broussard to redeem, became the absolute owner of the property. Whatever homestead rights may have remained in Broussard and wife, after their waivers supra, were extinguished by the sale to Brooks. If the debts which Brooks assumed to pay were less than the amount expressed in the act of sale, he may be accountable to Broussard for the difference. If Brooks has not paid the Kaplan judgment, he and his property are bound, and the defendant has not been injured. In other words, the fact that the plaintiff may not have fully paid the price of the sale does not affect his title. No demand for the nullity of the sale for nonpayment of the price is before the court, nor could such a demand be urged without a *restitutio in integrum*. Judgment affirmed.

(38 Fla. 469)

OPITZ et al. v. MORGAN.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. EQUITY §362—PROCEDURE—MOTION TO DISMISS BILL.

A motion to dismiss a bill in equity for want of equity is not known to our practice.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 758-761; Dec. Dig. §362.]

2. EXECUTORS AND ADMINISTRATORS §469—ACCOUNTING—CIRCUIT COURTS—EQUITY JURISDICTION.

The circuit courts as courts of equity have jurisdiction to compel accounting and discovery and to give appropriate relief in cases of mismanagement of estates by administrators and executors, particularly where the probate courts cannot administer the relief necessary to complete justice in the premises.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2000-2099, 2012, 2013; Dec. Dig. §469.]

Appeal from Circuit Court, Brevard County; J. W. Perkins, Judge.

Suit by Paul Opitz and others against Frederick A. Morgan, as administrator with will annexed of William Treutler, deceased. From an order dismissing amended bill, complainants appeal. Reversed.

F. J. Webb, of Titusville, and Bisbee & Bedell, of Jacksonville, for appellants. Rufus M. Robbins and Minor S. Jones, both of Titusville, for appellee.

WHITFIELD, J. A bill in equity was brought by beneficiaries of an estate alleging various acts of mismanagement of the estate by the administrator with the will annexed and praying for an accounting, for discovery, and for general relief. A demurrer to the bill of complaint, on the ground that the relief sought could be had in the county judge's court in which court the settlement of the estate is pending, was sustained. An amended bill was filed, and on motion it was dismissed. The complainants appealed.

[1] A motion to dismiss a bill in equity for want of equity is not known to our practice. See *Hull v. Burr*, 61 Fla. 625, 55 South. 852.

[2] Under the Constitution of 1868, art. 7, § 8, as amended in 1875, which gave circuit courts "original jurisdiction in all cases in equity," and "appellate jurisdiction of matters pertaining to the probate jurisdiction and the estates and interests of minors in the county courts," it was held that a court of equity has concurrent jurisdiction with the probate court over the administration of the assets of deceased persons, and that the probate court may remove an administrator, but it cannot grant the same relief as a court of chancery. *Sanderson's Adm'r v. Sanderson*, 17 Fla. 820, text, 831.

Under the present Constitution the circuit courts—

"have exclusive original jurisdiction in all cases in equity * * * and supervision and appel-

late jurisdiction of matters arising before county judges pertaining to their probate jurisdiction, or to the estates and interests of minors."

It seems clear that the circuit courts as courts of equity have jurisdiction in all such cases as this, particularly where as in this case the probate court cannot administer the relief necessary to complete justice in the premises. This was the rule under the Constitution of 1868. See *Ritch v. Bellamy*, 14 Fla. 537.

The order appealed from is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 479)

FLANDERS v. GEORGIA S. & F. RY. CO.
(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. DEATH §11, 38, 41—RIGHT OF ACTION—STATUTE.

At common law no right of action existed in any one to recover damages for the death of a person. Any statutory right of action given to recover damages for the wrongful death of a person must be instituted and maintained by the persons and for the damages as stated in the statute conferring the right of action, and the action must be brought within the time fixed by the statute.

[Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 10, 15, 53, 56, 57, 79; Dec. Dig. §11, 38, 41.]

2. COMMERCE §8—STATES §4—SUPREMACY OF UNITED STATES LAWS.

Whenever a valid federal regulation covers a subject within the sphere of the federal law, it is paramount; and any and all conflicting state regulations of such subject are ipso facto wholly excluded therefrom. Otherwise the federal enactments would not be the supreme law of the land, and the federal authority would not be paramount within its sphere of operation.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8; *States*, Cent. Dig. § 2; Dec. Dig. §4.]

3. COMMERCE §8—ACTION FOR WRONGFUL DEATH—FEDERAL EMPLOYER'S LIABILITY ACT.

If the facts on which a cause of action must rest bring the cause within the operation of the the paramount federal statute, it is quite immaterial how or when the real facts developed in the progress of the cause.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8.]

4. COMMERCE §8—INTERSTATE COMMERCE—WHAT LAW GOVERNS.

When the facts of a case, whether developed by the pleadings or by the evidence, bring the federal law regulating interstate commerce into operation, such law is paramount and excludes all conflicting state regulations, even though the facts are commingled with other facts showing an intrastate operation at the same time by the same parties and by the means used by them.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8.]

5. COMMERCE §8—INJURY TO SERVANT—INTERSTATE COMMERCE—WHAT LAW GOVERNS.

Where a decedent was fatally injured while he was employed in interstate commerce as an employé of a "common carrier by railroad," as a proximate result of the negligence of the car-

rier, the dominant federal law controls and is exclusive, even though the decedent and the carrier were also engaged in intrastate commerce.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. § 5; Dec. Dig. §8.]

6. PLEADING §93—PROCEDURE—RIGHT OF ACTION.

Procedure is not of substance or at all material, where the facts on which the cause of action rests do not authorize the action as brought to be maintained.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 189, 190; Dec. Dig. §93.]

Error to Circuit Court, Duval County; Geo. Couper Gibbs, Judge.

Action by William E. Flanders against the Georgia Southern & Florida Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

W. M. Toomer, of Jacksonville, for plaintiff in error. John C. Cooper & Son, of Jacksonville, for defendant in error.

WHITFIELD, J. In his individual capacity Flanders brought an action against the railroad company under the General Statutes of 1906 to recover damages for mental pain and suffering and for loss of services caused by the alleged wrongful death of his minor child, Charles Emory Flanders; the declaration alleging that the decedent was an employé of the defendant "as a switchman on the railroad yards, Y's, and terminals of said company, at and near Palatka, Putnam county, Fla., his said death having resulted from the passing over his body of a locomotive engine of said defendant," at Palatka, and that such death was caused by stated negligence of the defendant railroad company. The defendant pleaded not guilty, and that the alleged injury was caused solely by the negligent acts of the decedent. Issue was joined on these pleas. Later, a special plea of assumed risk was filed. A demurrer to this special plea was overruled. By leave of court and over the objection of the plaintiff a further plea was filed, as follows:

"That the said Charles Emory Flanders, mentioned in plaintiff's declaration, at the time of the injury causing his death and immediately prior thereto, was employed as a switchman by this defendant, a common carrier by railroad, operating a line of railroad between and through the states of Georgia and Florida, and, among other points, between the city of Valdosta in the state of Georgia, and the city of Palatka in the state of Florida, and engaged in commerce between said states, and that the said Charles Emory Flanders, at the said time of the injuries causing his death, and immediately prior thereto, was acting as such switchman in the operating and handling of a certain train of the defendant running between the city of Valdosta in the state of Georgia, and the city of Palatka in the state of Florida, and which train had just arrived in the city of Palatka in the state of Florida, from the city of Valdosta in the state of Georgia, and was then and there being handled and operated in the city of Palatka, Fla., by employes of said defendant, including said Charles Emory Flanders, preparatory to its leaving the city of Palatka in the state of Florida for a continuous movement of said train

from said city of Palatka in the state of Florida, through portions of the state of Florida and through portions of the state of Georgia to the city of Valdosta in the state of Georgia, and that the said injuries of the said Charles Emory Flanders, resulting in his death, occurred while he was thus engaged in such commerce between the states of Georgia and Florida, and while the defendant was thus engaged in operating its said train between and through the said states of Georgia and Florida, and that under and by the terms of the act of Congress of the United States of America in such cases made and provided, the defendant is made liable to and the right of action, if any, is given to and vested in the personal representative of said Charles Emory Flanders, deceased, for the benefit of certain persons therein named, including the parents of the said Charles Emory Flanders, deceased, and that the plaintiff in this cause is the father of said Charles Emory Flanders, deceased, and that the plaintiff in this cause is not such personal representative of said Charles Emory Flanders, deceased, and this action is not brought or maintained by plaintiff as such representative of Charles E. Flanders, deceased, and that plaintiff has no right or authority to bring and maintain the said above-entitled action.

"And this the defendant is ready to verify. Wherefore it prays the judgment of the writ and declaration in this cause, and that the same may be quashed."

A demurrer to this last plea was overruled. The following stipulation was then filed:

"It is stipulated in the foregoing cause in open court at the trial of said cause that the plea filed by leave of court on this date and attached to notice of motion for leave to file same, which notice was filed February 13, 1914, correctly states the facts in regard to the matters and things set forth in said plea; and that upon motion of defendant's attorneys on the said stipulation and plea that the court shall instruct a verdict in favor of the defendant upon the above mentioned and described plea, filed February 16, 1914, by leave of court, and that the court shall act upon the said motion without the intervention of a jury."

Final judgment for the defendant was entered, and the plaintiff on writ of error contends that there was error in allowing the last or second additional plea to be filed, and in overruling the demurrers to the first and second additional pleas.

[1] At common law no right of action existed in any one to recover damages for the death of a person. Any statutory right of action given to recover damages for the wrongful death of a person must be instituted and maintained by the persons and for the damages as stated in the statute conferring the right of action; and the action must be brought within the time fixed by the statute.

[2] Article 6 of the Constitution of the United States provides that:

"This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

Whenever a valid federal regulation covers a subject within the sphere of the federal

law, it is paramount; and any and all conflicting state regulations of such subject are ipso facto wholly excluded therefrom. Otherwise the federal enactments would not be the supreme law of the land, and the federal authority would not be paramount within its sphere of operation. See *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151.

[3] It is contended that the federal regulation giving a right of action in case of a wrongful death for the recovery of damages "for the benefit of the surviving widow or husband and children of such employé; and, if none, then of such employé's parents; and, if none, then of the next of kin dependent upon such employé"—does not cover the same subject covered by the state law giving a right of action to the parent to recover damages for his mental pain and suffering and for loss of services caused by the wrongful death of his minor child. But within the sphere it operates, the federal law covers every case of wrongful death whether of an adult or a minor; and within the sphere of its operation the federal law is both paramount and exclusive. Therefore any regulation by the state that in any material way conflicts with the paramount federal law is excluded. *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638; *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *Michigan Cent. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176; *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159; *St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031.

The state law, in its terms and purpose, is plainly in conflict with the federal law, and the latter, within its proper sphere of action, wholly supersedes the former; and in cases to which the federal law applies it should be administered as the supreme law of the land to the exclusion of conflicting state regulations, as required by the federal Constitution.

The act of Congress approved April 22, 1908 (35 Stat. 65, c. 149) and the amendment thereto approved April 5, 1910 (36 Stat. 291, c. 143 [U. S. Comp. St. 1913, §§ 8657-8665]), give a right of action to recover damages for wrongful death solely to the "personal representative" of a deceased person who was at the time of his fatal injury an employé of a "common carrier by railroad" engaged in interstate commerce, and such employé was fatally injured while employed by such carrier in interstate commerce, by reason of "the negligence of any officers, agents or employes of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment," of the railroad carrier. The beneficiaries of this right of action are:

"The surviving widow or husband and children of such employé; and if none, then such employé's parents; and, if none, then the next of kin dependent upon such employé."

In all cases the action must be brought and maintained by the decedent's "personal representative," viz., his executor or administrator. By the terms of the statute:

"No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

This statute is paramount within its proper sphere of operation, and wholly excludes all conflicting state regulations of the subject covered. See *In re Employers' Liability Cases* (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Lamphere v. Oregon Railroad & Nav. Co.*, 196 Fed. 336, 116 C. C. A. 156, 47 L. R. A. (N. S.) 1, and notes.

The state statute, section 3147, General Statutes of 1906, giving a right of action to a father to recover damages for his mental pain and suffering and loss of services, caused by the wrongful death of his minor child, conflicts with the federal law and is superseded thereby, and its operation is wholly excluded when the following three circumstances concur: (1) Where the minor child is an employé of a "common carrier by railroad" engaged in interstate or foreign commerce, and (2) the fatal injury occurs while the decedent was employed by such carrier in interstate or foreign commerce, and (3) the death results "in whole or in part from the negligence of any of the officers, agents, or employés of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boat, wharves or other equipment" of the carrier.

The act of Congress giving this right of action not existing at common law, is paramount substantive law creating a new right and limiting in express terms its use and purposes, specifically designating its beneficiaries, and giving the right to maintain the action solely to the "personal representative" of a decedent, and excluding all conflicting state regulations. Such legislation therefore cannot be regarded as a mere regulation of judicial procedure; and its essential requirements cannot be affected by mere possible waivers resulting from the order of presenting pleadings or of procedure that might operate in a local forum to affect a right given by the local law and in controversy. This being so, if the facts on which the cause of action must rest bring the case within the operation of the paramount federal statute, it is quite immaterial how or when the real facts developed in the progress of the cause. *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *Grand Trunk Western Ry. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168.

The stipulation is that the last additional plea "correctly states the facts," and the plea distinctly avers that the decedent, "at the time of the injury causing his death and immediately prior thereto, was employed as a switchman by this defendant, a common carrier by railroad, operating a line of railroad between and through the states of Georgia and Florida, * * * and engaged in commerce between the states, and that the said Charles Flanders, at the said time of the injuries causing his death, and immediately prior thereto, was acting as such switchman in the operating and handling of a certain train of the defendant, * * * which train had just arrived in the city of Palatka, * * * Fla., from * * * Valdosta, * * * Ga., and was then and there being handled and operated in * * * Palatka, Fla., by the employés of said defendant, including said Charles Emory Flanders, preparatory to its leaving * * * Palatka, * * * Fla., for a continuous movement of said train * * * to Valdosta, * * * Ga."; and that the injuries complained of occurred while the decedent was thus engaged in interstate commerce and while the defendant was engaged in interstate commerce as stated; and that the action is not brought or maintained by the personal representative of the decedent as required by the act of Congress giving the right of action; and the conclusion stated is that the plaintiff has no right to bring and maintain the action. The stipulation establishes, for the purposes of this case, the facts that clearly show the decedent was fatally injured while he was employed in interstate commerce as an employé of the defendant a "common carrier by railroad," engaged in interstate commerce, and it is alleged in the declaration that the injury was caused by the stated negligence of the said carrier. It thus clearly appears that the federal law controls, and such law is exclusive even though the plea does not negative the doing of intrastate business also by the defendant and the decedent employé at the time of the fatal injury. *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

Under the federal law the administrator or executor alone may maintain the action and the recovery is in general for pecuniary damage only. See *M. C. Ry. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. Ed. 417, Ann. Cas. 1914C, 176.

[4, 5] When the facts of a case, whether developed by the pleadings or by the evidence, bring the federal law into operation, such law is paramount and excludes all conflicting state regulations, even though the facts are commingled with other facts showing an intrastate operation at the same time by the same parties and by the means used by them. See *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156; *Gulf, C. & S. F. Ry. Co. v. Lester* (Tex. Civ. App.) 149 S. W. 842; *East-*

ern Ry. Co. of New Mexico v. Ellis (Tex. Civ. App.) 153 S. W. 701; C., N. O. & T. P. Ry. v. Bonham (Tenn.) 171 S. W. 79.

In other words, a conflicting state regulation cannot operate in a sphere covered by a federal regulation where matters of state regulation are indissolubly commingled with those exclusively controlled by the paramount federal law, for the reason that in such cases the federal regulation is paramount and exclusive; the purpose of the federal law being to maintain uniformity and supremacy.

[6] The plaintiff contends that the defendant, having pleaded the general issue and assumption of risk, should not afterwards be allowed to interpose the last additional plea stating facts on which the right of the plaintiff to maintain the action as brought is challenged. But the plaintiff brought the action as he chose to do, and the defendant was called upon to respond to the action as brought. Besides this, the contention relates to mere procedure, and procedure is not of substance or at all material where the facts on which the cause of action rests do not authorize the action as brought to be maintained. The facts stated in the plea are expressly admitted to be true. Such facts clearly show that the federal law is applicable, while the action is brought under the state law. Being applicable to the facts of the case, the federal law by its paramount force and effect supersedes and excludes the state law. It is therefore immaterial whether other pleas had been filed or whether the last plea be regarded as being in abatement or in bar of the action brought under the state law. On the admitted facts and notwithstanding the previous pleas in the case, the state law is superseded and excluded by the paramount federal law, and the action brought under the state law cannot be maintained. In bringing the action the express requirements of the federal law were not complied with either as to the necessary party plaintiff or as to the nature of the damages claimed. The action therefore could not be maintained under the federal law, no appropriate and timely amendments being offered.

In other words, the plaintiff brings his action under the state law, and during the progress of the cause expressly admits facts that under a paramount federal law operate to exclude the state law, and without offering amendments to comply with the federal law the plaintiff stipulates that the court may act on the admitted facts thereby making ineffectual the action as brought.

The plaintiff apparently made no effort to bring himself within the mandatory requirements of the act of Congress that the "personal representative" alone shall bring and maintain the action (see Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134); and

as it is clear that, under the stipulated facts, there can be no recovery under the state law, there was no error in permitting the filing or in sustaining on demurrer the last additional plea.

It is unnecessary to consider the first additional plea, since the judgment entered on the stipulation was proper.

Judgment affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(83 Fla. 525)

CITY OF PALATKA v. PALATKA WATERWORKS.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

1. WATERS AND WATER COURSES ⇐203—WATER COMPANIES—ACTION FOR RENTALS—DEFENSE.

When the sole consideration for a contract to pay hydrant rentals, for hydrants not used, between a municipality and a waterworks company is the furnishing through the system "of a full and reliable supply of water for fire protection and other purposes," the municipality may plead, in an action for these rentals, that the company did not furnish through the system "a full and reliable supply of water for fire and other purposes."

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇐203.]

2. WATERS AND WATER COURSES ⇐203—WATER COMPANIES—ACTION FOR RENTALS—PLEADING—MUNICIPAL CORPORATIONS.

If the donee of a franchise from a municipality provides a loose test for its continuing obligation to pay hydrant rentals, the municipality may be pardoned for the use of general language in pleading the breach of this duty.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇐203.]

Error to Circuit Court, Putnam County; J. T. Wills, Judge.

Action by the Palatka Waterworks, a Florida corporation, against the City of Palatka, a municipal corporation. Judgment for plaintiff, and defendant brings error. Reversed.

Hilburn & Merryday, of Palatka, for plaintiff in error. Axtell & Rinehart, of Jacksonville, for defendant in error.

COCKRELL, J. The waterworks corporation recovered judgment against the city of Palatka for hydrant rentals, alleged to be due upon a contract. Passing certain practice points, the vital issue depends upon a plea tendered by the city, to which a demurrer was sustained.

[1] In the contract, the franchise granted by the city, there were numerous provisions as to the character of the system of waterworks to be established, the source of the water supply, the charges to be assessed against private consumers, the standpipe to

be erected, and other provisions going to the life and validity of the franchise. The city contracted for itself as follows:

"In consideration of the furnishing, through works as above described, of a full and reliable supply of water for fire protection, and other purposes, the city of Palatka hereby agrees to rent from the owner of said works, during the term of twenty-five (25) years (or until the city shall sooner purchase said works, as hereinafter provided), forty (40) double-nozzle fire hydrants, at an annual rental of fifty (\$50) dollars each, payable quarterly, the city to have and to exercise the right to rent additional hydrants at the same rate upon pipe extended as provided in section four (4) and at the rate of forty (\$40) dollars each per annum for additional hydrants set upon the aforesaid twenty-six thousand (26,000) feet of pipe."

In the language of this section, the city pleaded in defense of this action for the contract rentals of hydrants not used, that the plaintiff "failed to furnish through said works a full and reliable supply of water for fire protection and other purposes." We do not read this plea as denying the adequacy of the system devised, or of the source of the water supply, all provided in the contract, but only a failure, through the negligence of the waterworks company, to maintain and operate that system up to the contractual standard of "a full and reliable supply of water for fire and other purposes," the sole and continuing consideration for the city's obligation to pay hydrant rentals.

[2] If the language be rather general for good pleading, is not the blame to be laid upon the waterworks company, which selected this loose test, rather than upon the city, the donor of the franchise? Those seeking the franchise could have applied a more certain standard for the fulfillment of its contract, as by static pressure, quantity of water to be maintained in the standpipe or the like; but, as the city may have been looking to the future and the probable increase in growth and population, it may have been that a fixed standard would have been placed higher than the seekers of the franchise desired. However this may be, the sole consideration to hold the city liable for the hydrant rentals was the continuing and ever present duty of the waterworks company to maintain a full and reliable supply of water for fire protection, and other purposes.

In the case of *Wiley v. Inhabitants of Athol*, 150 Mass. 426, 23 N. E. 311, 6 L. R. A. 342, the furnishing of a full and ample supply of water for fire protection was not made the consideration of the agreement for hydrant rentals, but was one of the many conditions for the grant of the franchise, and was considered as an independent contract for the breach of which an action by the municipality would lie.

If the system devised and accepted by the city does not admit of a full and reliable supply of water, despite the diligence of the waterworks company, this may be set up by

way of a replication to the plea, but we do not see that the defendant was bound to anticipate such reply.

We think the plea specifies the condition precedent the performance of which the pleaders intend to contest, and that the demurrer should have been overruled.

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(83 Fla. 539)

LOGAN COAL & SUPPLY CO. v. HASTY.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨258—INJURY TO SERVANT—DECLARATION—SUFFICIENCY.

A declaration alleging in effect that the defendant master "failed to provide and maintain a safe and proper place for plaintiff employé to work, in that certain boards or timbers forming the floor of" the elevated structure, where the plaintiff employé was directed to go in the discharge of a duty assigned to him, "were not nailed or fastened in any manner," of which the defendant knew, or should have known, and that plaintiff was injured because an unfastened board "tilted and flew up" when plaintiff stepped on it, states a cause of action.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. ⇨258.]

2. DAMAGES ⇨158 — PERSONAL INJURY — PLEADING AND PROOF.

Under allegations showing serious personal injuries to the plaintiff, proper evidence as to his inability to work, because of such injuries, up to the time of the trial, may be admissible.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-444; Dec. Dig. ⇨158.]

3. TRIAL ⇨240—ARGUMENTATIVE INSTRUCTIONS—REFUSAL.

It is not error to refuse to give argumentative charges, particularly where proper charges are given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. ⇨240.]

4. TRIAL ⇨139 — DIRECTION OF VERDICT — RIGHT.

The authority to direct a verdict should not be so exercised as to deny to any one the organic right to a jury trial. If a verdict is directed for one party when, under the pleadings and evidence, the jury may legally find for the opposing party, the right to a jury trial secured by the Constitution may be thereby invaded.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇨139.]

5. TRIAL ⇨134 — DIRECTION OF VERDICT — RIGHT—NEW TRIAL.

After verdict rendered, the trial court may, for good cause, set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial should not be confounded with the more limited authority to direct a verdict for one party only, when a finding for the opposite party would be clearly wrong.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 317; Dec. Dig. ⇨134.]

6. APPEAL AND ERROR ⇐1001—MASTER AND SERVANT ⇐226 — VERDICT — EVIDENCE — INJURY TO SERVANT—ASSUMPTION OF RISK.

Risks resulting from the master's acts of negligence are not assumed by the servant; and where there is substantial evidence to sustain a verdict upon the theory that the master was negligent in directing the servant to go upon an elevated trestle, where unfastened boards had to be stepped on in performing the duty assigned, which duty was not aiding in constructing the trestle, and that the servant was not guilty of contributory negligence, and there is nothing to indicate that the jury were not governed by the evidence, the verdict will not be disturbed by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928–3934; Dec. Dig. ⇐1001; Master and Servant, Cent. Dig. §§ 659–667; Dec. Dig. ⇐226.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by Robert Hasty, a minor, by his next friend, against the Logan Coal & Supply Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Marks, Marks & Holt, of Jacksonville, for plaintiff in error. Dewell & Triplett, of Jacksonville, for defendant in error.

WHITFIELD, J. Robert Hasty, a minor, by his next friend, obtained a judgment for \$800 damages against the coal and supply company, for personal injuries, and the company took writ of error.

The amended declaration alleges that on September 6, 1913, the defendant was "maintaining, operating, and controlling certain coaling docks and yards; * * * that in connection with said coaling docks and yards defendant maintained and controlled a certain tramway or elevated trestle; * * * that plaintiff, a minor, was employed by defendant in the capacity of a laborer at its said coaling docks and yards; that the plaintiff was ordered and directed by defendant to do certain work on tramway or elevated trestle; that then and there it became and was the duty of defendant to see to it that said place was a proper and safe place for the plaintiff to work, but, notwithstanding defendant's duty in that behalf, said defendant failed to provide and maintain a safe and proper place for plaintiff to work, in that certain boards or timbers, forming the floor of said tramway or elevated trestle, were not nailed or fastened in any manner; that defendant knew, or by the exercise of reasonable care could have known, that said board was not nailed or fastened, * * * and that said tramway or elevated trestle was an unsafe place for the plaintiff, a minor, to work; that the unsafe condition of said tramway or elevated trestle was unknown to plaintiff; that plaintiff, in performance of orders and directions of defendant, went upon said tramway or elevated trestle; that, in attempting to carry out said orders of defendant, plaintiff stepped upon certain boards

or timber in the flooring of said tramway or elevated trestle; that said board or timber was not nailed or fastened; that said board or timber tilted and flew up, whereby plaintiff was thrown or caused plaintiff to fall to the ground below, a distance of 40 feet, more or less, whereby" plaintiff was injured, as specifically stated.

[1] There was no error in overruling the demurrer to the amended declaration. The gist of the allegations is that the defendant employer "failed to provide and maintain a safe and proper place for plaintiff employé to work, in that certain boards or timbers, forming the floor of" the place where the employé was directed to go in the discharge of the duty assigned to him, "were not nailed or fastened in any manner," and that plaintiff was injured because an unfastened board "tilted and flew up" when plaintiff stepped on it. While the declaration does not specifically allege that the defendant negligently or carelessly "failed to provide and maintain a safe and proper place" for the employé to work in, yet from the facts alleged it may reasonably be inferred that the injury was the result of the defendant's negligence. See *Consumers' Electric Light & St. R. Co. v. Pryor*, 44 Fla. 354, 32 South. 797; *German-American Lumber Co. v. Brock*, 55 Fla. 577, 46 South. 740.

The allegation that the place provided for the plaintiff to work was unsafe in the particulars stated is not so indefinite as to subject the declaration to demurrer. In alleging that the defendant "failed to provide," etc., the declaration does not attempt to state the degree of care the law required of the defendant; nor was it necessary for the degree of care involved in the defendant's duty in the premises to be stated. If there be indefiniteness in the allegation as to the plaintiff's youth when its bearing or other allegations is considered, the substance of the declaration, as stating a cause of action, is not thereby affected. Contributory negligence is defensive matter to be pleaded where, as in this case, it does not clearly appear in the declaration.

[2] Under the allegation that the "bones in plaintiff's right arm were broken and his right hip dislocated, and the plaintiff suffered internal injuries, * * * and is hindered and prevented from transacting and attending to his business, and is deprived of divers gains which he would otherwise have acquired, and the earning capacity of plaintiff has been greatly reduced by reason of being injured as aforesaid," proper evidence as to the plaintiff's inability to work up to the time of the trial may be admissible. In this case the court charged the jury not to take into consideration any sums claimed to have been lost by reason of being incapacitated from performing his usual work, because there was no evidence as to its value.

[3] There was no error in refusing to give argumentative charges "that it is contended by the defendant that it was not negligent in having loose boards upon the particular tramway; that the tramway * * * was in course of construction, etc. Defendant, therefore, contends that it was not negligent in allowing said loose boards to be and remain upon said trestle." The court submitted to the jury, under fair instruction, the question of the negligence of the defendant, as alleged under the circumstances in evidence, with appropriate instructions as to assumed risk and contributory negligence; and it is clear that, if any technical errors were committed in refusing requested charges, no harm could reasonably have resulted to the defendant therefrom. It is not necessary to consider other charges refused, even if they were not assigned as error en masse. *McCoggle v. State*, 41 Fla. 525, 26 South. 734.

[4] There was no error in refusing to direct a verdict for the defendant, since there is evidence to sustain a finding for the plaintiff. See *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435. The authority to direct a verdict should not be so exercised as to deny to any one the organic right to a jury trial. If a verdict is directed for one party, when, under the pleadings and evidence, the jury may legally find for the opposing party, the right to a jury trial secured by the Constitution may be thereby invaded. After verdict rendered, the trial court may for good cause set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial should not be confounded with the more limited authority to direct a verdict for one party, only when a finding for the opposite party would be clearly wrong. *Aberson v. A. C. L.*, 67 South. 44, decided this term.

Either party to an action at law for damages is entitled to have the issues of fact, that are duly presented therein, examined by a jury under appropriate instructions from the court; and consequently a verdict should not be directed by the court, unless the evidence is of such legal probative force or insufficiency as to require a verdict for one of the parties and to make a verdict for the other party unlawful. Where the evidence would be sufficient in law to sustain a verdict found for one party, but the evidence does not require a verdict for such party and make a finding for the other party clearly wrong, the case should, under the organic right to a jury trial, be submitted to a duly constituted jury, whose province it is to determine primarily the probative effect of the evidence in common-law actions, where there is room for a difference of opinion in regard thereto.

[5] After a verdict, a new trial may be granted by the trial court, on the ground that the evidence is insufficient to support it,

where it appears from the entire case that the verdict is against the manifest probative force of the evidence and the legal rights of the parties, thereby showing that the jury were not governed by the evidence or misapplied the law in making the finding. The plaintiff was directed to go upon an elevated trestle to remove coal that had dropped thereon, and the boards on which he had to walk were not fastened; the trestle not being completed.

[6] Pleas of not guilty, of contributory negligence, and of assumed risk were interposed, and evidence thereunder was introduced. There is evidence tending to show that the plaintiff assumed the risk of the loose planks, and that he directly contributed to his own injury. If the jury had so found, and the verdict sustained, there could be no recovery, as the common law has not been modified in this class of cases. See *Stearns & Culver Lumber Co. v. Fowler*, 58 Fla. 362, 50 South. 680. But risks resulting from the master's acts of negligence are not assumed by the servant; and as there is substantial evidence to sustain a verdict for the plaintiff upon the theory that the defendant master was negligent in directing the plaintiff to go upon the elevated trestle, where the unfastened boards had to be stepped on in performing the labor as directed, which labor was not aiding in constructing the trestle, and that no appreciable negligence of the plaintiff proximately contributed to the injury, it does not clearly appear that the verdict is contrary to the manifest probative force of the evidence and the legal rights of the parties, or that the jury were not governed by the evidence in finding for the plaintiff; therefore the verdict approved by the trial court in denying the motion for new trial will not be disturbed by the appellate court. Chapter 6521, Acts of 1913, is not applicable to a coaling dock and yard company.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 251, 532)

HERLONG et ux. v. SHEFFIELD.

(Supreme Court of Florida. Nov. 17, 1914.
On Petition for Rehearing, Dec. 22, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 934.—PRESUMPTION—
DECREE OF FORECLOSURE—RECORD.

Where the decree to enforce a mortgage lien states that "the court having computed the amount due the complainant upon the note and mortgage mentioned in said bill," and rendered a decree for the amount found to be "due from the defendants to the complainant," it will be assumed that the chancellor had the original note before him in making the computation; there being nothing in the transcript indicating the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3782; Dec. Dig. \Leftrightarrow 934.]

Appeal from Circuit Court, Columbia County; M. F. Horne, Judge.

Action between G. Y. Herlong and wife against J. C. Sheffield. From the judgment, the parties first mentioned appeal. Affirmed, and rehearing denied.

A. B. & C. C. Small, of Lake City, for appellants. Palmer & Palmer, of Lake City, for appellee.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid, and briefs of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellee do have and recover of and from the appellants his costs by him in this behalf expended, which costs are taxed at the sum of \$——, all of which is ordered to be certified to the court below.

On Petition for Rehearing.

The decrees appealed from herein were affirmed without opinion.

In a petition for rehearing it is suggested that the court overlooked the assignment of error that the chancellor entered the final decree to enforce the mortgage lien "without having before him the original note described in the bill and which the mortgage sought to be foreclosed had been given to secure." The court did not overlook the point. In the decree it is stated that:

"The court having computed the amount due the complainant upon the note and mortgage mentioned in said bill, which is taken as confessed by the defendants, and the court having found that there is due from the defendants to the complainant," etc.

The appellants do not bring here the evidence that was before the chancellor, but direct the clerk to copy into the transcript certain designated papers and documents not including the evidence, and direct the clerk to "omit all other papers not above enumerated, unless required by the appellee." It was not incumbent upon the appellee, but upon the appellants, to make the record show error, if any, in the trial of the cause. In view of the language of the decree, it cannot be assumed that the chancellor did not have, but it must be assumed that he did have, the original note before him, or that its absence was properly accounted for.

A rehearing is denied.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

FREMD v. HOGG et al.

(68 Fla. 331)

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS — 224— PRESENTATION OF CLAIM—LIMITATIONS.

A mortgage by an intestate not presented to the administrator within the statute of nonclaim is barred in the absence of payment of interest or other act of estoppel.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 768-788; Dec. Dig. —224.]

(Additional Syllabus by Editorial Staff.)

2. EXECUTORS AND ADMINISTRATORS — 39— "ASSET" OF ESTATE.

Real estate is an "asset" of the estate of a decedent.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 280, 285-294; Dec. Dig. —39.]

For other definitions, see Words and Phrases, First and Second Series, Assets.]

Appeal from Circuit Court, Palm Beach County; J. W. Perkins, Judge.

Bill by A. Y. W. Hogg and another, as executors and administrator, etc., of Annie K. Hogg, deceased, against William Fremd, as administrator of the estate of David Thomas, deceased. From an order overruling plea of nonclaim, defendant appeals. Reversed.

H. L. Bussey, of West Palm Beach, for appellant. F. L. Hemmings, of Ft. Pierce, for appellees.

COCKRELL, J. A bill to enforce a mortgage lien was filed in March, 1914, by the personal representative of Annie K. Hogg, deceased, against the heirs and administrator of the estate of David Thomas, deceased. The heirs did not defend, and decree pro confesso was entered against them. The administrator pleaded the statute of nonclaim, and appealed from an order overruling this plea.

It is admitted that the plea should have been sustained if the decision by this court in *Bush v. Adams*, 22 Fla. 177, is still the law of this state. We there ruled that:

"When by law lands are assets of an estate, and the mortgagor dies without having disposed of the parcel mortgaged, and it is a part of his estate, the statute of nonclaim, as usually framed, is as applicable in its requirements to the preservation of the lien of the mortgage against the parcel of land as it is to the preservation of the claim against the general assets in case the mortgage security should prove inadequate. * * * The statute applies to all 'debts and demands of whatever nature against the estate of any testator or intestate,' and the notice is to all 'creditors,' etc. The fact that a particular portion of the land of the decedent's estate has been pledged by him in his life to the payment of a debt or demand has not been made an exception upon the requirements of the statute as to presentation. * * * If it applies to judgments which are a lien upon all the real estate, as it does [citing authorities], we cannot see why it should not hold as to a lien upon

part of the land. The policy of the Legislature requires action upon the part of the creditor to preserve his claim."

It may be observed that by statute a mortgage is, both at law and in equity, a mere lien, and passes neither title nor possession.

It is argued, however, that this decision is at variance with the majority of holdings of the courts of the various states, and that there has been such a change in the statutes since that decision as to require or at least justify us in going over with that majority.

Prior to the adoption of the Revised Statutes of 1892, it was the law of this state that the administrator became, as such, entitled to the possession of the real estate of the intestate, and was the necessary party defendant in suits for the enforcement of mortgage liens, and, further, that he could in his own name maintain ejectment. By section 1917 of that Revision it was enacted:

"Real estate shall be liable for the debts of a decedent, but shall descend to the heir or devisee of such decedent, and remain in his possession until the executor or administrator shall take possession of or sell the same, under the order of the court, for the payment of debts, or until the same shall be sold under execution by any creditor of the decedent."

[2] Real estate of a decedent, however, continued to be equally liable with personal property to levy and sale under an execution upon any judgment against the estate—in other words, an "asset" of the estate—as it was at the time *Bush v. Adams* was decided. The material change is that a court order is necessary to place the personal representative in the possession of the realty, and therefore, until that is done the heirs or devisees are the necessary parties in actions or suits dependent upon possession and legal title. The salient feature of the *Bush v. Adams* decision that a mortgage is a debt or demand against the estate within the non-claim statute is not affected by the later statute.

The bill in this case shows that the mortgage was given in 1898, payable three years after date, and that no interest had been paid thereon, or any part of the principal debt; that the mortgagor died in 1906; that Fremd was appointed administrator in 1907, and had never been discharged. There is no suggestion of estoppel by the heirs in payment of interest or otherwise keeping the lien alive, and the plea shows that no presentation was made, and that the lands embraced in the mortgage are necessary to the payment of the debts of the estate, other than this mortgage claim.

In the language of *Bush v. Adams*, the failure to present the claim does not merely postpone its payment to those claims presented, but it virtually destroys it, and operates pro tanto to the advantage of the beneficiaries of the estate.

The plea presented a defense to the suit, and should have been sustained.

Order reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 365)

MILLER et al. v. CROSBY.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS — 222 —
PRESENTATION OF CLAIMS — PRESUMPTION —
LIMITATIONS.

The payment of interest upon a mortgage executed by a decedent may, in effect, dispense with or assume a presentation of the mortgage claim within the statutory period, when suit is brought against the heirs and personal representatives of the decedent to enforce the mortgage lien.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 764-766; Dec. Dig. ¶222.]

Appeal from Circuit Court, Putnam County; J. T. Wills, Judge.

Suit by Martha W. Crosby against Mary Scott Miller, as administratrix, and others. From an order overruling demurrer to the bill, defendants appeal. Affirmed.

Hilburn & Merryday, of Palatka, for appellants. E. E. Haskell, of Palatka, for appellee.

WHITFIELD, J. This appeal is from an order overruling a demurrer to a bill of complaint brought against the administratrix and the heirs of the mortgagor to enforce a mortgage lien upon real estate executed in 1890 to secure the payment of a five-year note. The bill filed August 6, 1912, shows that the mortgagee died intestate prior to July 10, 1894, and alleges that no administration was had upon his estate; that he had no debts, and that his heirs made division of his entire estate amicably among themselves, making administration unnecessary; that the complainant became and is the owner of the note and mortgage by assignment. The grounds of the demurrer are that the complainant is not entitled to maintain the suit, and that the suit is barred by the statute of limitations.

It appears from the bill of complaint that the mortgagee died more than ten years before this suit was brought, and that no letters of administration on his estate were taken out, which, under section 1715, General Statutes of 1906, bars all his creditors, and this proceeding is in equity to enforce a specific mortgage lien upon lands. Under these circumstances, the rule for the benefit of creditors announced in *Bradley v. Raulerson*, 66 Fla. 601, 64 South. 237, requiring a particular showing to enable an heir to maintain an action at law on a note given to a decedent, is not applicable here. The bill of

complaint alleges an assignment of the mortgage to the complainant from one to whom it had been assigned by the heirs of the mortgagee, and, as all creditors of the mortgagee's estate are barred by statute after the lapse of ten years from the death of the mortgagee when no letters of administration on his estate had been taken out, the allegations are sufficient as against the demurrer to authorize the complainant to maintain this suit to enforce the mortgage lien.

The note is made a part of the bill of complaint, and indorsements thereon show that payments were made on the mortgage indebtedness in 1891, 1892, 1893, 1894, 1895, 1899, 1904, 1907, 1909, and on October 8, 1910. The administrator of the mortgagor's estate qualified March 16, 1907. Even if the mortgage here is a debt or demand against the mortgagor's estate which is by statute barred after two years from the first publication by the administrator of statutory notice to creditors, if not presented to the administrator within that time, the payments of the mortgage debt in the years 1907, 1909, and 1910 show a presentation of the mortgage claim within the statutory period that is sufficient at least for the purposes of an adjudication on the demurrer to the bill. This suit is against the heirs, as well as the administratrix; therefore section 1715, par. 2, Gen. Stats. 1906, does not control, even if the suit is not one "relating to land." See *Fremd, Adm'r, v. Hogg*, 67 South. 75, this day decided.

The order appealed from is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 548)

STATE ex rel. BAAS v. MCKINNON, Superintendent of Public Instruction.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

MANDAMUS \S 102 — WARRANTS — DUTY TO COUNTERSIGN—COUNTY SUPERINTENDENT.

The county superintendent of public instruction may by mandamus be required to countersign a warrant duly ordered and issued by the county board of public instruction, in a proper amount for the earned salary of a teacher, being a proper purpose, and there is no fraud or abuse of authority in the action of the board.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 217-219, 221, 222; Dec. Dig. \S 102.]

Error to Circuit Court, Orange County; J. W. Perkins, Judge.

Mandamus by the State, on the relation of Jennie E. Baas, against J. F. McKinnon, as Superintendent of Public Instruction of Orange County. Alternative writ dismissed, and relator brings error. Reversed and remanded, with directions to issue peremptory writ.

Davis & Giles, of Orlando, for plaintiff in error. Jones & Jones, of Orlando, for defendant in error.

WHITFIELD, J. The relator obtained an alternative writ of mandamus requiring the county superintendent of public instruction to countersign a warrant issued by the county board of public instruction to the relator for her salary as a teacher in the public schools of Orange county for the month of April, 1914, or to show cause for not doing so. At a hearing had on the alternative writ, the return, and affidavits received as evidence, the writ was dismissed, and the relator took writ of error.

The alternative writ alleges that the relator was duly employed as a teacher by the county board of public instruction; that she fully and faithfully performed her contract and duties as teacher, and was actually engaged in her school duties from 8 o'clock in the morning until 1 o'clock in the afternoon of each school day during the month of April, 1914; that the county board of public instruction determined that there was due relator the sum of \$65, and that a warrant should be drawn in favor of relator for \$65, covering her salary for the school month of April, 1914, under the terms of her contract; that said warrant was thereupon duly drawn and signed by the chairman of the board of public instruction for and on behalf of said board; that the county superintendent of public instruction failed and refused to countersign said warrant, as it was his duty to do, though requested so to do; that the treasurer of the county failed and refused to honor and pay said warrant because of the fact that it had not been countersigned by the respondent as secretary of the county board of public instruction and county superintendent. The writ commanded the respondent forthwith to countersign the warrant or to show cause for not doing so. A return was filed by the respondent, which, among other matters not material here, averred that the county board of public instruction in September, 1913, fixed and determined a school day to consist of five hours exclusive of recesses; that, the school rooms being insufficient to accommodate the attendance, a portion of the particular grade were taught from 8 a. m. to 12 m. and the other portion from 12 m. to 4 p. m.; that the grade taught by relator was not taught "as a grade" more than four hours a day for each portion of the grade as divided into morning and afternoon sections; that the law requires five hours of teaching a day; that though the teacher was required to remain till 1 o'clock when the class was dismissed at 12 m., and "that such was but an evasion and subterfuge, and not a compliance with the law that the pupils in attendance upon the public school should have for each school day five hours exclusive of recess-

es"; that respondent protested to the board against the curtailed hours of instruction as stated; that respondent "has declined under the discretion vested in him by the state and regulations of the department of education, which places in him special discretion in the disbursement of the public school funds," to see that the interests of the county are properly guarded and its rights secured in the making and performance of every contract for the construction of school buildings, or for other purposes; and that all moneys apportioned to or raised by the county are applied to the objects for which they were granted or raised. Section 351, par. 9, Gen. Stats. The respondent further avers:

"That in passing upon the warrants granted by the board, he had no vote, but that, in his vested powers as superintendent, the discretion of disbursement was placed on him."

It is also averred that the relator has adequate remedy in an action of assumpsit. Evidence in the form of affidavits was considered by the court.

An affidavit of the principal of the school states that the relator "actually taught for the full period of five hours each school day for and during the month of April aforesaid; that she has fully and faithfully discharged each and every duty and service incumbent upon her to perform as such teacher."

An affidavit of the relator states that:

"She actually taught and instructed pupils who were backward in their studies, from 12 until 1; that the number of pupils so taught during this hour ranged from 3 to approximately 20; that at no time during the month of April did she fail or refuse to perform such duties as were assigned her, and on no occasion did she give up these duties until after 1 o'clock."

An affidavit of A. B. Johnson, one of the trustees of the school subdistrict, states in effect that the board was unable to furnish sufficient rooms for the pupils in attendance at the school, and that to meet this emergency it was decided by the board, the trustees, and the principal of the school to have a double session, one portion of a grade to be taught from 8 to 12 and the other from 12 to 4, "but the teacher of the morning grade to remain for an hour after the grade had been dismissed, to coach such pupils in her section as were delinquent and needed additional instruction, and to assist as far as practicable the teacher for the grade of the second division, and the teacher of the second division reported for duty at 11 in the morning for the same purpose, so that each and every teacher was actually engaged for five full hours in the discharge of her duties as teacher." An affidavit of the respondent states:

"That if said teachers, including Miss Baas, performed any other services between 12 m. and 5 p. m., such services were not contemplated to be performed during the 5 hours exclusive of recesses named in their and her contract, but were done in order to fill out the five hours in attendance on the schools, and not as a part of the 5 hours bargained to be given the grade as a whole."

"Deponent also asked the principal of the

school if the arrangement by which the teachers of any division of grade 4 came to the school-house one hour before the first division was dismissed and whereby the teacher of the morning division remained one hour after her division was dismissed on pretext of coaching delinquent pupils was not for the purpose of filling out the 5 hours required by the law and their contract. To this inquiry the said principal made an evasive answer, saying that he did it for the good of the school." "That he protested against the four-hour double session plan as being illegal from the time the same was proposed in June, 1913, and on the opening day of school, in conference referred to by Johnson, affiant did protest and urged that rooms be obtained outside of school building, and that rooms suitable for the purpose could by proper diligence be obtained. That, as soon as affiant learned of the plan to call the afternoon teacher early by one hour and keep the morning teacher an hour after dismissal of her grade, he declared it to be an interruption of the school work and was a mere subterfuge to make out the five hours of school prescribed by statute."

In *State ex rel. v. Graham*, 64 South. 945, it was held that the county treasurer would not by mandamus be required to pay a warrant drawn by the county board of public instruction and signed by the chairman of such board, when the warrant had not been countersigned by the county superintendent of public instruction as is required by a regulation of the State School Department. The opinion in that case properly states that the county superintendent "is by law ex officio secretary of the county board of public instruction, with large powers and duties in the administration of the county school funds," and that the regulation requiring "that all warrants issued by the county school board to be countersigned by the county superintendent of public instruction as secretary of such board, and as county superintendent," is "a salutary regulation having the force of law within its proper sphere of operation."

But this does not indicate a view of the law that a county superintendent of public instruction may not by mandamus be required to countersign a warrant duly ordered and issued by the county board of public instruction for a proper disbursement; there being no fraud, illegality, or abuse of authority in the action of the board.

The Constitution provides that the county school fund "shall be disbursed by the county board of public instruction solely for the maintenance and support of public free schools." Section 9, art. 12.

Section 6 of article 8 authorizes the election in each county of a superintendent of public instruction, and provides that "their powers, duties and compensation shall be prescribed by law." The statute provides for the election of a county board of public instruction and authorizes the board "to employ teachers for every school in the county, and to contract with and pay the same for their services," and "to audit and pay all accounts due by the board of public instruction," and "to perform all acts reasonable and necessary for the promotion of the edu-

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cational interests of the county." Section 347, Gen. Stats. 1906.

The county superintendent of public instruction is by statute made the secretary of the county board, and is authorized "to see that the interests of the county are properly guarded and its rights secured in the making and performance of every contract for the construction of school buildings, or for other purposes; and that all moneys apportioned to or raised by the county are applied to the objects for which they were granted or raised." See sections 345 and 351.

The county superintendent has no vote in the disbursements of funds, and consequently has no primary or ultimate responsibility for such disbursements. It is his ministerial duty to countersign all warrants duly ordered and issued by the county board of public instruction when there is no fraud or abuse of authority or other illegal action in issuing such warrants. This being a ministerial duty involving no discretion, it may be enforced by mandamus.

In this case it clearly appears that the warrant was legally issued by the county board for a proper purpose, that the salary had been earned and was due, and that the refusal of the respondent to countersign the warrant is not justified. The judgment of the county superintendent that by remaining at the school for an hour after her grade is dismissed, engaged in coaching such pupils in her grade as are delinquent and needed additional instruction, or in other school duties assigned to her, the teacher is not performing the five hours of services contemplated by her contract, does not affect the validity or the propriety of the judgment and action of the county board; there being no fraud or abuse of authority in the action of the board. Nothing in the respondent's return or evidence or in the transcript shows any lack or abuse of authority by the issuance of the warrant by the board or shows any valid reason why the respondent should not be required to countersign the warrant in the discharge of a plain legal duty involving no discretion.

The judgment dismissing the alternative writ of mandamus is reversed, and the cause is remanded, with directions to issue the peremptory writ.

SHACKLEFORD, C. J., and COCKRELL and HOCKER, JJ., concur.

TAYLOR, J., takes no part.

CARLTON v. MORGAN.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

TRIAL \Leftrightarrow 139—DIRECTION OF VERDICT—EVIDENCE.

It is error to direct a verdict for the defendant where an action of assumpsit is brought by a minor by his next friend, who is the minor's guardian, when there is evidence that the debt in controversy is due to the minor.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 865; Dec. Dig. \Leftrightarrow 139.]

Error to Circuit Court, De Soto County; M. F. Horne, Judge.

Action by Russell Carlton, a minor, by his next friend, W. H. Simmons, against C. C. Morgan. Judgment for defendant, and plaintiff brings error. Reversed.

R. E. Brown, of Arcadia, and J. B. Singeltary, of Bradentown, for plaintiff in error. Leitner & Leitner, of Arcadia, for defendant in error.

WHITFIELD, J. An action of assumpsit was brought by W. H. Simmons, as guardian for Russell Carlton, against C. C. Morgan. A demurrer to the declaration was filed, one of the grounds of the demurrer being that "the said suit should be brought in the name of Russell Carlton, and not W. H. Simmons, if Carlton is the proper party." An amended declaration was filed, making the party plaintiff "Russell Carlton, by W. H. Simmons, his next friend." Appropriate amendments of the process were made. A plea of never was indebted was filed. There was positive evidence that the indebtedness of the defendant was the property of the plaintiff, a minor, and that the minor's next friend in this action is the minor's guardian. The court on motion of the defendant directed a verdict for the defendant, on the ground "that the plaintiff has not proven his title to the fund in controversy." This was error. Even if the defendant is not estopped, in challenging by demurrer the right of the guardian to maintain the action, from contesting the right of the plaintiff to maintain the action in his own name by next friend, the minor is the real party in interest, suing by next friend, who is his guardian, and the guardian may collect a judgment obtained in the name of the ward.

The judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

\Leftrightarrow For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(68 Fla. 338)

COLLINS v. PLANT.**PLANT v. COLLINS.**(Supreme Court of Florida. Nov. 24, 1914.
Rehearing Denied Dec. 22, 1914.)*(Syllabus by the Court.)***1. AGRICULTURE — ACTION FOR FERTILIZERS—DEFENSE.**

A plea to an action for fertilizers is bad if based upon a statute penalizing unlabeled fertilizers by seizure, and not making the failure to label defensive matter.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. —7.]

2. JUDGMENT — CONFORMITY TO PLEADINGS—RIGHT TO RELIEF.

Courts will not be held in error for refusing a right of action not pleaded.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 437; Dec. Dig. —251.]

3. AGRICULTURE — FERTILIZERS — PRIMA FACIE EVIDENCE—VALIDITY OF STATUTE.

An analysis by the state chemist may be made prima facie evidence of the ingredients of a bag of fertilizer, even though the legislation fail to provide that samples be taken from various parts of the bag; the identity of the sample being safeguarded.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. —7.]

4. AGRICULTURE — ACTION FOR FERTILIZERS—EVIDENCE.

Evidence as to the analysis of unsold fertilizer may be refused upon an issue as to the analysis of fertilizer that was sold.

[Ed. Note.—For other cases, see Agriculture, Cent. Dig. §§ 13, 14; Dec. Dig. —7.]

Error to Circuit Court, Santa Rosa County; J. Emmet Wolfe, Judge.

Action by S. G. Collins against J. H. Plant. Judgment for plaintiff, and each party brings error. Affirmed.

J. P. Stokes, of Pensacola, and J. T. Wiggins, of Milton, for plaintiff in error. McGeachy & Lewis, of Milton, for defendant in error.

COCKRELL, J. In an action upon the common counts for commercial fertilizers, Collins recovered judgment against Plant in the sum of \$125, with interest and costs. Each party takes separate writs of error to this judgment.

Taking up first the assignments of error by Plant, they are all based upon the overruling of certain pleas filed by him.

[1] Special plea numbered 2 is based upon chapter 5660, Laws of 1907. This act requires stamped labels on certain commercial fertilizers, subjecting the unlabeled to a liability for seizure by designated public officials, under a procedure hedged about with many details. There was no attempted seizure in

this case, and the statute does not make the failure to so label defensive matter.

[2] The other pleas overruled were more carefully and fully covered by plea 5, upon which trial was had, and we see no harmful error here. They were pleaded only as a set-off, and no recovery against the plaintiff was asked. We fail to find in the record brought here by Plant any ruling by the court that denies to him any claim to a cross-action he might have had against Collins.

[3] As to the contentions of Collins that he was injured by the court's ruling, there was apparently an admission that the defendant made out a prima facie defense, under Gen. Stats. §§ 1271, 1272, by showing an analysis by the state chemist upon samples submitted to him that the guaranteed analysis affixed to the bags of fertilizer sold to Plant fell far short in essential ingredients. The point made is that the statute does not sufficiently protect the seller, in that it does not require that the samples be taken in sufficient quantity, or rather from different parts of the bag. It does provide safeguards in the identity of the sample to be analyzed, and his certificate is made at most competent, but by no means exclusive evidence, as to the real analysis. He is subject to the ordinary rules of cross-examination and contradiction, and the trained expert of the state may be trusted to some prima facies of accuracy and fairness. The courts may well remit to the Legislature the determination of what may constitute prima facie a fair sample to be taken from a sack of fertilizer. If by reason of exposure to air there be a deterioration in the constituent elements of the fertilizer in an inconsequential proportion of the fertilizer, and the sample to be analyzed be taken from that inconsequential part, the analysis might for that reason be rejected, but we are not met with such condition.

[4] There was no error in refusing an analysis of unsold fertilizer. Too many elements of uncertainty suggest themselves to the admissibility of such evidence. The question to be determined is whether the fertilizer sold came up to the guaranty, and the plaintiff was given a fair opportunity to test that issue.

The plaintiff recovered on his commission accounts for so much of the fertilizer as accorded with the analysis, and failed in his recovery as to that below the analysis.

For other cases in this court upon this statute, see *Braxton v. Liddon*, 49 Fla. 280, 38 South. 717, and *Goulding Fertilizer Co. v. Johnson*, 65 Fla. 195, 61 South. 441.

We find no error upon either record, and the judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

—For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(68 Fla. 365)

MARSH et al. v. MARSH et al.

(Supreme Court of Florida. Nov. 24, 1914.)

*(Syllabus by the Court.)*PLEADING \S 362—STRIKING MATERIAL MATTER.

An order striking from a bill of complaint matters that have some proper relation to the subject-matter of the litigation is erroneous.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1147-1155; Dec. Dig. \S 362.]

Appeal from Circuit Court, Volusia County; James W. Perkins, Judge.

Bill by Albert S. J. Marsh and another against J. E. J. Marsh and others. From an order sustaining "exceptions" taken to the bill, complainants appeal. Reversed.

Stewart & Bly and Tom B. Stewart, all of De Land, for appellants. Landis, Fish & Hull, of De Land, for appellees.

WHITFIELD, J. This appeal is from an order sustaining "exceptions" taken to a bill of complaint. The bill seeks to vacate an order confirming a sale of lands made in a partition proceeding on the grounds of fraudulent conduct on the part of one of the parties to the suit for partition, which resulted in a sale of the property at a grossly inadequate price far below its real value at the time.

The paragraphs of the bill of complaint that were expunged by sustaining the exceptions are not scandalous, and it cannot be said that they are wholly immaterial or impertinent, since they give particulars of the fraudulent conduct on which the relief is sought. Without considering the propriety of the procedure in taking the "exceptions" to the bill of complaint, the order which in effect struck from the bill the designated matters set up as a basis for the relief sought is erroneous and is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 406)

BELL, Sheriff, v. ELECTRIC APPLIANCE CO. et al.

(Supreme Court of Florida. Nov. 25, 1914.
Rehearing Denied Dec. 22, 1914.)

*(Syllabus by the Court.)*EXECUTION \S 268—SALE SUBJECT TO LIENS—INDEMNIFYING BOND.

Where an execution sale is made subject to liens, with notice that purchasers would be required to give bond to indemnify the sheriff against claims of such lienholders, the sheriff should not be required to deliver the property to purchasers without bond, particularly when the lienholders are not parties to the proceeding against the sheriff.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 762-767; Dec. Dig. \S 268.]

Error to Circuit Court, Colton County; D. J. Jones, Judge.

Action by the Electric Appliance Company and others against J. M. Bell, as Sheriff. Judgment for plaintiffs, and defendant brings error. Reversed.

S. K. Gillis, of De Funiak Springs, for plaintiff in error. W. T. Bludworth, of De Funiak Springs, for defendants in error.

WHITFIELD, J. Executions were levied upon merchandise and other property covered by stated alleged liens, and sales were made subject to the liens, with notice that purchasers would be required to give bond. The sheriff refused to deliver the property sold to a purchaser, unless the purchaser would execute a bond to secure the alleged lienholders. The court ordered the sheriff to deliver the property without first requiring a bond, and the sheriff took writ of error. As the sale was made subject to the liens, and as the lienholders were not parties to the proceeding in which the sheriff was ruled to deliver the property to the purchaser without a bond, and as the sheriff should not thus be subjected to responsibility to the lienholders for not taking a bond to secure the liens, the order requiring the sheriff to deliver the goods to the purchasers without requiring a bond is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 244)

WOOD v. WORCH et al.

(Supreme Court of Florida. Nov. 10, 1914.)

*(Syllabus by the Court.)*COUNTIES \S 59—OFFICERS—NEGLIGENCE—PERSONAL LIABILITY—SUFFICIENCY OF EVIDENCE.

In an action against a county commissioner personally for alleged negligence in giving directions for the burning in his absence of brush by laborers who are working on the public highways of the county, the proofs are held to be insufficient to sustain a verdict against the defendant county commissioner.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 83, 84; Dec. Dig. \S 59.]

Error to Circuit Court, Pinellas County; F. M. Robles, Judge.

Action by Caroline Worch and others against F. A. Wood. Judgment for plaintiffs, and defendant brings error. Reversed.

W. R. Roland, of St. Petersburg, and H. P. Baya, of Tampa, for plaintiff in error. Macfarlane & Chancey, of Tampa, for defendants in error.

WHITFIELD, J. The declaration herein alleges, in effect, that the defendant F. A. Wood, a county commissioner, on a stated day, had the care and superintendence of a certain public highway, and "had in his employ as such county commissioner aforesaid

divers laborers, servants, and employes working along, on, and upon said public highway, at or near where the same traverses and abuts plaintiff's premises; that the trees and undergrowth taken from said highway had become highly combustible and inflammable, which fact was known to the said defendant, or should have been known to him; that the plaintiffs' said dwelling house was located about 50 or 60 feet from said highway; that the said defendant, through his said laborers, servants, and employes, had permitted the trees and underbrush, taken from said highway, to accumulate on or along said highway, and in close proximity to the plaintiffs' said dwelling house, and to become highly combustible and inflammable, as aforesaid; that on said date there was a strong and brisk wind blowing in the direction of plaintiffs' said dwelling house from the trees and underbrush; that the said defendant knew, or ought to have known, that the burning of said combustible and inflammable trees and underbrush, on said date, on or near said highway, and in close proximity to plaintiffs' said dwelling house, would cause plaintiffs' said dwelling house to become ignited and burned, yet the said defendant, well knowing the premises, carelessly, negligently, and from a reckless disregard of consequences, directed and instructed his said laborers, servants, and employes to pile into a heap said combustible and inflammable trees and underbrush, and to burn the same, at a point about 60 feet away from plaintiffs' said dwelling house; that defendant's said laborers, servants, and employes, in obedience to the instructions received by them from said defendant, piled and burned said combustible and inflammable trees and underbrush; and that from the burning of the same, sparks, embers, and coals of fire were emitted therefrom, and carried by the wind to, against, and upon the roof of plaintiffs' said dwelling house, thus and thereby causing said dwelling house to become ignited; and that said dwelling house was burned and totally destroyed with its contents.

A demurrer to the declaration was overruled, and trial was had on a plea of not guilty, which, under circuit court rule 71, "shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by defendant, and not of the facts stated in the inducement, and no other defense than such denial shall be admissible under that plea." Judgment was rendered for the plaintiffs, and the defendant took writ of error. The contentions here are that the court erred in overruling the demurrer to the declaration, and in denying a motion for a new trial.

While it may be lawful under the allegations of the declaration to prove a cause of action against the defendant, the proofs ad-

duced do not show liability of the defendant, who was acting in his official capacity in giving to his employes directions for burning brush in working on the public road in his absence. There is no statutory presumption of negligence arising from the fire loss in this case. The facts and circumstances in evidence do not fairly raise such a presumption, and the doctrine of *res ipsa loquitur* is not applicable here, even if the burden of proof would be thereby affected or shifted. See *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 58 L. Ed. 815.

In recognition of the degree of negligence required to be shown in such cases as this, the plaintiffs allege that the defendant, "well knowing the premises (the facts stated in the inducement), carelessly, negligently, and from a reckless disregard of consequences, directed and instructed his said laborers, servants, and employes to pile into a heap said combustible and inflammable trees and underbrush, and to burn the same, at a point about 60 feet away from plaintiffs' said dwelling house; that defendant's said laborers, servants, and employes, in obedience to the instructions received by them from the defendant, piled and burned said combustible and inflammable trees and underbrush; and that from the burning of the same, sparks, embers, and coals of fire were emitted therefrom, and, carried by the wind," burned plaintiffs' property. Upon the plaintiffs was the burden of proving the alleged character and degree of negligence on the part of the defendant, as well as other essential elements of the cause of action alleged. The evidence is that the defendant told the employes "to burn the trash in the road or close to the road," saying, "You better clean up the brush, trash, and burn it to-day"; that the wind was "blowing a little," "just a light breeze"; that defendant did not that day tell the employes to be careful, but "he had told us time and again to be careful with it, but I don't remember his saying it that day"; that the "brush pile was on the opposite side from this house"; that the road is 80 feet wide, the house was about 27 feet from the fence; that the defendant was not present when the fire was set to the brush or when the house was burned.

This evidence does not show any act or omission on the part of the defendant, an officer in the discharge of a public duty, that indicates "a reckless disregard of consequences," in giving instructions to employes on the public highway as is alleged. The defendant was not present and did nothing to contribute to the plaintiffs' loss, and the evidence does not show an unlawful or a reckless, or even a careless, giving of orders for the guidance of those working on the public highway, whose act is stated to be the direct cause of the alleged injury.

The evidence being insufficient in law to

sustain the verdict, the judgment is reversed, and a new trial is allowed.

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 336)

MARLOW v. STATE.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

HOMICIDE \S 250—MANSLAUGHTER—SUFFICIENCY OF EVIDENCE.

The evidence examined and found insufficient to support the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. \S 250.]

Error to Circuit Court, Seminole County; J. W. Perkins, Judge.

Jesse Marlow was convicted of manslaughter, and brings error. Reversed.

A. K. Powers, of Sanford, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. Jesse Marlow was convicted of manslaughter, and takes writ of error.

From the state's evidence it appears that about half past 8 o'clock one night four negroes went together to whip another negro, whom they disliked. When they came upon him, he started to run, whereupon three of them shot, and he was killed. It does not appear, however, that Jesse Marlow was present; in fact, irrespective of the evidence of himself and other witnesses testifying for him, making out a perfect alibi, the evidence of the state clearly indicates that he was not present. The only testimony approaching proof of guilt is that, several hours before the shooting, Jesse was in the company of those who are supposed to have done the shooting, when one of them was discussing the plan of whipping the deceased; and upon the suggestion that another negro, who testified to the conversation, be invited to participate in the whipping, Jesse interposed an objection that he was timid and might give them away. This is, however, short of proof that Jesse instigated and encouraged the others to commit the homicide, as an accessory before the fact. So far as we are advised, the guilty parties armed themselves after Jesse had separated from them, and that he knew nothing of the actual encounter until it was all over. The deceased, Tom Mumford, had been whipped before by the negroes of the little community for certain supposed peccadillos, and, so far as the conversation above alluded to, the conspiracy, to which Jesse was a part, went no further in purpose. Had he been present, a different law might apply, but we cannot hold that his remark to the witness, who

did not join the conspirators, was an incitement to the commission of the homicide.

There is an enormous mass of wholly irrelevant testimony in this case, so extensive in fact that the jury must have been misled by its quantity, and therefore lost sight of the real issue before them.

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 306)

WELBORN et al. v. SAWYER.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 1039 — HARMLESS ERROR—JOINDER OF ISSUE.

An irregular "joinder of issue" on an answer in equity may be harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. \S 1039.]

2. APPEAL AND ERROR \S 1073 — HARMLESS ERROR—DECREE PRO CONFESSO—FAILURE TO ENTER.

A failure to enter a decree pro confesso against one defendant may not affect the rights of another defendant, so as to require a reversal of a decree.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4240-4247; Dec. Dig. \S 1073.]

3. APPEAL AND ERROR \S 671—PRESENTATION FOR REVIEW — PROCEEDINGS ON REFERENCE.

Where testimony is taken before a general master, and the proceedings before the master are not brought to the appellate court, asserted irregularities in such proceedings cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. \S 671.]

Appeal from Circuit Court, Dade County; T. Emmet Wolfe, Judge.

Bill by W. B. Sawyer against Robert Welborn and others. From decree for complainant, defendants appeal. Affirmed.

Rand & Kurtz, of Miami, for appellants. Atkinson, Gramling & Burdine, of Miami, for appellee.

WHITFIELD, J. Sawyer filed a bill in equity against Robert Welborn, the city of Miami, and the National Mercantile Realty & Improvement Company, a Florida corporation, alleging in effect that on December 9, 1909, the National Mercantile Realty & Improvement Company was the owner in fee and in possession of lot 2 in block 55 north, of the city of Miami, Fla.; that on said date the National Mercantile Realty & Improvement Company entered into a contract with Sawyer for the sale of the lot and a part of another lot for \$3,500, on which Sawyer then paid \$1,000, and on the same date he went into possession, and has had actual possession ever since, and is now in possession of the property; that the full purchase price was paid, and on June 29, 1912, the

National Mercantile Realty & Improvement Company by warranty deed conveyed the property to Sawyer; that on March 10, 1910, a decree was rendered in the circuit court for Dade county for the sale of lot 2, block 55 north, city of Miami, for nonpayment of city taxes for 1906, and a master's deed was executed to the city of Miami on June 28, 1910, and recorded October 19, 1911; that on August 29, 1912, the city of Miami executed to Robert Welborn a quitclaim deed, quitclaiming said lot 2, which deed was recorded; that the city obtained its title through foreclosure proceedings based on the tax lien; that for stated reasons, including a failure to give the owner proper notice, the decree of sale was improper, and is a cloud upon complainant's title. The prayer is that the quitclaim deed from the city to Welborn be canceled and for general relief.

Appearance was entered by the defendants. Welborn by answer merely "desires strict proof of all of complainant's allegations as in his said bill alleged." On August 4, 1913, a replication was filed to this "answer." The city by answer disclaimed any interest in the lot, and denies liability of any kind to the complainant. On this disclaimer the complainant merely "joins issue" on August 26, 1913. Notice was given by a general master in chancery that the taking of testimony would begin on August 25, 1913. Service of this notice was accepted on August 21, 1913, by counsel for the complainant, "for defendants," and for "city of Miami." On November 3, 1913, "a notice of final hearing was filed." On December 6, 1913, the circuit judge sitting at Miami rendered a final decree adjudging:

"That the quitclaim deed from the city of Miami to Robert Welborn" be canceled of record, and "that the complainant herein pay into the court, at or before the time of the cancellation of the above described deed, the amount due on the lien of the city of Miami against the property described in the said bill of complaint filed herein, together with statutory interest and penalties on said sum to date."

Welborn appealed in the name of all the defendants. It is contended here that the court below erred in rendering final decree before the issues were closed, and on testimony taken before the issues were closed by a master without an order of reference, and that the decree is broader than the record warrants.

[1, 2] Even if the complainant's "joinder of issue" on the defendant city's answer or disclaimer is irregular, the defendant Welborn is not injured thereby. Though no decree pro confesso appears to have been entered against the defendant the National Mercantile Realty & Improvement Company, which appeared, but apparently did not answer, the defendant Welborn cannot complain of it here for the first time, if at all.

See *Neubert v. Massman*, 37 Fla. 91, 19 South. 625.

[3] The replication to the answer of the defendant Welborn was filed on August 4, 1913, and the final decree was rendered December 6, 1913, which was more than the three months allowed by circuit court rule 71 "for the taking of testimony after the cause is at issue." It does not appear that the time for taking testimony was enlarged by the court. The notice to take testimony was given by a general master in chancery, and it does not appear that he was not duly authorized to take the testimony. The proceedings in the cause taken before the general master in chancery are not brought here by the appellant, so as to show error, if any exists therein. Certainly on the record brought here by the appellant, he cannot complain here for the first time of the asserted irregularities as to the taking of testimony in the cause.

The quitclaim deed from the city to Welborn covers other lands than the lot 2 in controversy. This error might have been avoided, had the attention of the court been called to the land descriptions contained in the deed ordered to be canceled.

It is ordered that the decree appealed from be modified, so as to confine the cancellation of the quitclaim deed mentioned in the decree to the land in controversy here, and, as so modified, the decree will stand affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 206)

TODD v. LOUISVILLE & N. R. CO.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

1. PLEADING \S 230—AMENDMENT—STATUTES—LIMITATION OF ACTIONS.

The statute relative to amendment of pleadings should be liberally construed to facilitate the administration of justice, but it should not be so applied in any case as to nullify the operation of the statute of limitations in that case.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 592; Dec. Dig. \S 230.]

2. LIMITATION OF ACTIONS \S 127—STATUTES \S 158—CONSTRUCTION—AMENDMENT OF PLEADINGS—LIMITATION.

One statute should not be applied to nullify the operation of another statute, when such is not the intention of the lawmaking power. The Legislature could not have intended that the statute permitting amendments of pleadings should be used in any case to nullify the operation of the statute of limitations in that case.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. \S 543-547; Dec. Dig. \S 127; Statutes, Cent. Dig. \S 228; Dec. Dig. \S 158.]

On petition for rehearing. Rehearing denied.

For former opinion, see 67 South. 41.

PER CURIAM. In a petition for rehearing it is suggested that the order denying a new trial is excepted to, and that the court has not fully considered the points presented.

The following entry precedes the order denying a new trial: "The said referee denied and refused said motion in an order as follows, the which order the plaintiff excepted." If this recitation preceding the order is regarded as a sufficient exception to the order, a consideration of the motion will not change the result. The testimony of the plaintiff's witnesses clearly showed that the plaintiff, Todd, had no general or special right of property in the horses lost and injured, and that Todd was a mere purchasing agent for Melson, who paid for and owned the horses. The action was not brought by Todd for the use of Melson. There was no privity of ownership between them.

[1, 2] The defendant cannot fairly be held to have known, and could not fairly be required to show he did not know, that the plaintiff, Todd, was not the real owner of the horses, before the ownership was disclosed by the plaintiff's witnesses. The bill of lading may or may not have disclosed the ownership. Of course, Melson and Todd both knew that Melson was the owner, and that Todd had no property right in the horses, but was a mere purchasing agent for Melson, who paid for the horses, as is clearly disclosed by the plaintiff's witnesses. The statute relative to amendment of pleadings should be liberally construed to facilitate the administration of justice, but it should not be so applied in any case as to nullify the operation of the statute of limitations in that case. See *La Floridienne, J. Buttgenbach & Co., Société Anonyme v. Atlantic Coast Line R. Co.*, 63 Fla. 213, 58 South. 186; *Lowe v. De Laney*, 54 Fla. 480, 44 South. 710; *State ex rel. Andreu v. Canfield*, 40 Fla. 36, 23 South. 591, 42 L. R. A. 72; *Cornell v. Franklin*, 40 Fla. 149, 23 South. 589, 74 Am. St. Rep. 131; *Flatley v. Memphis & C. R. R. Co.*, 9 Heisk. (Tenn.) 230; *Willink & Willink v. Renwick & Renwick*, 22 Wend. (N. Y.) 608; *East Line & R. R. Ry. Co. v. Culberson*, 72 Tex. 375, 10 S. W. 706, 3 L. R. A. 567, 13 Am. St. Rep. 805. One statute should not be applied to nullify the operation of another statute, when such is not the intention of the lawmaking power. The Legislature could not have intended that the statute permitting amendments of pleadings should be used in any case to nullify the operation of the statute of limitations in that case. In *Hamburg v. L. & L. & G. Ins. Co.*, 42 Fla. 86, 27 South. 872, the action was brought by H. for the use of the bank.

The cause of action accrued in January, 1908; the declaration by Todd was filed November 2, 1909; and at the trial in November, 1913, the plaintiff's evidence disclosed that Todd was not the general or special owner of the horses. At this time, the stat-

ute of limitations having run against Melson, the owner of the horses, there was no error in permitting the special plea as to the ownership to be filed at the trial, or in denying a motion to amend the pleadings by making Melson the plaintiff, or in entering judgment for the defendant. 3 Ency. Pl. & Pr. 789. Melson knew of his ownership, and that Todd was a mere purchasing agent who was not a bailee and had no general or special property in the horses. The action is in tort, and Todd had no right to maintain it. The defendant was required to defend the action as instituted, and the testimony of the plaintiff's witnesses showed he had no right to maintain the action. No precedents are found that under the privilege of amendment authorize a new plaintiff to be substituted against whom the statute of limitations has run.

Rehearing denied.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and WHITEFIELD, JJ., concur.

(68 Fla. 312)

HOLDER TURPENTINE CO. v. M. C. KISER CO.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. CORPORATIONS ¶672—FOREIGN CORPORATIONS—PLEA IN ABATEMENT—REQUISITES.

A plea in abatement that the plaintiff foreign corporation had not complied with chapter 5717, Acts of 1907, by filing its charter, etc., is subject to demurrer when it does not in effect aver that the foreign corporation plaintiff was not doing business in this state when the pleaded statute was enacted.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2645-2649; Dec. Dig. ¶672.]

2. JUDGMENT ¶92—DEFAULT—EFFECT.

A judgment by default operates to deprive a defendant of substantial rights in contesting the liability alleged against him in the plaintiff's declaration, and such consequences are lawful only when the defaults are duly authorized.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 151; Dec. Dig. ¶92.]

3. COURTS ¶78—RULES OF COURT—DEFAULT—PROCEDURE.

In our law the authority to enter default judgments is regulated by statute, though rules of court may prescribe further regulation to make the statutory provisions effective; but such rules should not be inconsistent with the statutes on the subject.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 274, 276-281; Dec. Dig. ¶78.]

4. JUDGMENT ¶106 — DEFAULT — ENTRY — PLEAD.

The statutes authorize the entry of default judgments in law actions "if the defendant shall fail to appear, * * * or shall fail to plead or demur, at the time heretofore provided," thus showing the word "plead" has reference to the plea required by a previous section.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. ¶106.]

5. COURTS — 85—RULES OF COURT—ENTRY OF DEFAULT—CONSTRUCTION.

Rules of court relative to entry of default should be construed with reference to the statutory provisions authorizing judgments by default. Thus construed, the circuit court rules on the subject do not authorize the entry of a default without notice for failure to file, within the terms fixed by the rules, a rejoinder to a replication that requires an answer, there being no order of the court with reference to filing the rejoinder.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 294, 296-301; Dec. Dig. 85.]

6. JUDGMENT — 106 — DEFAULT — ENTRY — FAILURE TO FILE REJOINDER.

The court is not authorized to enter a default without notice for failure to file, within the time fixed by circuit court rule 20, a rejoinder to a replication that requires an answer; there being no order of the court with reference to filing the rejoinder.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 160, 162, 180-197; Dec. Dig. 106.]

7. BILLS AND NOTES — 534—ATTORNEY'S FEE — REASONABLENESS—QUESTION FOR COURT.

Under chapter 5960, Acts of 1909, when attorney fees are recoverable in actions on notes, the reasonableness of the fees should be adjudged by the court.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1946, 1947; Dec. Dig. 534.]

Error to Circuit Court, Citrus County; W. S. Bullock, Judge.

Action by the M. C. Kiser Company, a corporation, against the Holder Turpentine Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed.

H. M. Hampton, of Ocala, for plaintiff in error. D. Niel Ferguson, of Ocala, for defendant in error.

WHITFIELD, J. The Kiser Company brought an action against the Holder Company on promissory notes under seal. The defendant in abatement and also in bar pleaded in effect that the plaintiff company was a foreign corporation that had not complied with chapter 5717, Acts of 1907, and that under said statute the payment of the notes could not be enforced. A demurrer to the plea in abatement was sustained and the demurrer to the plea in bar was overruled. On November 25, 1913, the plaintiff filed replications alleging that the transaction was interstate commerce and not subject to the statute. In February, 1914, the defendant's attorney accepted service of notice of the filing of the replications. No rejoinder to the replication was filed, and on April 11, 1914, without notice to the defendant the court rendered a default judgment against the defendant "for failure to file rejoinder to the plaintiff's replication to defendant's plea," and final judgment for the plaintiff including 10 per cent. attorney fees provided for in the notes was rendered by the court.

On writ of error the defendant below contends that the court erred in sustaining the

demurrer to the plea in abatement, in entering a default judgment, and in allowing attorney fees in the final judgment.

[1] The demurrer to the plea of noncompliance by the plaintiff foreign corporation with the statute pleaded in abatement was properly sustained, since the plea did not aver that the plaintiff company was not doing business in this state when the pleaded statute was enacted, so as to make the statute applicable. The same defect exists in the plea in bar, but a demurrer to the plea in bar was overruled by the court.

[2, 3] A judgment by default operates to deprive a defendant of substantial rights in contesting the liability alleged against him in the plaintiff's declaration, and such consequences are lawful only when the defaults are duly authorized. In our law the authority to enter default judgments is regulated by statute, though rules of court may prescribe further regulation to make the statutory provisions effective; but such rules should not be inconsistent with the statutes on the subject. See section 1740, Gen. Stats. 1906.

[4, 5] The statutes authorize the entry of default judgments in law actions "if the defendant shall fail to appear, * * * or shall fail to plead or demur, at the time heretofore provided," thus showing the word "plead" has reference to the plea required by a previous section. Rules of court relative to the entry of default should be construed with reference to the statutory provisions authorizing judgments by default. Thus construed, the circuit court rules on the subject do not authorize the entry of a default without notice for failure to file within the term fixed by the rules a rejoinder to a replication that requires an answer; there being no order of the court with reference to filing the rejoinder.

[6] In this case the defendant failed to file its rejoinder as required, not by an order of the court, but by circuit court rule 20, within 20 days after notice of the filing of the plaintiff's replication, and the statutes and rules do not authorize the rendering of a default judgment for failure to file a rejoinder, at least in the absence of a failure to comply with an order of the court relative to the filing. See circuit court rule 21.

[7] Under the statute, when attorney fees are recoverable in a case like this, the reasonableness thereof should be adjudged by the court. See *Cooper Grocery Co. v. Citizens' Bank & Trust Co.*, 62 Fla. 142, 56 South. 435; chapter 5960, Acts of 1909.

As the judgment by default was not authorized by law, the judgment consequent upon such default is erroneous and is reversed.

SHACKLEFORD, C. J., and **TAYLOR, COCKRELL**, and **HOCKER, JJ.**, concur.

(68 Fla. 357)

UNITED STATES FIDELITY & GUARANTY CO. v. CITY OF PENSACOLA.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

DEPOSITARIES. —13— BOND—CONSTRUCTION AND EFFECT.

The obligation of a surety company's bond that a bank "shall well and truly keep and preserve the funds of the city now deposited or which may hereafter be deposited with it as such depository of city funds, and shall faithfully account for and pay over all moneys which may be deposited with it" during a stated period, covers all moneys deposited during the contemplated period and continues as to such deposits, though the time had expired during which deposits could be made under the protection of the bond.

[Ed. Note.—For other cases, see *Depositaries*, Cent. Dig. § 27; Dec. Dig. —13.]

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by the City of Pensacola against the United States Fidelity & Guaranty Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Watson & Pasco, of Pensacola, for plaintiff in error. J. B. Jones and Blount & Blount & Carter, all of Pensacola, for defendant in error.

WHITFIELD, J. The city of Pensacola brought an action on a bond for \$50,000 executed by the fidelity and guaranty company to "faithfully account for and pay over" all moneys deposited in the Pensacola State Bank from the date of the bond to November 1, 1913. It is alleged that the city had on deposit in the bank more than \$146,000; that on December 5, 1913, the bank suspended payment and defaulted in payment of said deposits. The condition of the bond is as follows:

"The condition of this obligation is such that, whereas, the above bounden the Pensacola State Bank was heretofore duly designated by said city, in conformity with chapter 5835, Laws of Florida, depository of the funds of said city of Pensacola for the year beginning on the first day of November, 1912, and ending on the first day of November, 1913, and as such depository of city funds, it has been required by a resolution adopted by the council of said city to give and furnish the city a bond, or security, for the funds now deposited, or to be hereafter deposited, with it, in the above named sum of \$50,000.00, in addition to, and exclusive of, the amount of the bond of \$75,000.00, with the Maryland Casualty Company as surety, heretofore executed and delivered to said city on the first day of November, A. D. 1912.

"Now if the said Pensacola State Bank, shall well and truly keep and preserve the funds of said city now deposited or which may be hereafter deposited, with it, as such depository of city funds, and shall faithfully account for, and pay over, all moneys which may be deposited with it as aforesaid, and from time to time honor such warrants as may be lawfully drawn against said sum, not to exceed the amount on deposit at the time of the presentment of said warrants then this obligation to be null and void, else to remain in full force

and virtue, as security in addition to, and independent of, the aforesaid bond of November 1, 1912, which said last mentioned bond shall also remain in full force and effect."

A demurrer to the declaration was overruled, and the defendant filed the following pleas:

"(1) That after November 1, 1913, and after the time of the termination of the contract of the Pensacola State Bank as depository for city moneys, which was November 1, 1913, the plaintiff continued to make its deposits in said Pensacola State Bank in the same manner and in every respect as it had done prior to the said date, and received from said bank statements of its account.

"Wherefore, the defendant says that the plaintiff by its course of conduct aforesaid constituted said bank depository for the city moneys without bond and thereby released this defendant from all obligation on the bond set forth and mentioned in the declaration.

"(2) That after November 1st, and while the Pensacola State Bank was a going concern, paying all checks of its customers having funds on deposit with it to meet such checks, this defendant demanded of the commissioners of the city of Pensacola that they demand and collect in behalf of said city from said bank the funds deposited therein by said plaintiff, but said commissioners failed and neglected so to do.

"(3) That prior to the time of the execution of the bond sued on the plaintiff took from said Pensacola State Bank a bond substantially the same in conditions and terms as the bond mentioned and described in the declaration; the surety on said bond being the Maryland Casualty Company, and the amount of said bond being \$75,000; that the remedy of the plaintiff is in every respect as available and effective on said bond as on the bond sued on, and said surety is solvent and able to respond to and satisfy any judgment that may be obtained against it; that after crediting the amounts drawn out of said bank after October 31, 1913, and after crediting the dividends collected from the receivers of the said bank by the city, the balance due to said city from said Pensacola State Bank on account of the deposits made prior to November 1, 1913, is less than \$75,000.

"(4) No demand was made by said city upon the said Pensacola State Bank on or before the 1st day of November, A. D. 1914, for payment of the same sums on deposit in said bank by the said city of Pensacola.

"(5) There was no default or refusal on the part of the said Pensacola State Bank on or prior to November 1, 1913, to pay any demand or warrant by the said city of Pensacola for or upon any of the said deposits of said city in said bank.

"(6) No demand was made by said city upon the said Pensacola State Bank on or before the suspension of said bank on the 4th day of December, A. D. 1913, for payment for the sums on deposit in said bank by the said city of Pensacola.

"(7) There was no default or refusal on the part of the said Pensacola State Bank on or before the suspension of said bank on the 4th day of December, A. D. 1913, to pay any demand or warrant by the said city of Pensacola for or upon any of the said deposits of said city in said bank.

"(8) There was no default or refusal on the part of the said Pensacola State Bank on or before the suspension of said bank on the 4th day of December, A. D. 1913, to pay any demand or warrant by the said city of Pensacola for or upon any of the said deposits of said city in said bank, and no liquidation of the

affairs of said bank or ascertainment of what deficiency, if any, in the payment of depositors will result therefrom as yet has been had.

"(9) That on the 3d day of December, A. D. 1913, the day prior to the suspension of said bank, the said city was urged by the agent of defendant to withdraw the said deposits from the said bank because of the unstable condition of the said bank and it failed and refused so to do."

A further plea was filed as follows:

"That the said Pensacola State Bank was the depository of the funds of the city of Pensacola, duly designated from November 1, 1912, to November 1, 1913, and on or about November 1, 1913, said bank was designated and was notified by said city that it had been designated as depository of the funds of the city of Pensacola for another year, commencing November 1, 1913, and thereupon rendered to the city a statement of the funds then on hand, and with the consent of the said city kept the funds already deposited with it and received further deposits of funds of said city up to and beyond December 1, 1913, by reason whereof the defendant alleges that the said bank accounted to the said city for the said funds and its liability for funds deposited prior to November 1, 1913, was terminated."

Demurrers to these pleas were sustained, and, the defendant not desiring to plead over, final judgment for the plaintiff was rendered, and the defendant took writ of error.

The contentions here require a construction of the condition of the bond as above quoted.

It is argued that under the terms of the bond the defendant company is not liable except for defaults occurring during the year from November 1, 1912, to November 1, 1913, and that this defendant's liability does not accrue until after the exhaustion of the bond given by the Maryland Casualty Company, and referred to in the defendant's bond. These contentions do not accord with the express terms and the manifest purpose of the bond. The bond was executed January 11, 1913, and the condition is that the bank "shall well and truly keep and preserve the funds of said city now deposited or which may be hereafter deposited with it as such depository of city funds, and shall faithfully account for and pay over all moneys which may be deposited with it as aforesaid." Under this express condition the defendant company is liable if the bank does not "account for and pay over all moneys" deposited with the bank on January 11, 1913, and to November 1, 1913. It is alleged in effect that the bank has not paid over all the moneys received by it as the city depository between the dates just mentioned, and that, until this is done or the obligation of the bond is otherwise discharged, the defendant is liable. The mere fact that the period contemplated by the bond for making deposits with the bank as the city depository expired before the bank failed does not relieve the defendant from the obligation of its bond that the bank "shall faithfully account for and pay over all moneys" deposited by the city during the period contemplated, if the bank does not in

fact pay over or the obligation to do so is not otherwise extinguished. The obligation was not merely to insure or secure the payment of warrants drawn by the city on its deposits during the contemplated period, but to pay over all moneys received on deposit by the bank from the city during the stated period. The obligation to pay over all moneys deposited during the contemplated period continued though the time had expired during which deposits could be made under the protection of the bond.

The obligation of the defendant's bond was expressly made "in addition to, and exclusive of, the amount of the bond of \$75,000.00 with the Maryland Casualty Company as surety, heretofore executed and delivered to said city on the first day of November, A. D. 1912," and until the condition is performed "to remain in full force and virtue, as security in addition to, and independent of, the aforesaid bond of November 1, 1912, which said last-mentioned bond shall also remain in full force and effect." Under these express provisions it cannot successfully be claimed that the defendant's liability on its bond does not accrue until the bond of the American Casualty Company is exhausted. See *National Surety Co. v. United States*, 123 Fed. 294, 59 C. C. A. 479.

A demurrer admits well-pleaded statements of material facts, but does not admit conclusions that are unsustained by stated facts.

In admitting by demurrer the averments of the pleas that on or about November 1, 1913, the bank was designated by the city as depository of the funds of the city for another year commencing November 1, 1913, that thereupon the bank rendered to the city a statement of the funds then on hand, and with the consent of the city kept the funds already deposited with it, the plaintiff does not admit the asserted conclusion that "by reason of which * * * the bank accounted to the city for the said funds, and the liability of the defendant for funds deposited to November 1, 1913, was thereby terminated." The facts stated do not sustain the asserted conclusions. Rendering a statement of funds on hand is not an accounting for or a paying over of the funds under the provisions of the bond, and, though the statement was in fact rendered as averred, the obligation of the bond was not "thereby terminated." Though the city designated the bank as city depository for another year and the bank rendered a statement of funds on hand, and with the assent of the city the bank kept on deposit the funds already deposited with it, the duty of the bank to pay such deposits to the city on demand is not thereby satisfied, or the right of the city to demand payment in any wise affected or suspended. And the obligation of the defendant's bond that the bank "shall faithfully account for and pay over all moneys which may be deposited with it" by the city to No-

vember 1, 1913, is not in law or in fact "thereby terminated." The bond does not limit the time within which a demand for payment of drafts or checks drawn against the deposited funds shall be made as apparently was held to be the case in *United States Fidelity & Guaranty Co. v. American Bonding Co.*, 31 Okl. 689, 122 Pac. 142. The averment of the plea that after November 1, 1913, the bank "received further deposits of funds from the city up to and beyond December 1, 1913," is immaterial, since the obligation of the defendant's bond does not extend to deposits made after November 1, 1913. The bond did not contemplate that all the moneys deposited to November 1, 1913, should be demanded and paid during the period beginning with the date of the bond and ending November 1, 1913. The facts that the statute required the depositaries to be designated for a period not exceeding one year, and that the designation referred to in the bond expired November 1, 1913, do not affect the obligation of the bond that the bank "shall faithfully account for and pay over all moneys" deposited to November 1, 1913, even though the moneys were left on deposit after November 1, 1913.

In effect the obligation of the defendant is that the bank "shall faithfully account for and pay over all moneys which may be deposited with it" by the city from the date of the bond to November 1, 1913; and this obligation continues after November 1, 1913, until all the moneys deposited to November 1, 1913, by the city with the bank, have been "faithfully accounted for and paid over," or until the obligation is extinguished by the parties or by operation of law. The declaration shows a right of recovery on the bond. It does not appear from the admitted averments of the pleas that the right of the plaintiff or the duty of the bank, or the binding obligation of the defendant in the premises, has been extinguished or in any way affected by any act of the parties or by operation of law. Therefore, a right of recovery appearing, and no valid defense being interposed, the judgment for the plaintiff rendered upon the adversary pleadings is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 395)

BOYD et al. v. GOSSER.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

EQUITY — 232—BILL—GENERAL DEMURRER.

A general demurrer to a bill in equity as an entirety should not be sustained if any relief may properly be granted in accordance with the allegations and prayers.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. § 508; Dec. Dig. —232.]

Appeal from Circuit Court, Pinellas County; F. M. Robles, Judge.

Suit by Nellie T. Boyd and others, as administrators, against Lillian M. Gosser. From an order sustaining demurrer to the bill, complainants appeal. Reversed.

K. I. McKay and James F. Glen, both of Tampa, for appellants. O. C. Whitaker and W. F. Himes, both of Tampa, for appellee.

WHITEFIELD, J. The appellants brought a bill in equity against the appellee, in which it is in effect alleged that on September 14, 1910, the defendant, Lillian Mayrue Gosser, executed to Vincent Ridgely a mortgage upon a certain lot of land to secure a loan; that on November 1, 1911, Lillian Mayrue Gosser executed to Ella C. Chamberlain, a mortgage on the same premises; that on March 6, 1912, Lillian Mayrue Gosser executed and delivered to W. T. Boyd a power of attorney "to grant, bargain and sell the same premises described in the said mortgage deeds and to act as her attorney in paying off the two mortgages aforesaid, and thereby authorized the said W. T. Boyd to satisfy the aforesaid mortgages by the payment of principal and interest thereon, and in and by the said instrument she further authorized the said W. T. Boyd to deduct from the purchase price realized and obtained from the sale of the said property all expenses, interest and other moneys paid out necessary for perfecting a sale and transfer of the said premises in giving a perfect and unincumbered title thereto"; that "the said W. T. Boyd prior to the time of his decease did pay off and discharge the said mortgages, and each of them, and procured from the said Vincent Ridgely a formal satisfaction and release of the aforesaid mortgage, Exhibit A hereto, to be held by him as evidence of the payment by him of the said mortgage, and which was not delivered to the defendant or placed on record, and your orator annexes hereto as Exhibit D hereto the said satisfaction, and your orator also annexes hereto the original notes given by the defendant to the said Vincent Ridgely and also the original note given by the said defendant to the said Ella C. Chamberlain"; that "the said W. T. Boyd did not sell the said premises in his lifetime, and the same are now the property of the defendant, but the said W. T. Boyd, in addition to the amounts paid by him as aforesaid to the holders of the said mortgages, also expended in the payment of taxes on the said mortgaged premises and in payment for labor bestowed on the buildings thereon upwards of the sum of \$150 for which he is entitled to a lien under the terms of the said instrument given him by the said defendant"; that W. T. Boyd died on October 20, 1912, and complainants qualified as his administrators; that the said W. T. Boyd "by reason of the payment by him of the aforesaid mortgages

is entitled in equity to be subrogated to the rights of the respective mortgagees, and is also entitled under the terms of the instrument, Exhibit C hereto, to a lien on the mortgaged premises for the amount of the taxes and disbursements for labor performed thereto, and your orators as administrators of the said W. T. Boyd are entitled to enforce the said mortgages, and each of them, and also to enforce a lien against the mortgaged premises for the amount of the said taxes and the amount paid by the said W. T. Boyd for labor on the mortgaged premises, and they are advised that they are entitled to an accounting with the defendant to ascertain the amounts due, and to a decree in default of the payment thereof within a short time to be fixed by the court, that the defendant be barred and foreclosed of all interest or equity of redemption of, in, and to the mortgaged premises, and that the said mortgaged premises be sold for the satisfaction of the amount ascertained to be due on such accounting, together with the costs of this proceeding including reasonable solicitors' fees in accordance with the usual practice of this honorable court in such cases."

The prayer is for an accounting and payment through sale, if necessary, and for general relief.

To this bill of complaint the following demurrer was interposed:

"(1) That there is no equity in complainants' bill of complaint.

"(2) Because complainants in their said bill of complaint have not alleged such matters and things therein, or shown such matters and things by the exhibits attached to said bill of complaint and made a part thereof, as entitles said complainants to be subrogated to the rights of Vincent Ridgely and Ella C. Chamberlain, the original mortgagees mentioned in the two certain mortgages sought to be foreclosed by said bill of complaint.

"(3) Because, so far as appears from the allegations of complainants' bill of complaint and the exhibits attached thereto, and made a part thereof, it appears that the said W. T. Boyd was a mere volunteer in paying off and discharging those two certain mortgages made— one to Vincent Ridgely and the other to Ella C. Chamberlain.

"(4) Because it appears, from complainants' bill of complaint and the exhibits attached thereto and made a part thereof, that a part of the mortgage indebtedness secured by the mortgages sought to be foreclosed by said bill of complaint was paid and discharged prior to the execution by this defendant of the power of attorney to W. T. Boyd, which is attached and made a part of the complainants' bill of complaint, and complainants failed to allege in their said bill what amounts or upon what dates the alleged payment or payments were made by W. T. Boyd on the indebtedness of said mortgages.

"(5) Because the allegations of said bill of complaint attempting to show subrogation to the rights of the said Vincent Ridgely and Ella C. Chamberlain are mere conclusions of law.

"(6) Because said bill of complaint does not show that the said W. T. Boyd had any interest in the said mortgages, the mortgage indebtedness, or the mortgaged premises, or that this defendant requested him to pay the said mortgages, or that there was any contract or under-

standing between this defendant and W. T. Boyd that he should pay the same.

"(7) Because there is no allegation in said complainants' bill of complaint that the said W. T. Boyd, under the power of attorney mentioned in said bill and thereto attached and made a part thereof, ever sold or in any way disposed of said mortgaged premises."

On this demurrer the following order was made:

"The demurrer of the defendant to the bill of complaint in the above cause coming on this day to be heard, and the court having heard the argument of counsel for the complainants and the defendant, and the court being advised:

"It is ordered, adjudged, and decreed that the said demurrer be, and the same is hereby, sustained upon all grounds of said demurrer, and complainants given leave to amend bill if they so desire."

The complainants appealed from this order and assigned it as error.

A general demurrer to a bill in equity as an entirety should not be sustained if any relief may properly be granted in accordance with the allegations and prayers. See *Roberts v. Cypress Lake Naval Stores Co.*, 58 Fla. 514, 50 South. 678; *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 South. 599, Ann. Cas. 1914A, 173; *Porter v. Taylor*, 64 Fla. 100, 59 South. 400.

It is clear that Boyd was not a mere volunteer in paying the indebtedness of his cestui que trust, since the payment of such indebtedness was the purpose for which the power of attorney was executed to Boyd.

Even if Boyd is not entitled to be subrogated to the rights of the mortgagees, and even though he paid a portion of the indebtedness before the power of attorney was executed, and even though Boyd did not before his death sell the land as he was authorized to do, his administrators are entitled to an equitable adjustment of his rights growing out of his bona fide transactions in so far at least as they were in substantial pursuance of the authority given him by the power of attorney.

The order sustaining the demurrer is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 262)

CAMPBELL v. DANIELL

(Supreme Court of Florida. Nov. 17, 1914.
Rehearing Denied Dec. 22, 1914.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS § 445—SIDEWALK ASSESSMENT—LIEN—ENFORCEMENT.

A municipality may enforce a lien against an abutting owner for sidewalks, even though it had the work done by a nonregistered foreign corporation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1065; Dec. Dig. § 445.]

2. PLEADING \Rightarrow 126—PLEA—CONSTRUCTION.

Where the bill of complaint shows that a contract was fully performed on August 1, 1911, a plea denying that a permit to the contractor, a foreign corporation, had been granted during the years 1910 and 1911, when the contract was to be performed, does not deny that a permit had been granted on December 18, 1911.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. \Rightarrow 126.]

Shackelford, C. J., and Whitfield, J., dissenting.

Appeal from Circuit Court, Escambia County; T. Emmet Wolfe, Judge.

Bill by Lee Daniell against Pattillo Campbell. From an order overruling a plea, defendant appeals. Affirmed.

The bill of complaint herein is as follows:

"Lee Daniell, a citizen and resident of Escambia county, Fla., brings this, his bill of complaint, against Pattillo Campbell, a citizen and resident of Escambia county, Fla., and thereupon your orator complaining, says:

"That the city of Pensacola, in said county of Escambia, has established grades for, and provided for the grading, construction, and repair of sidewalks, and of materials of which same should be constructed, and prior to the work done by W. W. Hatch & Sons Company, as hereinafter stated, had required by its ordinances the owners of lots in said city, including the defendant Pattillo Campbell, to construct sidewalks in front of or around their said lots in said city. That the following described property, to wit: Lots three (3) to ten (10) inclusive in block one hundred and eighty-eight (188), New City Tract in the city of Pensacola, Escambia county, Fla.—is and was located within the limits prescribed for the building of said sidewalks, and said property is and was owned by the defendant, Pattillo Campbell. That said city, through its board of public works, with the approval of the city council, had, after advertisement according to law, let to the said W. W. Hatch & Sons Company a contract for the construction of said sidewalks in said city, during the years 1910 and 1911, at such place and times as might be directed by the city, or its constituted authorities, and that the said W. W. Hatch & Sons Company during said years was engaged in constructing in said city, wherever and whenever so directed. That defendant, Pattillo Campbell, was duly required to construct a sidewalk upon the grade established by the city, in front of or alongside of said lots, in pursuance of laws of the state of Florida, and ordinances of said city. That the said defendant failed and refused to comply with said requirements, and did not proceed to construct said sidewalk, as required by the laws and ordinances of said city, and, after the time expired within which he was required to construct the same, the said defendant having failed to construct or begin the construction of the same, the said company was directed by the proper authorities of said city to construct the necessary sidewalk, and to do the necessary grading, under the terms of its said contract with the city, which instructions to the said company were given long after the expiration of the time within which the said defendant was authorized, under the laws and ordinances of the city, to construct or begin the construction of the same. That thereupon, in said year, A. D. 1911, said company did grade and construct a sidewalk alongside the said lot, in accordance with the ordinances of the said city and with its said contract, and the price of such work, and materials furnished by it, according to said contract price, amounted to the sum of \$209.65, and said work was completed

August 1, 1911. That subsequent to the completion of said sidewalk, and subsequent to the giving of the notice of the time and place fixed for the inspection of the work done by the company in the construction of said sidewalk and the materials furnished therefor, the board of public works, upon due consideration of the said matter, determined that said sidewalk had been constructed in accordance with the ordinances of said city, and the contract therefor, and apportioned the cost thereof to the said lot at the sum of \$209.65, and directed the issuance of an apportionment warrant for said sum to the said company, which warrant was duly issued on the 18th day of December, A. D. 1911, and duly recorded by the city clerk of said city, as required by law. That the city of Pensacola and said company at all times complied with the ordinances of said city and the laws of the said state, in directing, ordering, and constructing said sidewalk so constructed in accordance with the contract aforesaid, and said ordinances and laws, and although all things have happened, and all times elapsed to entitle the said company to enforce the lien upon said property for the construction of said sidewalk and apportionment warrant aforesaid, and the defendant had been requested to pay the amount due for same, yet the said defendant has neglected and declined to pay the same, and the complainant, as the assignee of said company, is therefore entitled to enforce the lien upon the said property, which is given by the laws of Florida for the sum aforesaid, with interest, costs, and attorney's fees. That said apportionment warrant was duly recorded, and the record thereof made by the board of public works on the 18th day of December, A. D. 1911; same being entered upon a register kept by said board in alphabetical order for that purpose.

"That subsequent to the issuance of said apportionment warrant the said W. W. Hatch & Sons Company, which was and is a corporation, for a valuable consideration paid by complainant, duly transferred and assigned to complainant the said apportionment warrant and its said claim for the amount due for the construction of said sidewalk, and the complainant is now the owner and holder of the same.

"To the end, therefore, that the defendant may, if he can, but not under oath, the oath to the answer being hereby specially waived, show why your orator should not have the relief hereby prayed, and may, according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all and singular the premises, as if same were here again set forth and numbered, and they specially interrogated thereto.

"In view of the premises, may it please your honor to order, adjudge, and decree that your orator has a lien upon the property hereinbefore described, for the cost of the construction and grading of such sidewalk alongside of same in the sum of the amount hereinbefore alleged, with interest and attorney's fees; that a lien exists upon the said property for the security and payment of the said apportionment warrant, and for the interest and costs, including a reasonable attorney's fee to be ascertained by your honor. Your orator alleging that ten per cent (10%) of the amount due for principal and interest is a reasonable attorney's fee; and that said property be sold for the payment of such sums, by a master to be appointed by your honor, in the manner required by the laws of the state of Florida; and that the defendant and all persons claiming by, through, or under him, be forever barred and foreclosed of all right and equity of redemption in and to the said property, except as provided by the statute; that from the proceeds of such sale there be paid the full amount due upon said appor-

tionment warrant, and the interest, costs, and reasonable attorney's fee, to be fixed by your honor; that your orator have such other and further relief in the premises as may seem meet and proper, and agreeable to equity and good conscience. May it please your honor to grant unto your orator the state's most gracious writ of subpoena, to be directed to the defendant, Pattillo Campbell, returnable according to the course and practice of this honorable court."

To this bill of complaint the defendant filed the following plea:

"The Plea of Pattillo Campbell, the Defendant, to the Bill of Complaint of Lee Daniell, the Complainant.

"The defendant by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill mentioned, to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunder, and for plea says that at the time of the making of the contract between the city of Pensacola and W. W. Hatch & Sons Company, referred to in said bill of complaint, the said W. W. Hatch & Sons Company was a corporation under the laws of the state of Indiana; that said corporation was not transacting business in the state of Florida on June 1, 1907; that said contract was made in the year 1910, in Pensacola, Fla., and was performed in the city of Pensacola, Fla., during the years 1910 and 1911; that at the date said contract was made, August 11, 1910, and during the years 1910 and 1911, when the said contract was to be performed, no foreign corporation was permitted to contract business, or acquire or hold or dispose of property in this state until it had filed in the office of the Secretary of State a duly authenticated copy of its charter or articles of corporation, and received from the Secretary of State a permit to transact business in this state, and every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state before it complied with the provisions of chapter 5717, Laws of 1907, approved June 1, 1907, was void on its behalf and on the behalf of its assigns; and that upon the said 11th day of August, 1910, the date upon which the said contract was made, and during the years 1910 and 1911, when the said contract was to be performed, the said W. W. Hatch & Sons Company, a corporation, had not complied with the laws of this state, in that it did not file in the office of the Secretary of State a duly authenticated copy of its charter or articles of corporation, and had not then received from the Secretary of State a permit to transact business in this state; and that said contract was executed in Pensacola, Fla., where the said contract was entered into and was to be performed, of which facts the complainant had full knowledge. Therefore the said contract and the said warrant mentioned in the said bill of complaint are void and unenforceable, and neither the W. W. Hatch & Sons Company nor the complainant acquired or held any lien whatever, upon the property of the defendant mentioned and described in the said bill of complaint. All of which matters and things this defendant avers to be true, and pleads the same to the whole of said bill; and demands the judgment of this honorable court whether he ought to be compelled to make any answer to the said bill of complaint; and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained."

The court overruled the plea, and the defendant appeals.

Sections 1 and 4 of chapter 5717, Acts of 1907, entitled "An act to prescribe the terms and conditions upon which foreign corporations for profit may transact business, or ac-

quire, hold or dispose of property in this state," are as follows:

"Section 1. That no foreign corporation shall transact business or acquire, hold or dispose of property in this state until it shall have filed in the office of the Secretary of State a duly authenticated copy of its charter or articles of incorporation, and shall have received from him a permit to transact business in this state. * * *

"Sec. 4. Every contract made by or on behalf of any foreign corporation affecting its liability or relating to property within the state before it shall have complied with the provisions of this act shall be void on its behalf and on behalf of its assigns, but shall be enforceable against it or them."

The statute does not apply to corporations transacting business in this state prior to its taking effect on June 1, 1907.

The contention of the appellee is that this statute is not applicable to the facts shown by the pleadings here.

Pattillo Campbell, of Pensacola, in pro. per. Blount & Blount & Carter, of Pensacola, for appellee.

OOCKRELL, J. (after stating the facts as above). The true construction of the bill of complaint, as we read it, is an effort to enforce the lien given by statute to the city of Pensacola, against an abutting owner for a special benefit to his property, by reason of the construction of a sidewalk. The plea admits that the proportionate cost of the paving to be assessed against his property was duly fixed by the proper city authorities and that the city had performed the work through an agency at the lowest cost after competitive bidding.

The plea does not question the value of the improvement to the property, nor the sufficiency of the notice to the defendant, nor does it assert any irregularity in the proceedings that could in any wise prevent the city of Pensacola from itself enforcing the lien for the amount claimed. The city had the power to do the work through any agency it saw fit, limited only to a reasonable cost for the work after proper notice. It saw fit to perform the work through a foreign corporation, and we may admit that it could have avoided the contract as against the foreign corporation, had it seen fit so to do, or even further it might perhaps have used this statute to compel specific performance of the contract had the foreign corporation declined performance; but the city, so far from raising objection, has ratified and approved the contract, which has been fully performed to the entire satisfaction of the city as shown by its issuance of the apportionment warrant. All this is, then, past history.

[1] The statute does not forbid the municipality or any citizen of the state entering into a contract with a nonregistered foreign corporation; to the contrary, the statute in terms permits the enforcement of the contract on its behalf. We are not then asked to assist the city in the evasion of a police or

other regulation of the Legislature. The city has had the work done in the least expensive way it could be done, after the abutting owner had failed to do the work, and without the violation of any law. It thus acquired a lien against the property for the fair cost of this improvement, the city could have enforced this lien against Campbell, and there is no doubt that, having a valid lien, the city could have assigned the lien directly to Lee Daniell.

[2] The plea then presents the question of the proper party complainant; that the city is the proper complainant, and not Lee Daniell. In framing the plea the pleader did not have in mind this narrowed defense, else he would have asserted in more positive terms that the foreign corporation had not obtained the permit to do business in Florida when the apportionment warrant was issued to and assigned by it, assuming that this transaction would offend the statute. The plea denies that the permit had been granted "during the years 1910 and 1911, when the said contract was to be performed." This plea is addressed to a bill that alleges that the contract was fully performed August 1, 1911, while the warrant was not issued until December 18, 1911. The plea does not aver that the foreign corporation "had not then (that is, on December 18, 1911) received from the Secretary of State a permit to transact business in this state." We are not therefore called upon to express an opinion as to whether the receipt of the apportionment warrant, and its assignment, offended the statute. The plea was therefore properly overruled, and the order is affirmed.

TAYLOR and HOCKER, JJ., concur.

SHACKLEFORD, C. J., and WHITFIELD, J., dissent.

(68 Fla. 430)

OCALA NORTHERN R. CO. et al. v.
MALLOY.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

1. EJECTMENT \S 9—TITLE—RIGHT TO RECOVER.

In an action of ejectment where the plaintiff introduces documentary evidence, tracing his title to the land in controversy through successive deeds back to a certain railroad corporation, and also introduces documentary evidence showing that such land had been approved by the United States to another railroad corporation, and fails to connect his title with any title emanating from the corporation to which such land was approved, he cannot recover.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 16-29; Dec. Dig. \S 9.]

2. EVIDENCE \S 48—JUDICIAL NOTICE—RECORDS.

An appellate court will take judicial notice of its own opinions and also of its own records, so far as they appertain to the case before it for consideration, but will not take judicial notice, in deciding one case, of what may be contained in the record of another and distinct case,

unless it be brought to the attention of the court by being made a part of the record in the case under consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 82-85; Dec. Dig. \S 43.]

3. EJECTMENT \S 9—TITLE—RIGHT TO RECOVER.

The plaintiff in ejectment must recover upon the strength of his own title, and not on the weakness of his adversary's title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 16-29; Dec. Dig. \S 9.]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Ejectment by J. B. Malloy against the Ocala Northern Railroad Company, a corporation, and others. Judgment for plaintiff, and defendants bring error. Reversed and remanded for new trial.

H. M. Hampton and Hocker & Martin, all of Ocala, for plaintiffs in error. W. K. Zewadski, of Ocala, for defendant in error.

SHACKLEFORD, C. J. [1-3] J. B. Malloy brought an action of ejectment against the Ocala Northern Railroad Company, a corporation, J. G. Boyd, as receiver of the Ocala Northern Railroad Company, and J. M. Thomas, trustee in bankruptcy of E. P. Rentz & Sons, for the recovery of the possession of certain described lands and for mesne profits. A trial was had which resulted in a verdict and judgment in favor of the plaintiff. Twelve errors are assigned; but, in view of the conclusion which we have reached, it will not be necessary to discuss all of them. We shall confine ourselves to those assignments which attack the sufficiency of the evidence to prove the plaintiff's title to the land in controversy. By a chain of deeds the plaintiff traced his title from the Peninsular Railroad Company, a corporation. The plaintiff then introduced in evidence a certificate from the General Land Office of the United States, showing that the land in question was approved to the Florida Central & Peninsular Railroad Company, a corporation, in 1893, under the act of Congress, approved May 17, 1856 (chapter 31, 11 Stat. 15), entitled "An act granting public lands, in alternate sections, to the state of Florida and Alabama, to aid in the construction of certain railroads in said states." It was and is contended by the defendants that, as the plaintiff claimed to derive his title to the land in dispute through successive deeds back to the Peninsular Railroad Company, a corporation, out of which whatever title it had passed by a deed dated the 17th day of November, 1882, which was a different corporation from the Florida Central & Peninsular Company, to which such land had been approved, as above stated, the plaintiff, having failed to connect his title with any title emanating from such Florida Central & Peninsular Railroad Company, could not recover, and that the defendants were entitled to have the jury instruct-

ed to return a verdict in their favor, which the trial court refused to do. We are of the opinion that this contention is supported by the evidence adduced and will have to be sustained. If it be true that the Peninsular Railroad Company was ever merged into, consolidated with, or succeeded by the Florida Central & Peninsular Railroad Company, no evidence was introduced to that effect. It is true that the plaintiff introduced as a witness in his behalf W. K. Zewadski, and sought to prove by him that the Florida Central & Peninsular Railroad Company and the Peninsular Railroad Company constituted the same railroad company; but the testimony so offered was inadmissible for that purpose, and, viewed in the most favorable light possible for the plaintiff, failed to establish such fact, and the motion of the defendants to strike the same should have been granted. We cannot take judicial notice of what is contained in the record of another and distinct case, unless it is made part of the record of the case under consideration. See *McNish v. State*, 47 Fla. 69, 36 South. 176; *Capital City Bank v. Hillson*, 64 Fla. 206, 60 South. 189, Ann. Cas. 1914B, 1211; *South Florida Lumber & Supply Co. v. Read*, 65 Fla. 61, 61 South. 125. This being true, we cannot take judicial notice of what is contained in the record in the case of *Bloxham v. Florida Cent. & P. R. R. Co.*, 35 Fla. 625, 17 South. 902, to which the plaintiff refers in his brief, even if our doing so would aid him in his contention. It is elementary that the plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's. See *Ropes v. Minshew*, 51 Fla. 299, 41 South. 538.

It follows from what we have said, that the judgment must be reversed, and the case remanded for a new trial.

Judgment reversed.

TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

HOCKER, J., took no part.

(68 Fla. 278)

WALKER v. STATE.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. FALSE PRETENSES — OFFENSE—WHAT CONSTITUTES—EXPRESSION OF OPINION.

Where the defendant obtains from the prosecutor an automobile in exchange for \$150 in cash and a deed to a lot of land that he represented to contain ten acres, after having shown the land to the prosecutor and pointed out to him its true boundaries, and the prosecutor about six months after receiving his deed has the land surveyed, and then discovered that it contains only five acres, and there is no evidence of any effort or intention on the defendant's part to willfully deceive the prosecutor or to defraud him in the transaction, except the bare expression of his opinion that there were ten acres in the tract, or that there were five acres cleared and five acres in woodland, which

assertion, if it was false, must have been perfectly apparent to the prosecutor when he had the boundaries truly pointed out to him, and walked all over it with the defendant, this does not constitute such a false pretense for which the defendant can in law be held criminally liable.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. ¶7.]

2. FALSE PRETENSES — OFFENSE—WHAT CONSTITUTES—EXPRESSION OF OPINION.

It is well settled that an expression of a false opinion or judgment is not within the statute.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. §§ 5-12, 25; Dec. Dig. ¶7.]

3. FALSE PRETENSES — OFFENSE—WHAT CONSTITUTES.

Where the pretense relied upon to support the crime is absurd or irrational, or such as the party injured had at hand at the very time the means of detecting, it does not constitute a criminal offense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 14; Dec. Dig. ¶9.]

Error to Criminal Court of Record, Volusia County; T. P. Warlow, Judge.

H. S. Walker was convicted of obtaining property by false pretenses, and brings error. Reversed, and defendant discharged.

Stewart & Stewart and J. E. Alexander, all of De Land, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

TAYLOR, J. The plaintiff in error, hereinafter referred to as the defendant, was by information charged with the crime of obtaining an automobile of the alleged value of \$600, by false pretenses, in the criminal court of record of Volusia county, and was tried, convicted, and sentenced for said offense, and seeks a review of such judgment by writ of error.

[1-3] Thirty-nine errors are assigned, but, from the conclusions we have reached upon the facts and law of the case, we will discuss but one of them, since that one disposes of the entire case, and that is the denial of the defendant's motion for new trial, made upon the ground that the verdict is contrary to law and the evidence in the case. A brief summary of the evidence for the state in support of the charge makes out the following case: The prosecutor, who is alleged to have been imposed upon by the alleged false pretense, himself sought the defendant, saying to him that he had an automobile that he valued at \$600 that he desired to dispose of. The defendant then told him that he had a 10-acre lot of hammock land out in the country that he would give him, together with \$100 in cash in exchange for the automobile. Thereupon the prosecuting witness went out with the defendant and walked all over the lot of land, the defendant pointing out to him the boundaries, and again saying that there were 5 acres cleared and 5 acres in woodland; there being a fence around three sides of it. After inspecting the land, the

defendant and the prosecutor went back to town, and on the following Monday morning the prosecutor again approached the defendant and told him he would exchange his automobile for the land they had inspected the previous Saturday, and \$150. The defendant accepted this proposition, and executed with his wife a warranty deed to the lot in question, stating in said deed that it contained 10 acres more or less, and paid the \$150 in money, upon which the prosecutor delivered the automobile. The deed by which the defendant acquired his title to the land in question also asserted that it contained 10 acres, though there was some proof that the defendant knew that in reality it contained only 5 acres. The prosecutor some six months after his trade with the defendant had the land surveyed by a surveyor, and then discovered that there were only 5 acres, instead of 10, and he testified that, if he had known there were only 5 acres, he would not have parted with his automobile, but that he relied on the assertion of the defendant that there were 10 acres in the tract. The prosecutor also testified that he was a stock raiser and farmer, and was fairly familiar with land, land values, acreage, etc. The foregoing facts fairly state the case as made by the proofs on the part of the state. It will be observed that there was no assertion by the defendant that he had ever had the land surveyed, or that he positively knew that it contained fully 10 acres. There was no hurrying of the prosecutor into the trade. No effort on defendant's part to deter him from examination of the public maps and records as to the quantity of land contained in the lot; but, on the contrary, he goes out with the prosecutor to the land, points out to him its true boundaries, and they walked all over it together. There is no hint in the record of any effort or intention on the part of the defendant to willfully deceive the prosecutor or to defraud him in the transaction between them, except the bare expression of his opinion that there were 10 acres in the tract, or that there were 5 acres cleared and 5 acres in woodland, which assertion, if it was false, must have been perfectly apparent to the prosecutor when he had the boundaries pointed out to him and walked all over it with the defendant. Especially is this true in the prosecutor's case, since he testified that he was fairly familiar with the acreage of lands. It is well settled that an expression of a false opinion or judgment is not within the statute. 19 Cyc. 398; Gordon v. Parmelee, 2 Allen (Mass.) 212; State v. Webb, 26 Iowa, 262. In the case of Mooney v. Miller, 102 Mass. 217, it is held that:

"If the representations relate to the quality and productiveness of the soil, or the number of acres within boundaries which are pointed out, they are not actionable, for they are to be regarded as the usual and ordinary means adopt-

ed by sellers to obtain a high price, and are always understood as affording to buyers no ground for omitting to make inquiries." Bishop v. Small, 63 Me. 12; State v. Young, 76 N. C. 258.

In the case of State v. Cameron, 117 Mo. 641, 23 S. W. 767, it is held that:

"Where the pretense relied on to support the crime is absurd or irrational, or such as the party injured had at hand at the very time the means of detecting, it does not constitute a criminal offense." Buckalew v. State, 11 Tex. App. 352; State v. Paul, 69 Me. 215; Commonwealth v. Norton, 11 Allen (Mass.) 266.

Under the facts in proof in this case, we do not think that the defendant has been shown to be guilty of any criminal offense, and, inasmuch as another trial could result in law only in an acquittal of the defendant, and in useless costs to the county, the judgment of the court below in said case is hereby reversed at the cost of Volusia county, and the plaintiff in error is ordered to be discharged without day.

SHACKLEFORD, C. J., and COCKRELL, HOOKER, and WHITFIELD, JJ., concur.

(68 Fla. 294)

MOSELEY et al. v. TAYLOR.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. HOMESTEAD §136—DEVISE—VALIDITY.

The will of a head of a family who died in 1886, residing in this state on 18 acres of land which he attempted to devise by his will, was void under the Constitution of 1868.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 249, 250; Dec. Dig. §136.]

2. EQUITY §141—COMPLAINT—REQUISITES.

It is incumbent upon a complainant to allege in his bill every fact clearly and definitely that is necessary to enable him to relief, and if he omits essential facts therefrom, or states such facts as show he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 323-330, 333; Dec. Dig. §141.]

3. PARTITION §44 — RIGHT TO REMEDY — LACHES—HOMESTEAD.

Where a deceased head of a family residing on 18 acres of land in this state in 1886, when he died, attempted to devise his homestead to his widow, who continued to reside on it for three years, and where the widow conveyed the land to one of the two sons of the deceased husband on July 18, 1908, who on November 24, 1908, mortgaged the land to innocent parties without notice of facts which showed the land to have been the homestead of the deceased, a bill for partition of the said homestead land, filed by the other son of said deceased, against the mortgagees and his brother, for the partition of said 18 acres of land as the alleged homestead of his father, 27 years after the death of his father, there being no previous notice to the mortgagees of such alleged homestead claim, is without equity, as the complainant is barred by his laches in asserting his alleged rights in said land.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 111-113; Dec. Dig. §44.]

Appeal from Circuit Court, Suwannee County; M. F. Horne, Judge.

Bill by Harry Taylor against M. L. Moseley and others. From decree for complainant, defendants appeal. Reversed.

F. B. Coogler, of Brooksville, for appellants. Humphreys & Blackwell and J. L. Blackwell, all of Live Oak, for appellee.

HOCKER, J. Harry Taylor, of Madison county, brought his amended bill of complaint in the circuit court of Suwannee county against M. L. Moseley and T. B. Williams, doing business under the firm name of Moseley & Williams, of Pasco county, Fla., and W. B. Taylor of Calhoun county, Fla., alleging and praying in substance as follows: That William B. Taylor, late of Suwannee county, the father of complainant Harry Taylor and defendant W. B. Taylor, and husband of one Mary L. Taylor, was in his lifetime and at the time of his death the owner of, and at the time of his death was the head of a family living upon, the following described lands: (Here follows a description of the land, which contains 18 acres more or less, now situated within the corporate limits of the city of Live Oak, in Suwannee county.) That when William B. Taylor moved on said land for the purpose of residing on the same as a home, said land was not within the limits of the city of Live Oak, but said limits were subsequently extended to include said land. That William B. Taylor died in October, 1886, intestate as to said land, leaving Mary L. Taylor, his widow, and W. B. Taylor and Harry Taylor, his sons and only heirs at law. That William B. Taylor by his will attempted to devise said land to his widow, but it was the homestead of said William B. Taylor, and said will was null and void, and, at the death of W. B. Taylor, the complainant Harry Taylor and defendant W. B. Taylor became seised in fee of said land as tenants in common by descent from W. B. Taylor, subject to the rights of Mary L. Taylor in said homestead. It is alleged that Mary L. Taylor is entitled to a child's part, i. e., one-third of said land, and complainant Harry Taylor and defendant W. B. Taylor are each entitled to an undivided one-third interest in said land; that Mary L. Taylor continued to reside on said land and occupy same as her home for about three years after the death of her husband, and during the year 1889 moved off of said land, and has not had actual possession of same, or any part thereof, since. The bill alleges that no person or persons other than the complainant and defendants have any interest in or title to said premises or any part thereof, in possession, remainder, reversion, or otherwise. The defendant alleges he desires partition of the premises according to the respective interests of the parties; that it was necessary for him to employ counsel, etc., and prays for partition of the premises, etc., for solicitor's fees, and for the premises to be divided among the parties according to their

interests, for process, etc. The foregoing contains the substance of the amended bill, so far as it is necessary to be stated.

The defendants Moseley and Williams demurred to the amended bill, substantially on the following grounds:

(1) There is no equity in the bill.

(2) That the amended bill shows complainant has been guilty of laches in asserting his alleged rights.

(3) The bill seeks to quiet title in a partition suit.

[1, 2] This demurrer was overruled, and the defendants Moseley and Williams appealed to this court. It does not appear from the allegations of the bill that at the time of the death of W. B. Taylor, the father of complainant, which occurred in October, 1886, the premises in question were embraced in the corporate limits of the city of Live Oak. The question whether said premises was the homestead of said W. B. Taylor is to be ascertained by the provisions of the Constitution of 1868. We think the allegations of the amended bill show that it was a homestead, as he was the head of a family residing upon the premises at the time of his death. His attempt to devise the premises to his wife was therefore void as prohibited by said Constitution. But the most important question presented is whether complainant was barred from bringing this bill by his laches in asserting his rights. It is incumbent upon a complainant to allege in his bill every fact clearly and definitely that is necessary to entitle him to relief, and if he omits essential facts therefrom, or states such facts that he is not entitled to relief in a court of equity, he must suffer the consequences of his so doing. *McClinton v. Chapin*, 54 Fla. 510, 45 South. 35, 14 Ann. Cas. 365. It is well settled that in passing upon a demurrer to a bill every presumption is against the bill. *Id.*; *Dunham v. Edwards*, 50 Fla. 495, 38 South. 926; *Godwin v. Phifer*, 51 Fla. 441, 41 South. 597; *Weeks v. J. C. Turner Lumber Co.*, 53 Fla. 793, 44 South. 173.

[3] It is alleged in the bill that W. B. Taylor, father of complainant, by his will devised the premises to his wife. In the absence of denial in the bill it must be assumed this will was probated, and that complainant had notice of it. This was in 1886. Mrs. Taylor lived on the property for three years, of which fact the complainant must be assumed to have notice. Mrs. Taylor on July 18, 1908, conveyed the premises to the other son, of which fact the complainant is presumed to have notice, as there is no denial of the fact. On November 24, 1908, W. B. Taylor and wife mortgaged the premises to Moseley and Williams, and of this fact the complainant must be presumed to have had notice, as such notice is not denied. So far as appears, the complainant never asserted any right to an interest in this property from 1886, when

his father died, until August 6, 1913, when his original bill was filed in this case. So far as Moseley and Williams are concerned, the record shows a good title to the premises in W. B. Taylor, complainant's brother, when he mortgaged the same to appellants Moseley and Williams on the 24th of November, 1908. There is no allegation in the amended bill that they knew anything of complainant's claim that the premises was the homestead of his father, which depended upon matters in pais. Complainant therefore allowed his claim of an interest in the premises to lie dormant for about 27 years after his father's death (the record all the time showing an adverse claim in his mother and brother) and for nearly five years after the mortgage to Moseley and Williams was executed. The question whether land is a homestead or not must in the nature of things depend largely on matters in pais, i. e., actual residence in the state, the fact that the resident is the head of a family, etc. It therefore behooves a party who makes a claim of this kind to exercise reasonable diligence to assert his rights, in order that innocent purchasers may not be deceived. The defendants Moseley and Williams, so far as the allegations of the bill show, are innocent purchasers for value and without notice, and the ground of demurrer to the bill setting up the laches of complainant as to them should have been sustained. For sustaining and applying this principle, see the following authorities: *Anderson v. Northrop*, 30 Fla. 612, text 646, 12 South. 318; *Johnson v. McKinnon*, 45 Fla. 388, 34 South. 272; *Murrell v. Peterson*, 57 Fla. 480, 49 South. 31; *Pinney v. Pinney*, 46 Fla. 559, 35 South. 95; *Geter v. Simmons*, 57 Fla. 423, 49 South. 131.

The decree overruling the demurrer to the amended bill is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

(68 Fla. 344)

TAMPA DRUG CO. v. BERGER.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. ACTION \Leftrightarrow 69—STAY OF PROCEEDINGS—DEFINIAL—DISCRETION—ASSUMPSIT.

Where, on the trial of an action of assumpsit which had been pending for nearly three years, an application for a stay of proceedings pending a suit in equity for an accounting is made by the defendant, and no controlling cause appears why the issues cannot be determined by a jury, the trial judge commits no abuse of discretion in denying the application.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 744-751; Dec. Dig. \Leftrightarrow 69.]

2. WITNESSES \Leftrightarrow 224—EXAMINATION—LIMITATION.

When a defendant's witness has substantially testified positively to certain facts, it is not reversible error to refuse the permission to the defendant to ask the witness whether he

had ever heard of the existence of a claim by the plaintiff inconsistent with the facts stated by the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 788; Dec. Dig. \Leftrightarrow 224.]

3. MASTER AND SERVANT \Leftrightarrow 80—SALARY—EVIDENCE.

When a plaintiff is suing for an alleged balance of salary, and the issue as tried involved the question whether with a change of his duties he had voluntarily consented to a reduction of his original salary, and the plaintiff had testified to a change in his duties and employment, it was error to refuse to allow a witness for the defendant who had testified to his familiarity with the affairs and business of the defendant to answer a question as to the extent of extra work which the plaintiff testified had been imposed upon him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 107-127; Dec. Dig. \Leftrightarrow 80.]

4. JUDGMENT \Leftrightarrow 263—MOTION IN ARREST—COUNTS—PLEADING.

A motion in arrest of judgment should not be granted because of an alleged defect in only one of the common counts of the declaration, when the declaration had not been attacked by demurrer or otherwise.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 468-480; Dec. Dig. \Leftrightarrow 263.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Ernest Berger against the Tampa Drug Company, a corporation. Judgment for plaintiff, and defendant brings error. Reversed.

H. N. Sandler and McMullen & McMullen, all of Tampa, for plaintiff in error. K. I. McKay, of Tampa, for defendant in error.

HOCKER, J. [1] On the 6th of March, 1911, the defendant in error brought an action of assumpsit against the plaintiff in error in the circuit court of Hillsborough county. There was a verdict and judgment below for defendant in error, and a writ of error by the drug company. Berger, who will be called the plaintiff herein, claimed a balance due him as salary as an officer of the company from July 1, 1908, to July 1, 1909, and an item of \$170 advanced by him to the company. This item was eliminated on the trial. The declaration contained the common counts, and the defendant company pleaded the general issue. On the 6th of January, 1914, nearly three years after the suit was begun, the case came on for trial, and the defendant company asked for a stay of proceedings, on account of the pendency of an equity suit for an accounting with Berger, and attached a copy of the bill to the application. It does not appear from the record when this equity suit was filed, but the trial judge denied the application on the ground that the defendant company's claim was barred by the statute of limitations. This ruling of the court is assigned as error. We discover no reversible error in this ruling, inasmuch as an application of this kind must rest in the sound

judicial discretion of the court. Moreover, we are not persuaded by the facts set up in the bill, and which appear in the record, that it was necessary to have the account settled in a court of equity. 9 Cyc. 89, 90.

[2] The second assignment of error is based on the ruling of the trial judge refusing to allow the plaintiff in error to propound the following question to witness W. G. Allen:

"Did you ever hear anything of his (Mr. Berger's) leaving a portion of his salary to the credit of the company during that year?"

Mr. Allen testified at considerable length as to Berger's relations with the company. Allen was the president of the company, and a director from its organization. He testified emphatically that Berger's salary of \$3,600 per annum was by his request cut to \$2,000 per annum, and incidentally denied Berger's claim. We find no reversible error in this ruling.

[3] The next assignment of error is based on the ruling of the trial judge in sustaining the objection of Berger's attorney to the following question propounded to Mr. Allen:

"You were present this morning when Mr. Berger testified that after he was relieved of the duties of secretary and fiscal manager that he had the other duties of chief chemist imposed on him. Will you state to the jury how much additional work this extra duty, if any, imposed on Mr. Berger?"

Inasmuch as the issue between the parties, as developed before the jury, was whether Berger's salary had been reduced from \$3,600 to \$2,000, and Mr. Berger in his testimony had gone into the question of the character of the services which he performed, this question addressed to Mr. Allen should have been permitted, and the action of the court in refusing to allow it is reversible error.

[4] The next assignment presented is based on the action of the trial judge refusing a motion in arrest of judgment. This contention is based on the proposition that there is no appropriate count in the declaration to sustain the verdict, and that the count for "work and labor performed" is defective, because it does not allege that the services sued for were rendered at the request of the company. There was no objection made to the declaration before trial. It contained several of the common counts, among them counts "for money had and received by the defendant for the use of the plaintiff," and a "count upon an account stated," as well as the one which is criticised. This court has several times had occasion to apply section 1610, General Statutes of 1906, to cases similar to this, and we hold that no reversible error is committed in overruling a motion in arrest of judgment.

For the error pointed out the judgment of the circuit court is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

(68 Fla. 463)

LEIBOVIT v. GARFUNKEL.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

NEW TRIAL \S 114—AUTHORITY OF SUBSTITUTED JUDGE.

When the presiding judge postpones the hearing upon a motion for a new trial, and before the date so fixed becomes physically incapacitated to act, and another judge is transferred to that circuit, the substituted judge should act upon the motion.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. \S 234-236; Dec. Dig. \S 114.]

Error to Circuit Court, Monroe County; J. W. Perkins, Judge.

Replevin by Jake Leibovit against R. Garfunkel. Judgment for defendant, and plaintiff brings error. Reversed.

G. Bowne Patterson and H. H. Taylor, both of Key West, for plaintiff in error. W. Hunt Harris, of Key West, for defendant in error.

COCKRELL, J. This is an action in replevin brought by Leibovit against Garfunkel. There was a verdict for Garfunkel rendered June 17, 1913. Within four days thereafter a motion for a new trial was filed and presented to the presiding judge, Hon. L. W. Bethel, who fixed the date for the hearing thereon for June 23, 1913. On the day before that date Judge Bethel was stricken with paralysis, from which he never recovered. On February 10, 1914, Judge James W. Perkins, of the Seventh circuit, was assigned by the Governor to preside over the circuit court for Monroe county, in lieu of Judge Bethel, who was incapacitated to sit by reason of his illness.

No judgment having been entered upon the verdict, Judge Perkins was asked to rule upon the motion for a new trial, and also to enter judgment upon the verdict. He declined to entertain the former motion, and entered judgment final upon the verdict.

That the defendant has a right, a most valuable right, to have his motion for a new trial considered and determined cannot be questioned, provided only he has not waived or lost it by operation of law. That he has been guilty of no laches is equally clear. The trial judge recognized the right to be heard upon the motion, and set the hearing for a day within the term not then adjourned.

It would require a definite statute to make us hold that the right had been lost under the circumstances, and we have no such legislative command.

Chapter 5403, Laws of 1905, relating to motions for new trials, permits the judge to enlarge the time within which such motions may be made and presented, but this

motion was made without the need of such enlargement.

The motion was a matter pending before Judge Bethel, and, as such, became a matter to be determined or disposed of under Gen. St. § 1481, by the judge substituted for him by reason of his inability to act.

There may be encountered some difficulty in properly disposing of the motion, but there is no lack of jurisdiction in the substituted judge, and it becomes under said section one of his "duties."

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 425)

POORE v. STARR PIANO CO.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

TRIAL § 139—DIRECTION OF VERDICT—EVIDENCE.

Where any evidence has been submitted upon which the jury could lawfully find for one party, the trial court should not direct the jury to find a verdict for the opposite party.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.]

Error to Circuit Court, Santa Rosa County; J. E. Wolfe, Judge.

Action by the Starr Piano Company against J. F. Poore. Judgment for plaintiff, and defendant brings error. Reversed.

Clark & Magaha, of Milton, for plaintiff in error. J. T. Wiggins, of Milton, for defendant in error.

PER CURIAM. The piano company brought an action on a note given to the company for balance due on a piano and attorney fee. The defendant filed only a special plea in the nature of a plea of partial failure of consideration on which plea issue was joined. After introducing the note and evidence of a reasonable attorney fee, the plaintiff rested. The defendant produced evidence which at least tended to prove the issue tendered to and accepted by the payee of the note, but the court directed a verdict for the plaintiff and the defendant took writ of error.

Where any evidence has been submitted upon which the jury could lawfully find for one party the trial court should not direct the jury to find a verdict for the opposite party.

As there was evidence at least tending to prove the issue tendered and accepted, it was error to direct a verdict for the plaintiff. See Hillsborough Grocery Co. v. Leman, 51 Fla. 203, 40 South. 680; Gunn v. City of Jacksonville, 67 Fla. 40, 64 South. 435. See section 1465, Gen. Stats.

The judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 471)

DAVIS et al. v. DRUMMOND.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. FORCIBLE ENTRY AND DETAINER § 34—DIRECTION OF VERDICT—EVIDENCE.

Where the evidence in an action of forcible entry and detainer tends to show a bona fide peaceful possession and a forcible ouster of the plaintiff, and there is no showing whatever that the defendant had been in possession, or that he claimed any right or interest in the land at or prior to the plaintiff's peaceful entry, it is material error to direct a verdict for the defendant.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 157; Dec. Dig. § 34.]

2. FORCIBLE ENTRY AND DETAINER § 29—EVIDENCE—TITLE DEEDS—POSSESSION.

In actions for forcible entry, title deeds may be put in evidence when the possession of a part of the land is shown, for the purpose of showing the boundaries or the extent of the possession claimed.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 134-140, 147; Dec. Dig. § 29.]

Error to Circuit Court, Bay County; D. J. Jones, Judge.

Forcible entry and detainer by Mary F. Davis and others against J. H. Drummond. Judgment for defendant, and plaintiffs bring error. Reversed.

W. H. Milton, of Marianna, Reeves, Watson & Pasco, of Pensacola, and W. B. Farley, of Marianna, for plaintiffs in error. Blount & Blount & Carter, of Pensacola, for defendant in error.

WHITFIELD, J. Mary E. Davis and others brought an action of forcible entry and detainer against Drummond. The court directed a verdict for the defendant, on which a judgment for defendant was rendered, and the plaintiffs took writ of error.

The evidence shows that the lands were unoccupied; that early in the morning the plaintiffs entered upon a part of the land, cleared away the growing bushes, and had partially constructed a house thereon when the defendant appeared during the same morning with firearms, and required the parties at work in constructing the house to desist, whereupon the defendant tore down the partially constructed house, and inclosed the premises by a substantial fence. There is also evidence that "at or about the time" the plaintiffs "started to put a house there" "the boundaries of the land" were run out, and also that, "either on the day or the day before" the plaintiffs began the house building, a single wire was placed "practically around the land." In addition to this there is at least some evidence of good faith on the part of the plaintiffs in entering upon

the land. These facts tended to show a peaceful possession and a forcible ouster from at least a portion of the land, and the evidence tends to show the plaintiffs intended and by running lines and a wire attempted to occupy and possess the entire lot in controversy, there being nothing to indicate that the defendant had been in possession or claimed any right or interest in the land at or prior to the plaintiffs' peaceful entry. This being so, it was error to direct a verdict "that the defendant did not * * * forcibly enter upon the real estate in the complaint mentioned and turn the plaintiffs out of the possession thereof." See *Greeley v. Spratt*, 19 Fla. 644; 19 Cyc. 1132.

A verdict for the defendant should not be directed when the evidence tends to prove the issues in the case, and a verdict for the plaintiffs on the evidence would not be unlawful. See *Gunn v. City of Jacksonville*, 67 Fla. 40, 64 South. 435; *Hillsborough Grocery Co. v. Leman*, 51 Fla. 203, 40 South. 680; *Poore v. Starr Piano Co.*, 67 South. 99, decided at this term. In actions for forcible entry, title deeds may be put in evidence when the possession of a part of the land is shown, for the purpose of showing the boundaries or the extent of the possession claimed. *Walls v. Endel*, 17 Fla. 478.

The judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 523)

JOHNSON v. STATE.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW §547—EVIDENCE INTRODUCED ON FORMER TRIAL—PROOF—BILL OF EXCEPTIONS.

Where a party has been tried for murder in a circuit court and convicted, and on writ of error from this court the judgment has been reversed and a new trial granted, and where on a subsequent trial the testimony of a witness for the state who testified on the first trial cannot be had because the witness could not be found, the exclusive method provided by chapter 5897, Laws of 1908, for obtaining the desired evidence is to introduce in evidence the original bill of exceptions containing the evidence of the witness at the first trial, or, if that be lost, to re-establish such bill of exceptions, or such parts as were desired, which would under the statute have the force and effect of the original bill of exceptions.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1237-1246; Dec. Dig. § 547.]

2. HOMICIDE §305—INSTRUCTIONS—INDICTMENT.

Where the indictment charges a defendant with murder in the first degree, it is not erroneous under the statute for the trial judge to charge the jury to the effect that, if the party indicted is found to be an accessory before the fact to the crime of murder, she (or he) may be found guilty of murder in the first degree.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 637; Dec. Dig. § 305.]

3. WITNESSES §388—CROSS-EXAMINATION—IMPEACHMENT.

A witness who has not testified in chief in regard to a substantial fact not in issue may not be cross-examined as to what he may have said to some third person in regard to said matter, for the purpose of laying the ground for contradiction or impeachment.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.]

(Additional Syllabus by Editorial Staff.)

4. CRIMINAL LAW §27—"SUBSTANTIVE FELONY."

A "substantive felony" is one dependent on itself, and not on another felony to be first established (citing *Words and Phrases*, *Substantive Felony*).

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 29-31; Dec. Dig. § 27.]

Error to Circuit Court, Calhoun County; D. T. Jones, Judge.

Elizabeth Johnson, alias Sis Johnson, was convicted of murder in the first degree, and brings error. Reversed.

Price & Price, of Marianna, and J. W. Kehoe, of Panama City, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

HOCKER, J. Elizabeth Johnson, alias Sis Johnson, was jointly indicted with one Munroe Bess at the fall term of the circuit court of Calhoun county, A. D. 1911, for the murder of one James Whiddington. At the same term she was placed on trial and convicted of murder in the first degree, with a recommendation to mercy. From the judgment rendered she sued out a writ of error from this court, and upon consideration the judgment was reversed and a new trial awarded. 63 Fla. 16, 58 South. 540, 40 L. R. A. (N. S.) 1195. She was again tried at the spring term of said circuit court, A. D. 1914, and was found guilty of murder in the first degree, and sentenced to be hung. From this judgment a writ of error was sued out from this court.

[1] The first assignment of error is based on the ruling of the trial judge, over the objection of the defendant, "permitting the introduction in evidence of all that portion of the original transcript of record which was filed in the Supreme Court in a certain cause wherein Elizabeth Johnson, alias Sis Johnson, was plaintiff in error, and the state of Florida was defendant in error, which purported to show by the copy of the bill of exceptions incorporated in such transcript the testimony of Townie Bray given upon a former trial of this cause, and in admitting in evidence the purported testimony of said witness Townie Bray, as shown in said transcript."

This use of a part of the bill of exceptions contained in the transcript of the record sent to this court and filed and lodged with the clerk of the Supreme Court was object-

ed to by the defendant's attorneys on several grounds: First, it is not the bill of exceptions made up on the former trial; second, it is not shown by the testimony that it is a true copy of such bill of exceptions; third, the evidence does not show the loss or destruction of the bill of exceptions; fourth, that any statute which permits the use of a bill of exceptions, or a copy thereof, in lieu of the testimony of the witnesses, is unconstitutional; fifth, the evidence offered is not the best evidence. An attempt was made at the trial to show by the clerk of the circuit court that the original bill of exceptions was not in his office or possession. There were several attorneys in the case for the defendant, and the clerk says that the original bill of exceptions was sent to some one of them at Marianna, Fla. He does not seem to know positively whether it was ever returned to him or not. Some search was made by the attorneys in Marianna in several law offices, but it was not found. With this proof of the loss of the original bill of exceptions it seems the trial judge permitted the prosecuting attorney to read to the jury from the bill of exceptions contained in the transcript of the record of the former trial of Sis Johnson lodged in this court the evidence of one Townie Bray, who was a material witness for the state at the first trial, but could not be found for the second trial. In order that it may appear that the clerk of this court was not in fault, it is proper to say that, upon the application of the prosecuting attorney of the circuit court, the transcript of the record lodged in this court was sent by order of this court to the circuit judge. It was suggested to this court that the said transcript might aid in refreshing the memory of the clerk of the circuit court in the re-establishment of the alleged lost bill of exceptions, or some portion of it, but no such use of it was made. The only use made of it was in reading from it the alleged testimony of Townie Bray, given at the former trial, and this was objected to. It was not filed in the circuit court, and could not be, because it was a record of the Supreme Court, and not a record of the circuit court. The record of this court was not sent by it to the trial court "to take the place of a record shown to be lost," as is contended by the Attorney General in his brief in this case, and that the trial judge so understood the action of this court is shown by the fact that he did not attempt to file it in this trial, but returned it to the clerk of this court. There was no attempt made to re-establish the alleged lost bill of exceptions in the circuit court. A re-established lost record under the statute has the force and effect of the original. Section 1982, Gen. Stats. of 1906. It is contended by the plaintiff in error that under the statute of Florida (section 1, c. 5897, Laws of 1909) the original bill of exceptions, and not a certified copy thereof,

affords the only method of proving the testimony of a witness who testified on the first trial, but whose presence could not be secured for the second trial. That section reads as follows:

"In case any judgment at law rendered by any court of the state of Florida shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used in the former trial, whether oral or written, and incorporated in the bill of exceptions, cannot be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial: Provided, that no evidence given upon a former trial of any case pending in any of the courts of the state of Florida shall be used in evidence upon the trial of any cause in any of the courts in the state of Florida, except as herein provided."

It will be observed that the substantial amendment of section 1523, Gen. Stats. of 1906, by this section is contained in the proviso. This proviso limits the method of using evidence given upon a former trial to the bill of exceptions. The history of this section and its proviso is as follows: The opinion of this court in the case of Putnal v. State, 56 Fla. 86, 47 South. 864, had been promulgated a short time before its adoption by the Legislature. In that case this court held that section 1523, Gen. Stats. of 1906, providing for the use of bills of exceptions to prove testimony given at a former trial, did not exclude the use of other competent evidence to prove such testimony. The doctrine of Putnal v. State, was therefore abolished by the adoption of section 1, c. 5897, and by the terms of the proviso a bill of exceptions is the exclusive method by which evidence given at a former trial may be proven. Neither the original bill of exceptions nor a re-established bill of exceptions, having the force and effect of the original was used. It is contended, however, by the Attorney General, that what was read to the jury was a certified copy of the original bill of exceptions, and that under the statutes of Florida such a certified copy was competent testimony. Without going into a critical analysis of the several sections of the law applicable to the use of certified copies of records, it is sufficient to say that no certified copy was filed in evidence in this case, or became a part of the record of this case, and we say this without meaning to intimate that such a certified copy could take the place of the original bill of exceptions, or, if that be lost, of the re-established bill of exceptions. It is evident that a re-established record has greater probative value than a certified copy, unless the statute gives the latter equal force and effect as the original. This court, in the case of Simmons v. Spratt, 26 Fla. 449, 8 South. 123, 9 L. R. A. 343, had occasion to discuss the evidential value of a bill of exceptions and to suggest some uses to which it might be adapted. This case was decided before the passage of

chapter 4135, Laws of 1893 (section 1523, G. S. 1906). It seems to us the trial judge erred in admitting the evidence objected to under this assignment.

[2, 4] The seventh assignment of error questions the following special instruction requested by the state attorney, and given by the court, viz.:

"The court instructs the jury that, if you find from the evidence in this case, beyond a reasonable doubt, that Zeke Johnson, in Calhoun county, Fla., on December 23, 1910, feloniously and from and with a premeditated design to kill James Whiddington, shot the said James Whiddington with a gun and killed him, and that the said defendant, Elizabeth Johnson, was present and unlawfully and from and with a premeditated design to kill the said James Whiddington then and there advised, aided, and abetted, counseled or assisted the party who did kill James Whiddington to kill him as I have charged you, it will be your duty to find the defendant guilty of murder in the first degree."

The Attorney General contends that, under section 3179, General Statutes of 1906, authorizing the indictment of an accessory before the fact for a substantive felony, and conviction of such substantive felony, whether the principal has or has not been convicted, or is or is not amenable to justice, no error is shown by this instruction. Undoubtedly the indictment charges Elizabeth Johnson with substantive felony, which, under the statute, embraces the crime of accessory before the fact. A substantive felony is one dependent on itself, and not on another felony to be first established. 1 Bishop's New Criminal Law, § 696; 7 Words and Phrases, 6743. The defendant's evidence tended to show that James Whiddington was killed by Zeke Johnson. Zeke Johnson was himself killed in the fight in which Whiddington was killed. It is true that all the charges and instructions given by the trial judge ought to conform to the issues made by the pleadings, and that Zeke Johnson is not mentioned in the indictment. But in the indictment Elizabeth Johnson is named as a principal, and, under the statute referred to, if she was an accessory before the fact, she was properly indicted for the substantive offense. Her guilt or innocence would not be dependent on, or affected by, that of Munroe Bess or Zeke Johnson or other possible principal in the first degree. The substance of the issue was whether Elizabeth Johnson was guilty of the murder of James Whiddington, whether as principal in the first degree or second degree, or as accessory before the fact, and the instruction did not go beyond this issue. The fact that she was jointly indicted with Munroe Bess did not affect the issue on which she was tried, for her guilt was not dependent on his.

[3] The sixth assignment questions the ruling of the trial judge in refusing to grant the motion to strike the testimony of Green Sellars as to what Buddie Johnson told him

with reference to Munroe Bess shooting at Townie Bray. Buddie Johnson had testified for the defendant, and on cross-examination he was asked if he had not told Green Sellars that Munroe Bess shot at Townie Bray. He denied making any such statement. Sellars was then asked if Buddie Johnson had not made such a statement to him. This was objected to when propounded, and a motion made to strike the answer. This motion, it seems to us, should have been granted. On his direct examination Buddie Johnson had said nothing about Munroe Bess shooting at Townie Bray. It does not appear to have been matter relevant to the guilt or innocence of the defendant, and did not afford proper ground for cross-examination or for impeachment. The court erred in not granting the motion. *Stewart et al. v. State*, 42 Fla. 591, 28 South. 815; *Fields v. State*, 46 Fla. 84, 35 South. 185.

We think it unnecessary to discuss other assignments.

The judgment of the circuit court is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

(68 Fla. 320)

BUIE et al. v. STATE

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION ~~§ 99~~ — COUNTS—REQUISITES—REFERENCE TO OTHER COUNTS.

One count of an indictment may by apt expressions refer to a previous count for specifications of time and place, when the data referred to are not repugnant to the count in which the reference is made and the reference cannot reasonably be harmful to the accused.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 270, 270½; Dec. Dig. ~~§ 99~~.]

2. HOMICIDE ~~§ 130~~ — INDICTMENT — SUFFICIENCY.

In an indictment for murder, an allegation that the accused did "unlawfully and from a premeditated design to effect the death of the said J. shoot off and discharge at and upon the said J., thereby and by thus striking the said J., with the lead," etc., sufficiently alleges the efficient cause of the death to have been done unlawfully and from a premeditated design to effect death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 199-202; Dec. Dig. ~~§ 130~~.]

3. CRIMINAL LAW ~~§ 69~~—PRINCIPAL AND ACCESSORY—STATUTE.

The provision of section 3178, General Statutes of 1906, that whoever aids in the commission of a felony, or is accessory thereto, before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner prescribed for the punishment of the principal felon, in effect makes an accessory before the fact a principal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 87; Dec. Dig. ~~§ 69~~.]

4. HOMICIDE \S 342 — HARMLESS ERROR — VERDICT.

In view of section 3178, General Statutes of 1906, a verdict finding both defendants guilty of murder in the second degree, where one is charged as principal and the other as accessory before the fact of murder in the first degree, is not material or harmful error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 722; Dec. Dig. \S 342.]

5. CRIMINAL LAW \S 1144—PRESENCE OF DEFENDANTS—PRESUMPTION.

Where the bill of exceptions shows the cause was submitted to the jury after the defendants had testified, and there is nothing to indicate the contrary, it will be assumed that the defendants were present when the case was submitted to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. \S 1144.]

6. CRIMINAL LAW \S 565—TIME OF OFFENSE — EVIDENCE.

Evidence that a homicide was committed "about the last of February" is sufficient when, taken with other testimony, it is apparent that the current year was meant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1270; Dec. Dig. \S 565.]

7. CRIMINAL LAW \S 1172 — HARMLESS ERROR—CAUTIONARY INSTRUCTIONS.

Where no reference is made to any particular witness, if the use of the word "should" instead of "may" or other permissive expression, in a charge that "in considering the testimony you should consider the standpoint from which a witness testifies, his or her interest," etc., can be prejudicial in any case, it could not reasonably have been harmful in this case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. \S 1172.]

Error to Circuit Court, Citrus County; W. S. Bullock, Judge.

Anita Buie and another were convicted of murder in the second degree, and bring error. Affirmed.

B. G. Langston, of Inverness, and Fred R. Hocker, of Ocala, for plaintiffs in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

WHITFIELD, J. The plaintiffs in error were found and adjudged to be "guilty of murder in the second degree as charged in the second count," which second count of the indictment is as follows:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that Anita Buie, late of the county of Citrus aforesaid, did unlawfully and from a premeditated design to effect the death of one Will Jackson, make an assault on said Will Jackson, and a certain shotgun which was then and there loaded with gunpowder and leaden bullets, and by her, the said Anita Buie, then and there had and held in her hands, she, the said Anita Buie, did then and there unlawfully and from a premeditated design to effect the death of the said Will Jackson, shoot off and discharge at and upon the said Will Jackson, thereby and by thus striking the said Will Jackson with the lead of the said leaden bullets, inflicting on and in the body of the said Will Jackson mortal wounds, of which said mortal wounds the said Will Jackson then and there died.

"And so the said Anita Buie did in manner and form aforesaid unlawfully, and from a premeditated design to effect the death of the said Will Jackson, kill and murder the said Will Jackson.

"That Judge D. Ruffian, late of the county of Citrus aforesaid in the circuit and state aforesaid, laborer on the said 22d day of January, 1914, in the county and state aforesaid, with force and arms at and in the county of Citrus aforesaid, did unlawfully and from a premeditated design to effect the death of the said Will Jackson was present aiding, abetting, assisting, counseling, and advising the said Anita Buie the aforesaid felony to do and commit."

[1-4] The first count charges murder in the first degree against both parties, in that it alleges that the two defendants on the 22d day of January, 1914, in Citrus county, Fla., "did unlawfully, and from a premeditated design to effect the death of Will Jackson, fatally shoot him from which he died." On writ of error it is contended that the motion in arrest of judgment was erroneously overruled because the second count on which the conviction was had does not state the time or venue of the alleged offense. The statements in the second count that the grand jury "do further present," and that Ruffian on January 22, 1914, and in the county and state aforesaid, was unlawfully, etc., present aiding, abetting, etc., the said Anita Buie the aforesaid felony to do and commit, clearly and definitely refer to the allegations of the preceding count, which, in these particulars, are not repugnant to the second count; therefore the omissions of time and place from the second count are, under the circumstances here, not material or harmful. The act constituting the efficient cause of the death is sufficiently alleged to have been done unlawfully and from a premeditated design to effect the death of the person killed. See Webster v. State, 49 Fla. 131, 38 South. 514; Daniels v. State, 52 Fla. 18, 41 South. 609; Barber v. State, 52 Fla. 5, 42 South. 86. Section 3178 of the General Statutes of 1906 provides that whoever aids in the commission of a felony or is accessory thereto, before the fact, by counseling, hiring, or otherwise procuring such felony to be committed, shall be punished in the same manner prescribed for the punishment of the principal felon. This statute in effect makes an accessory before the fact a principal. See Albritton v. State, 32 Fla. 358, 13 South. 955. In view of this statute, it cannot be said that there was material or harmful error in the verdict finding the one charged as an accessory before the fact, as well as the one charged as principal, to be guilty of murder in the second degree.

[5, 6] The contention that error appears in the failure of the record proper to show that the case was submitted to the jury in the presence of the defendants cannot avail. The bill of exceptions states that the judge "submitted the said issues and the evidence so given to the jury," after the defendants

had testified with nothing to indicate that the defendants were not present when the case was submitted to the jury. Evidence that the homicide was committed "about the last of February" is sufficient, taken in connection with other testimony tending to show it was in 1914, as alleged.

[7] Error is assigned on the use of the word "should" in a charge given that:

"In considering the testimony you should consider the standpoint from which a witness testifies, his or her interest in the determination of the suit," etc.

The charge did not refer to any particular witness. If the use of the word "should" instead of "may," or other permissive expression, can be prejudicial to a defendant in any case, its use could not reasonably have been harmful under the circumstances of this case.

There is ample evidence to sustain the verdict, and the judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR and COCKRELL, JJ., concur.

HOCKER, J., takes no part.

(68 Fla. 439)

MILLER v. STATE.

(Supreme Court of Florida. Dec. 1, 1914.)

(*Syllabus by the Court.*)

HOMICIDE \S 257 — ASSAULT TO MURDER — SUFFICIENCY OF EVIDENCE.

The evidence in this case examined and found sufficient to sustain the verdict.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 543, 552; Dec. Dig. \S 257.]

Error to Circuit Court, Polk County; F. A. Whitney, Judge.

Lawrence Miller was convicted of assault to murder, and brings error. Affirmed.

C. B. Parkhill, of Tampa, and J. W. Brady, of Bartow, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

HOCKER, J. Lawrence Miller was indicted in the circuit court of Polk county at the fall term, A. D. 1913, for an assault to murder one Henry Burke. On the trial he was convicted as charged and sentenced to the state prison for 10 years. The assignments of error here question, first, the sufficiency of the evidence to support the verdict, and, second, the sentence as being excessive.

A state's witness testified that on the day before the shooting Miller told the witness he was going to shoot Burke to scare him, because he had caused a separation between Miller and his wife, and he was going to get revenge.

It is not easy to determine from the evidence how the encounter took place in which Miller shot Burke. It seems that Miller was stationed in a scrub near a road along which

Burke passed, and, when he got within about 50 yards of Miller, the latter shot at him several times, with a shotgun loaded with either No. 4 or No. 6 shot. Burke was struck by shot in several places. There is no testimony that he was severely wounded. The defendant says that Burke was armed with one or more pistols, and there is some evidence that Burke had threatened Miller's life before the encounter took place.

There is no evidence that Burke either shot at Miller or attempted to do so. Miller insisted that he shot simply to scare Burke, to keep him from his wife, and that he was afraid of him.

We are not able to say that the jury as reasonable men might not have found the verdict which they rendered. The parties to this transaction evidently belonged to a turbulent class.

It is contended that the size of the shot used and the distance the parties were apart when the shooting occurred showed that Miller had no purpose to kill Burke. The evidence is not such as would justify us in substituting our judgment for that of the jury and the circuit judge upon this point.

The sentence imposed was within the limits of the law, and its alleged severity would be a matter for the consideration of another department of the government.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

(68 Fla. 334)

STATE ex rel. FLORIDA WAREHOUSE & DOCK CO. v. GIBBS, Judge of Fourth Judicial Circuit et al.

(Supreme Court of Florida. Nov. 24, 1914.)

(*Syllabus by the Court.*)

APPEAL AND ERROR \S 485—SUPERSEDEAS—EFFECT.

When an appeal with supersedeas, from an order overruling a demurrer going to the entire equity of a bill, is pending in the Supreme Court, the appellant should not be required by the circuit court to plead to an amended bill thereafter filed in the same cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2228, 2264-2374; Dec. Dig. \S 485.]

Original prohibition by the State, on the relation of the Florida Warehouse & Dock Company, a corporation, against George Couper Gibbs, Judge of the Fourth Judicial Circuit, and another. Demurrer to return sustained.

J. T. G. Crawford, of Jacksonville, for petitioner.

COCKRELL, J. This is an original proceeding, a prohibition against the circuit judge to prevent his entertaining and proceeding further in a certain cause now pend-

ing in this court, wherein the Florida Warehouse & Dock Company is the appellant and the W. W. Cummer & Sons Company, a corporation, is the appellee.

A bill of complaint was filed in December, 1913, by the Cummer Company against the warehouse company, to which the latter demurred, attacking the equities of the bill, assigning 12 grounds of demurrer; some of these grounds being addressed to the whole of the bill and others to specific parts of the bill. The demurrer was overruled and the warehouse company appealed to this court and obtained a supersedeas. While the cause was so pending in this court under that supersedeas, the complainant obtained leave of the circuit court to file an amended bill upon the same cause of action, directing the warehouse company to plead thereto. An order was also entered October 24, 1914, that the supersedeas order of March 2, 1914, be modified so as to stay only further proceedings upon the original bill of complaint.

It is immaterial that the amendments permitted were such as in the minds of the pleader or of the court obviated the objections interposed to the bill as originally framed. The demurrer that is before this court attacks the right of the complainant to recover in a court of equity, and the defendant upon this appeal has the right to have this court decide that question. The law does not permit the same cause of action to be litigated in the same case between the same parties at the same time in the courts of original and appellate jurisdiction, when the action of the court of original jurisdiction has been stayed by a supersedeas duly or regularly obtained.

In *Holland v. State*, 15 Fla. 549, we held that, pending an appeal, the circuit court could not dismiss a cause as to the appellant and thus deprive him of the right to have his case adjudicated upon that appeal. Further it was there said that, "after an appeal is prayed for and allowed, the record cannot be changed or altered by either party." See, also, *State ex rel. Shrader v. Phillips*, 32 Fla. 403, 13 South. 920.

We are not dealing with exceptional cases, such as those arising out of the necessity for maintaining the status quo and preventing waste, nor the mere filing of actions or defenses with a view to avoiding the statute of limitations and the like. The vice here is in ordering the defendant to proceed to litigate the amended bill of complaint, before it had forfeited its right to have this court determine some at least of the same issues of law presented by both original and amended bill.

The *Holland Case*, supra, would seem to be decisive in its reasonings, with which we fully concur. The circuit court should not have ordered the warehouse company to

plead to the amended bill of complaint while its appeal was pending before this court.

A formal order is doubtless unnecessary, as we are sure our views will be fully respected.

The costs of this writ will be taxed against the W. W. Cummer & Sons Company.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 305)

THOMAS CO. v. DAUGHERTY et al.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 1009—DECREE—EVIDENCE — SEPARATE PROPERTY OF MARRIED WOMAN.

Where the evidence is legally sufficient to sustain a finding that material used in erecting a building on a married woman's separate property was not so "used with her knowledge or assent," and it does not clearly appear that the finding is erroneous, a decree dismissing a bill in equity which seeks to subject such property in payment for the material will not be reversed on the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. \S 1009.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Suit by the Thomas Company, a copartnership, against Ida S. Daugherty and her husband. From decree for defendants, complainants appeal. Affirmed.

W. S. Broome, of Gainesville, for appellants. S. L. Carter, of Gainesville, for appellees.

WHITFIELD, J. The appellants seek to charge in equity and have sold certain lands, the separate real property of a married woman, to pay for material alleged to have been in part selected by her, and all used "with the full knowledge of the married woman in the erection and construction of a residence on her separate property."

By answer the married woman denies the indebtedness; denies that she personally selected or purchased any material from the complainants "for use in her dwelling; and denies that any merchandise or material was ever furnished or was ever used in the construction of her dwelling house with her knowledge or consent." The answer avers that the married woman, "while living in the city of Jacksonville, county of Duval, and state of Florida, in the year 1911, and owning the lot in Gainesville, Alachua county, Fla., described in complainant's bill, and desirous of building a bungalow on said lot, she contracted with one B. Daugherty, a contractor and builder in the city of Jacksonville, for an agreed price, to erect and build said building, he furnishing all material, etc.; that she had no knowledge of

where he was to buy the material—whether in Jacksonville, Gainesville, or elsewhere; that during the erection of the bungalow she was in Gainesville several times on visits to her sister, while the work was being carried on; that she had no knowledge where the contractor obtained his material, and supposed that he paid for it as he obtained it, as no notice of any kind was given her that she was expected to be responsible for it; that after the building was done and turned over to her she then paid the contractor in full the agreed price and some extras; that she never knew that the complainant or any one else had any claim against the contractor or her, until long afterwards, and after the completion of the building, and after she had settled in full with the contractor." A general demurrer was incorporated to the bill of complaint. Replication was filed and testimony taken. From a final decree dismissing the bill, the complainants appealed.

The Constitution provides that:

"A married woman's separate real or personal property may be charged in equity and sold for labor and material used with her knowledge or assent in the construction of buildings, or repairs, or improvements upon her property."

The evidence shows that the dwelling was built by a contractor, and that the materials in question were charged to him. There was evidence upon which the chancellor could have found that the married woman did not select or order any of the materials, and that, if they were purchased as alleged and used in the building, it was done without any knowledge on her part that they were purchased from the complainants, and that she did not assent to such purchase and use, but dealt only with the contractor who purchased in his own name in constructing the house under contract. We do not hold that the notice required in cases of statutory liens does not apply in a case like this.

On the entire evidence it is not clear that the chancellor erred in dismissing the bill of complaint. Where the evidence is legally sufficient to sustain a finding that material used in erecting a building on a married woman's separate property was not so "used with her knowledge or assent," and it does not clearly appear that the finding is erroneous, a decree dismissing a bill in equity which seeks to subject such property in payment for the material will not be reversed on the evidence. In this case it is not clearly shown that any conduct on the part of the married woman misled the complainants, or that by implication she had knowledge of, or did assent to, the purchase of the material in question from the complainants for use in constructing the building on her separate property. The contractor was paid in full before complainant's claim was presented. The material was, in fact, charged

to the contractor, and there is evidence to sustain a finding that the married woman had no contractual relation with complainants, did not purchase the material in question, and did not know of or assent to the use of it in erecting the building.

The decree is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 369)

C. E. INGALLS & BRO. v. MERCHANTS' BROOM CO.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

PROCESS \Leftrightarrow 49—SERVICE—COUNTY COURT.

There is no repugnancy between sections 1401 and 2037 of the General Statutes of 1906. If process of the county court is to be served in the county where the court sits, the service is made under section 2037. If service of the process is to be made in another county, section 1401 provides the regulation.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 48; Dec. Dig. \Leftrightarrow 49.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by the Merchants' Broom Company, a corporation, against C. E. Ingalls & Brother, copartners. A writ of certiorari was issued by the circuit court to the county court, an order of the county court quashing return of service was vacated and the cause remanded to the county court, and defendants bring error. Affirmed.

J. M. Carson, of Jacksonville, for plaintiffs in error. Johnson & McIlvaine, of Jacksonville, for defendant in error.

WHITFIELD, J. A writ of certiorari issued from the circuit court for Duval county requiring the county court to certify for review an order made by the county court quashing a return upon a summons ad respondendum made by the sheriff of Duval county on the defendants there. The order quashing the return was vacated, annulled, and reversed by the circuit court, and the cause remanded, with directions that the county court assume jurisdiction of the defendants on the service as made. The defendant below took writ of error to this court.

The sole question to be determined is whether the process of the county court for Duval county may lawfully be served on the defendants in Dade county by the sheriff of Dade county so as to give the Duval county court jurisdiction of the defendants for the purposes of the litigation in the cause.

Sections 1401 and 2037 of the General Statutes of 1906 are as follows:

"1401. (1014 and 1246.) Process by Whom.—All process, except that issuing from a justice of the peace court, shall be served by the sheriff of the county in which it is to be served. Process of a justice of the peace court may be served by a sheriff of the county or by a constable. A

justice of the peace in the respective counties may serve all process in cases where the sheriff is interested, and in case of necessity the judge of the circuit court may appoint an elisor to act instead of the sheriff.

"All writs or process issued upon the institution of a suit which may be begun in a county where the defendant does not reside, and all writs, process or notices requiring service upon a defendant not in the county where the suit is pending, may be served by the sheriff of the county in which the defendant is to be found.

"2037. (1575.) Sheriff.—The sheriff of the county shall serve and execute all civil process and do and perform all duties in and about county courts which are required to be performed by an executive officer."

Section 1401 relates to the service of process generally, while section 2037 relates to the duties of the sheriff of the county to be performed in the county as the executive officer of the county court. There is no repugnancy in the two sections. Each operates in its proper sphere without conflict with the other. If process of the county court is to be served in the county where the court sits, the service is made under section 2037. If service of the process is to be made in another county, section 1401 provides the regulation.

The judgment of the county court quashing the service made by the sheriff of Dade county in that county was properly vacated by the circuit court.

Affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 458)

HAY v. STATE.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. ABDUCTION — 1 — ENTICING FOR CLANDESTINE MARRIAGE — ELEMENTS OF OFFENSE — FRAUD AND DECEIT.

The inducing of an unmarried female under the age of 16 years to leave her home, without the consent of her parents, for the purpose of effecting a marriage, so long as no fraud or deceit is practiced upon her, does not constitute the offense set forth in section 3522 of the General Statutes of Florida. The fraud and deceit must be practiced upon such unmarried female in order to entice her away, and not upon her parents, for the purpose of effecting a clandestine marriage, without the consent of her parents.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. — 1.]

2. ABDUCTION — 1 — "CLANDESTINE MARRIAGE."

A clandestine marriage is one contracted without observing the conditions precedent prescribed by law, such as procuring a license, or the like.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. — 1.]

Error to Circuit Court, Osceola County; T. W. Perkins, Judge.

Warren Hay was convicted of unlawfully enticing away a female under the age of 16 years, to effect a clandestine marriage, and brings error. Reversed.

Johnston & Garrett, of Kissimmee, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, C. J. An indictment was found against Warren Hay, wherein it was charged that the accused "did fraudulently and deceitfully entice away one Eva Simpson, an unmarried female, under the age of 16 years, from her father's house, without the consent of her parents, under whose care and custody she was living, for the purpose of effecting a clandestine marriage of the said Eva Simpson without such consent." The defendant pleaded not guilty, and was tried before a jury and convicted and sentenced to confinement at hard labor in the state prison for the period of one year.

Obviously the indictment was based upon section 3522 of the General Statutes of Florida, which is as follows:

"Whoever fraudulently and deceitfully entices away an unmarried female, under the age of sixteen years, from her father's house, or wherever else she may be found, without the consent of the parent, guardian or master, if any, under whose care and custody she is living, for the purpose of effecting a clandestine marriage of such female without such consent, shall be punished by imprisonment in the state prison not exceeding one year, or by fine not exceeding one thousand dollars."

[1] Several errors are assigned, some of which are predicated upon the exclusion of testimony proffered by the defendant, and others upon the general charge given by the court and upon the refusal of instructions requested by the defendant. There is also an assignment based upon the overruling of the motion for a new trial, which, among other grounds, questioned the sufficiency of the evidence to support the verdict. We shall not undertake to discuss the assignments in detail. One of the assignments is based upon that portion of the general charge numbered 10 which is as follows:

"(10) The court further charges you that any acts or conduct by which an unmarried female under the age of 16 years is caused to leave her father's home, for the purpose of depriving the father or mother of the privilege of consent to a marriage which is expected to be brought about by such acts and conduct, constitutes such fraud and deceit upon the parent as it is intended by the law of the state of Florida, which makes it a crime for any one to so entice an unmarried female under the age of 16 years away from her father's home for the purpose of effecting such marriage, and any such acts or conduct as induces such unmarried female under the age of 16 years to leave her father's home for the purpose of effecting a marriage without the consent of the parents of such female is a clandestine marriage within the meaning and intent of the statutes of the state of Florida."

[2] We are of the opinion that this error is well assigned. The statute upon which the indictment is based and which we have copied above contains no such provision as the charge defines or embraces. The inducing of an unmarried female under the age

of 16 years to leave her home, without the consent of her parents, for the purpose of effecting a marriage, so long as no fraud or deceit is practiced upon her, does not constitute the offense set forth in the statute. The fraud and deceit must be practiced upon such unmarried female in order to entice her away, and not upon her parents, for the purpose of effecting a clandestine marriage, without the consent of her parents. As defined in Black's Law Dictionary (2d Ed.):

"A clandestine marriage is (legally) one contracted without observing the conditions precedent prescribed by law, such as publication of bans, procuring a license, or the like."

We shall not undertake to set forth the evidence adduced. Suffice it to say that it utterly fails to show that the defendant fraudulently or deceitfully enticed Eva Simpson to leave her father's house, but, on the contrary, that she willingly left her home with him and of her own volition consented to marry the defendant; that she and the defendant went together to the house of the county judge, who had issued the marriage license, within less than two hours after the issuance of such license, who performed the marriage ceremony, in the presence of a number of witnesses. We frankly say, after a careful reading of all the evidence, that we fail to see wherein the defendant was shown to have violated the statute. The judgment must be reversed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(68 Fla. 537)

BELOTE v. CHALIFOUX.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

MECHANICS' LIENS §115—RIGHT — LABOR
AND MATERIAL FURNISHED CONTRACTOR.

Where a building is constructed under contract with a builder who is to furnish all material and labor for the entire job for a stated amount, and material is bought by the builder and charged to him, and the owner does not directly or indirectly assume responsibility for material used in the building, and no notice of lien for such material is given the owner before the builder is paid in full, persons so furnishing material to the builder are not entitled to a lien on the land therefor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent.Dig. §§ 150-159; Dec.Dig. §115.]

Appeal from Circuit Court, Duval County;
Geo. Couper Gibbs, Judge.

Action by Charles G. Belote against H. M. Chalifoux. From decree for defendant, complainant appeals. Affirmed.

J. M. Carson and Bryan & Carson, all of Jacksonville, for appellant. D. C. Campbell, of Jacksonville, for appellee.

WHITFIELD, J. A bill in equity was filed by Belote against H. M. Chalifoux to declare

a lien upon real estate of the defendant for labor and materials furnished in buildings on said property. An answer was filed contesting the rights asserted, replication was filed, and a report was made by a master in favor of the complainant. The court sustained exceptions to the master's report and rendered a final decree for the defendant. On appeal the complainant below assigns error on the action of the court.

The theory of the bill is that the complainant was in privity with the defendant in furnishing the labor and material for which a lien is sought. A careful consideration of the evidence discloses no error in the action of the chancellor in decreeing in favor of the defendant. There is substantial evidence to sustain a finding that the building was constructed by a person who engaged to do the entire job, furnishing all materials, for a stated price, and that the complainant furnished labor and material for the plumbing, etc., pursuant to a contract made with the builder on his own account, and not as agent of the owner. The evidence shows a contract made by the complainant with the builder to do the work and furnish the material in controversy, and there is no showing that the defendant owner of the property in any way became responsible for the material and labor furnished under such contract. It is true payments were made to the complainant by the defendant's checks, but there is evidence that this was done at the request of the builder. There is evidence that the defendant gave some attention to the character of the labor and material furnished and that she gave instructions in the absence of the builder; but the evidence does not show that she directly or indirectly assumed responsibility for the labor and material ordered by the builder, who was paid in full by installments as agreed before any notice was given to the defendant owner that the complainant demanded payment of her. There is evidence that the builder did not fully complete the job, and that the plumbing, etc., here in controversy was completed after the builder left the job; but there is also evidence that the last payment made by the defendant to the complainant was made at the request of the builder. Bills for material were made to the builder and not to the defendant, and it does not appear that the builder acted as the agent for the owner in ordering or receiving the material. As the evidence does not show a relation of privity between the complainant and the defendant, or of principal and agent between the owner and the builder, and as no notice was given as required where no privity exists, there was no error in rendering a decree for the defendant. Decree affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 473)

SUMTER COUNTY STATE BANK v. HAYS
et al.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. BILLS AND NOTES \S 335—INDORSEE—NOTICE—"HOLDER IN DUE COURSE."

Where an indorsee takes a negotiable note with knowledge of an executory contract that is the sole consideration for the note, such indorsee is not a holder in due course without "notice of any infirmity in the instrument or defects in the title" thereof within the meaning of the negotiable instrument statute, even though the indorsee did not know of the subsequent breach of the contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 817; Dec. Dig. \S 335.]

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course.]

2. BILLS AND NOTES \S 453 — DEFENSES — CONSIDERATION—EXECUTORY CONTRACT.

Where an executory contract is the sole consideration for a negotiable note, the contract and its breach may be shown in defense of an action on the note by a holder who took with knowledge of the contract.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. \S 1344-1351; Dec. Dig. \S 453.]

Error to Circuit Court, Sumter County; W. S. Bullock, Judge.

Action by the Sumter County State Bank against R. S. Hays and another. Judgment for defendants, and plaintiff brings error. Affirmed.

McMullen & McMullen, of Tampa, for plaintiff in error. Hocker & Martin, of Ocala, for defendants in error.

WHITFIELD, J. The bank brought an action on a promissory note for \$500 made and indorsed by R. S. Hays and R. M. Hays to the Florida Consolidated Canning Company, who indorsed the note to plaintiff bank. The pleas were: (1) That the defendants did not execute and deliver the note; (2) that the note was given for stock subscribed for, and to be issued by, a corporation thereafter to be organized as the Consolidated Canning Company, the condition being that a canning plant of a stated capacity per day be built and equipped at Webster, Fla., within a time limit; that the company be organized within three months from a stated day, and that, in the event said company should not be organized within such time, said subscriptions to stock were to be canceled; that "thereupon defendants, upon the sole consideration" of the premises, made and delivered the note; "that at the time of the indorsement and delivery of said note to the plaintiff, it had actual notice of the conditions upon which the said note was made, and that the conditions were broken, and the plaintiff is not a holder in due course, and the consideration for the note has wholly

failed." It is not necessary to set out other pleas seeking to raise somewhat similar issues. Demurrers to all the pleas except the first were overruled. A replication to the second plea alleges that the plaintiff purchased the note immediately after the execution thereof, and long prior to its maturity, in good faith and in the usual course of business, for full value, and plaintiff had no notice or knowledge of any breach of the executory contract which was the consideration for which the note was given. A demurrer to the replication was sustained. The plaintiff declining to further plead, judgment for defendants was rendered, and the plaintiff took writ of error.

[1, 2] As the replication does not deny the plaintiff's knowledge of the executory contract which was the sole consideration for the note, and only alleges that "the plaintiff had no notice or knowledge of any breach of the executory contract which was the consideration for which said note was given," the implied admission of knowledge of the executory contract and its conditions, as constituting the sole consideration for the note, renders the plaintiffs not a holder in due course without "notice of any infirmity in the instrument or defects in the title of" the canning company or those who assumed to act for it in transferring the note to the plaintiff. See sections 2962, 2985, 2988, Gen. Stats. of 1906.

The contract referred to in the pleas has reference solely to the consideration for and the validity of the note, and its introduction is not for the purpose of varying the terms of the note. See 17 Cyc. 655; Dicken v. Morgan, 54 Iowa, 684, 7 N. W. 145; Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698.

The replication alleges that the plaintiff purchased the note immediately after it was executed. This, of course, was before the breach of the condition of the executory contract, which contract was the sole consideration for the note. As the plaintiff bank knew the contract was the consideration for the note, and that a breach of the condition of the contract would affect the consideration for the note, the bank took no better title than its indorser, the canning company, had. This being so, the note taken by the bank with knowledge of the contract is affected by the failure of consideration caused by a breach of the contract after the bank took the note; since a breach of the contract was one of the contingencies affecting the consideration for the note. Not being a holder in due course within the meaning of the statute, the plaintiff cannot enforce the payment of the note against the averments of the pleas.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 465)

WHITNER et al. v. WOODRUFF et al.
(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

1. HIGHWAYS \S 105—PAVING—AUTHORIZATION BY VOTE—SUBSTITUTED STREET.

When a vote of the people for issuance of bonds has authorized the pavement of a certain street in a municipality at public expense, the county commissioners have no authority to substitute another street to be so paved.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. \S 105.]

2. HIGHWAYS \S 105—PAVING—CHANGE OF WIDTH.

When bonds have been voted for paying with brick streets and roads of specified width, the county commissioners should not attempt to materially lessen those widths, because the amount voted was not sufficient to carry out the scheme as voted.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 323-330; Dec. Dig. \S 105.]

3. COUNTIES \S 196—EXPENDITURE OF PUBLIC FUNDS—INJUNCTION—PARTIES.

Taxpaying citizens may enjoin a further unauthorized expenditure of the public funds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. \S 196.]

4. MUNICIPAL CORPORATIONS \S 323—STREET PAVING—SUBSTITUTION OF STREET—INJUNCTION—ABUTTING OWNERS.

Abutting owners upon a street which their votes have authorized to be paved at public expense may enjoin the substitution of another street to be so paved.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 842-846; Dec. Dig. \S 323.]

Appeal from Circuit Court, Seminole County; J. W. Perkins, Judge.

Bill by J. N. Whitner and others against F. L. Woodruff and others. From an order modifying restraining order previously granted, complainants appeal. Reversed.

Landis & Fish, of De Land, for appellants. Geo. A. De Cottes, of Sanford, and Fred T. Myers, of Tallahassee, for appellees.

COCKRELL, J. This is an appeal from an order modifying a restraining order theretofore granted.

The bill was filed by J. N. Whitner and other resident taxpayers against the county commissioners of Seminole county, the trustees of the special road and bridge district, and the contractors for the building of certain roads with vitrified brick, to prevent certain changes in the routes as authorized by the vote of the people, and also in narrowing the widths of certain roads to be so built. Bonds had been voted for the construction of these roads, and had been awarded to the respective contractors, but had not been all delivered.

One of the roads authorized to be paved is described in the proposal submitted to the voters and ratified as "Sanford and Orlando road, 8 miles to be constructed of vitrified brick for a width of 14 feet within the city

limits of Sanford, and 9 feet from said city limits to Soldier creek." It would seem that this description applied within the city limits to Sanford avenue, a direct continuation of the Sanford and Orlando road, but, in response to a petition numerous signed and a resolution of the city council, the county commissioners fixed the route upon entering the city limits so as then to go west on Hughey avenue to Park avenue, and thence north on Park avenue, thus paving at the public expense Park avenue, and leaving Sanford avenue, upon which is the property of the complainants, without pavement, and thereby tending to divert the traffic from passing their property.

[1] The chancellor approved this action of the commissioners upon the theory, as expressed in his decree, that they had "the right to vary the route of the road within the city limits from the route as designated and described in said original petition as the Sanford and Orlando road within the city limits, provided the county commissioners adhere to some direct route leading to the same objective point." From this language we understand the holding to be that the county commissioners may change the proposed route within a municipality after a different location has been submitted to popular vote as the one to be paved. To this we cannot give our assent. While the citizens might, if requested, have such confidence in their officials as to give them power in general terms, yet, when the request is for specific limited power, those officials must keep within its limitations. If the county commissioners obtain the consent of the people by a vote to pave, at public expense, a designated road or street, those owning property fronting upon that road or street may justly complain, if the officials undertake to pave, not that street, but another parallel street three blocks distant.

It is common knowledge that streets in towns are often better known by the places to which they lead than by the official name, and it is evident that what was understood as the Sanford and Orlando road within the city of Sanford was that portion of it platted as Sanford avenue.

[2] Again, the court erred in permitting the county commissioners, within their discretion, to narrow the width of the roads, so long as it be done reasonably, proportionately, and uniformly, and that they expend all the funds and use all the material belonging to this special fund, and to reduce the width of certain roads to such an extent as to permit the construction of the total mileage originally authorized. One vice in this order is its uncertainty. The changes actually attempted to be made, and for which contracts had been let, were not uniform, and what may constitute uniformity, proportion, and reasonableness commits again too much dis-

cretion to the officials whose powers are granted and hedged in by a specific vote, a specific contract, as it were, with those in whom the Legislature have confided the ultimate right. The whole difficulty in this case arises out of the primary mistake made in attempting to award contracts, when it had been ascertained that the funds voted were not sufficient to carry out the scheme. The county commissioners are authorized, in these matters, to make contracts only when the contract price does not exceed the amount voted for at the special election. The people voted \$200,000 for the building of certain roads of specified widths. The commissioners, before a bond was issued, ascertained that the project as voted would cost over that sum by about \$25,000, if the contracts then proffered them were accepted. It became then their duty either to call for new bids, to decline to award the contract, or to ask again for further power or for more money. An agent authorized to build a road 16 feet wide, if he can do so for a certain sum of money, may not use that money to build a road 12 or 9 feet wide. This variance is not a mere administrative detail that inferentially or impliedly is committed to the discretion of the agent, but a serious matter of substance, and an act beyond the limits of the power conferred.

[3, 4] Whether as taxpayers seeking to prevent the further unauthorized expenditure of money, or as abutting owners peculiarly interested in the diversion of the proposed route, the complainants have a standing in a court of equity.

It follows that the modification of the restraining order was improper, and the order appealed from is reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 443)

HACKNEY et al., County Com'rs, v. SNIPES, et al.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

INTOXICATING LIQUORS §41—ISSUANCE OF PERMITS—DIVISION OF ELECTION DISTRICT.

If an election district be divided and the numbers given to the election districts constituting the same territory are changed as authorized by law, the status of the original territory is not thereby changed for the operation of the statute regulating the issuance of permits to sell liquors therein, unless by some action taken it has become unlawful to sell liquors in that territory.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 35; Dec. Dig. §41.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Certiorari by W. D. F. Snipes and others against J. L. Hackney and others, County Commissioners, to annul a permit to sell

liquors. Judgment annulling the permit, and respondents bring error. Reversed.

G. B. Wells, of Plant City, and P. O. Knight, of Tampa, for plaintiffs in error. McMullen & McMullen, of Tampa, for defendants in error.

WHITFIELD, J. The board of county commissioners granted a permit to sell liquors, wines, and beer in that portion of Hillsborough county designated as election district No. 39, which territory had previously been a part of election district No. 33, in said county. By certiorari the circuit court annulled the permit so granted, holding in effect that the statute must be applied to election district as constituted and numbered, and if a change is made in an election district in which it is lawful to sell liquor by the division of the district, and a change of the numbers, such division and change of numbers ipso facto render it unlawful to issue a permit to sell liquors in the district when a majority of the registered voters of the newly made and numbered election district have not since October 1, 1897, petitioned for the sale of liquor therein. The respondents took writ of error, and challenged the propriety of the use of certiorari in this class of cases, the right of the relators to maintain the action, and the construction put upon the statute by the circuit court.

As this court has appellate jurisdiction of all cases originating in the circuit court, and as this cause originated in the circuit court and a writ of error was taken to the judgment entered therein, the judgment may be reviewed and reversed if erroneous, even though the action be not appropriate to the case, or not brought by the proper parties, and such a course may be pursued where it will facilitate the administration of justice under the law. Therefore, without considering the propriety of the procedure adopted or the right of the parties to maintain the action, the correctness of the judgment will be determined in so far as it depends upon a construction of the statute regulating the issue of permits for selling liquors where such sale is not unlawful.

Section 1222 et seq. of the General Statutes provides for obtaining a permit from the board of county commissioners "to sell liquors, wines and beer in any election district wherein a majority of the registered voters have, since October 1, 1897, petitioned for a permit to sell liquors, wines and beer." Section 184 et seq. of the General Statutes authorizes the board of county commissioners "to alter or change" any election district "or to create new districts, designating each district by number." Considering these statutes together, it is clear that the intent of the law is that permits may be granted to sell liquors in a particular portion or part of the

territory of a county constituting at the time an election district with a designated number "wherein a majority of the registered voters have, since October 1, 1897, petitioned for a permit to sell liquors, wines and beer," and such sale is not unlawful. If the election district be divided and the numbers given to the election districts constituting the same territory are changed as authorized by law, the status of the original territory is not thereby changed for the operation of the statute regulating the issuance of permits to sell liquors therein, unless by some action taken it has become unlawful to sell liquors in that territory. It appears to be conceded that election district No. 33 in Hillsborough county was divided and made election districts Nos. 38 and 39, and that in the territory constituting election districts Nos. 38 and 39 "a majority of the registered voters have, since October 1, 1897, petitioned for a permit to sell liquors, wines and beer," and that the sale of liquors in that territory has not by any governmental action taken become unlawful. This being so, in the absence of controlling legislation, the mere division of the election district into two election districts bearing different numbers does not make it unlawful to issue permits to sell liquors in that territory without a new petition. See *McGriff v. State*, 68 Fla. 332, 63 South. 724.

The judgment of the circuit court annulling the permit in controversy is erroneous and is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 480)

GOVE v. NAUTILUS HOTEL CO. et al.
(Supreme Court of Florida. Dec. 22, 1914.
Rehearing Denied Jan. 20, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR 6877 — PARTIES — SCOPE OF REVIEW.

If a final decree is not so joint as to require all the defendants to join in an appeal therefrom, those entering a separate appeal cannot complain of errors only prejudicial to others who refuse to join in the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3560-3572; Dec. Dig. 6877.]

2. APPEAL AND ERROR 1009 — FINDINGS AND CONCLUSIONS—EQUITY.

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. 1009.]

3. APPEAL AND ERROR 900, 1009—DECREE IN EQUITY—EVIDENCE.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed unless the evidence clearly shows that it was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3667-3669, 3970-3978; Dec. Dig. 900, 1009.]

Appeal from Circuit Court, Volusia County; J. W. Perkins, Judge.

Bill by S. H. Gove against the Nautilus Hotel Company, a corporation, and others. From a decree for defendants, complainant appeals. Affirmed.

Stewart & Bly and Tom B. Stewart, all of De Land, for appellant. Landis & Fish, of De Land, for appellees.

SHACKLEFORD, C. J. On the 12th day of May, 1911, S. H. Gove filed his bill in chancery against the Nautilus Hotel Company, a corporation, and other defendants, for the enforcement of a lien against certain described property of the Nautilus Hotel Company for the sum of \$8,227.33, the balance remaining due and unpaid the complainant for labor performed and material furnished in the construction of a hotel building for such defendant. The Nautilus Hotel Company filed its answer, in which it denied practically all the material allegations in the bill, and averred that the complainant had no lien whatever upon the property described by virtue of the fact that he had been fully paid for all his labor as well as for all the material which he had furnished and supplied, and also by virtue of the fact that, even if he had any claim for a balance remaining unpaid to him for such labor and material, he was estopped from asserting and enforcing it by reason of certain conduct and acts upon his part, all of which the answer sets out in detail. Answers were also filed by the other defendants, and T. F. Williams as trustee for the bondholders of the Nautilus Hotel Company, one of the defendants to the original bill, filed a cross-bill against the complainant and the other defendants. Replications were filed both to the several answers to the original bill and to the answers to the cross-bill, and a special examiner was appointed to take such testimony as might be adduced by the parties litigant upon the issues as framed, before whom a large amount of testimony was taken. On the 10th day of January, 1914, the cause came on for a final hearing upon the pleadings and the evidence taken before the special examiner, and a final decree was rendered, wherein it was ordered, adjudged, and decreed, among other things, that the complainant had no claim whatsoever against the Nautilus Hotel Company, and his bill was dismissed. From this decree S. H. Gove has entered his appeal and assigned 15 errors.

[1, 2] The transcript of the record covers nearly 1,500 typewritten pages, voluminous briefs have been filed, and we have also had the benefit of elaborate oral arguments by the counsel for the respective parties, all of which have been considered by us. We do not copy any of the pleadings or the final decree or set forth a summary of the evidence, as we see no useful purpose to be accomplished by so doing. Neither shall we discuss the several errors assigned. Even if errors were committed either during the progress of the case or in the final decree, unless such errors were prejudicial or harmful to the appellant, he cannot be heard to complain of them. As we held in *Clarkson v. Louderback, Gilbert & Co.*, 36 Fla. 660, 19 South. 887, if a final decree is not so joint as to require all the defendants to join in an appeal therefrom, those entering a separate appeal cannot complain of errors only prejudicial to others who refuse to join in the appeal. As Gove alone has appealed, if we should find that no error was committed in dismissing his bill for the reason that he had no lien, then it would become unnecessary to consider any of the other assignments, since the determination that he had no lien to enforce ends the matter so far as he is concerned. To the consideration of that point we now direct our attention. As we have frequently held, while the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[3] In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed unless the evidence clearly shows that it was erroneous. See *Barnes & Jessup Co. v. Putnam*, 64 Fla. 190, 60 South. 787. While there are conflicts in the evidence upon material points, we are of the opinion that the circuit court was warranted from the evidence adduced in reaching the conclusion and finding that the complainant had no lien to enforce, either upon the ground that he had been paid all amounts to which he was entitled, or on the ground that he was estopped by his conduct, which it is not necessary to particularize, from enforcing any claim which he might otherwise have had.

This being true, it necessarily follows that the complainant's bill was properly dismissed. Therefore the decree must be affirmed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(68 Fla. 449)
SILER MILL CO. v. TATRO et al.
(Supreme Court of Florida. Dec. 3, 1914.)

(Syllabus by the Court.)

NEW TRIAL \Leftrightarrow 159—GROUNDS NOT AFFECTING PARTY.

A referee will not be held in error for granting a new trial upon a proper ground, even though such ground may not affect the party making the motion for new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 319; Dec. Dig. \Leftrightarrow 159.]

Error to Circuit Court, De Soto County; Arthur F. Odlin, Referee.

Action by the Siler Mill Company against Freeman Tatro and others. From the granting of a new trial, plaintiff brings error. Affirmed.

Leitner & Leitner, of Arcadia, for plaintiff in error. Treadwell & Treadwell, of Arcadia, for defendants in error.

WHITFIELD, J. An action was brought by the Siler Mill Company, a corporation, against Freeman Tatro on a foreign judgment for \$11,738.50, with attachment, and also garnishment proceedings against Roberts Bros., partners, and the State Bank of Zolfo, to subject the proceeds of a note to the plaintiff's demand. Notice of the attachment proceeding appears to have been served on Freeman Tatro in British Columbia.

An affidavit was filed by Jennie A. Tatro, claiming ownership of the note in the hands of the garnishees. The cause was referred to a referee for trial and determination. In his findings the referee states that "it is * * * conceded that Freeman Tatro is indebted to the plaintiff Siler Mill Company in the sum of \$11,738.50, with interest," etc. The judgment is that the Siler Mill Company recover from Freeman Tatro the sum of \$13,199.93, the judgment "to be a lien upon no property except such as has been the subject of attachment and garnishment in this action; said Freeman Tatro not having appeared in this action and not having been personally served with process within the state of Florida." The referee also found that the attached and garnished property belonged to the defendant Freeman Tatro, and not to Jennie A. Tatro, the claimant, and adjudged that the proceeds of the note be paid to the plaintiff, Siler Mill Company, and be credited on the judgment against the defendant.

The claimant moved for a new trial, on grounds that the findings are contrary to the law and to the evidence, that the referee erred in admitting and in rejecting evidence affecting the claimant, and also "because the finding of the referee that it is conceded that Freeman Tatro was indebted to the Siler Mill Company in the sum of \$11,738.50, with interest," etc., "is contrary to the evidence * * * and has no basis" in the evidence,

or in admissions or stipulations in the cause. The referee granted the motion for new trial, because he "committed error in entering judgment herein upon the evidence of the foreign judgment as submitted." The plaintiff took writ of error.

The ground on which the new trial was granted may not affect the claimant, but the referee would have been justified in sua sponte granting the new trial on such ground, and the new trial granted in effect vacates the entire judgment of the referee. As the indebtedness of the defendant was not proven, and the order granting the new trial was proper, it is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 519)

DENNISON v. DENNISON.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

DIVORCE — §184 — DECREE — APPEAL — EVIDENCE.

Where a wife files a bill against her husband for alimony and suit money and the husband, after answering her bill, files a cross-bill against her, alleging a willful and obstinate desertion of him by her without any just cause for more than one year continuously before the filing of his cross-bill, and upon the testimony taken the chancellor renders a final decree dismissing the wife's bill for alimony and granting to her husband on his cross-bill an absolute divorce a vinculo, and where upon appeal to this court we cannot adjudge that the chancellor erred in his finding from the evidence submitted that the wife did without just cause willfully desert and abandon her husband, and that such desertion continued obstinately for more than a year prior to the filing of said cross-bill, such decree will be affirmed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 570-573; Dec. Dig. §184.]

Appeal from Circuit Court, Duval County; George Couper Gibbs, Judge.

Suit by Agnes J. Dennison against Edwin H. Dennison. From decree for defendant, complainant appeals. Affirmed.

James M. Carson, of Jacksonville, for appellant. B. B. MacDonell, of Jacksonville, for appellee.

TAYLOR, J. The appellant as complainant below filed her bill in equity in the circuit court of Duval county against the appellee as defendant below, praying for alimony for the support of herself and child and for attorney's fees. In brief her bill alleges that she and the defendant were lawfully married on the 23d day of November, A. D. 1905, in the state of Pennsylvania, and have continued to be man and wife up to and including the time of the filing of her bill; that one child, called Sarah Dennison, now five years old, was born of said wedlock and is now living with her; that she is now living apart from him, for the rea-

son that some time after their marriage he commenced to shower attentions on another woman; that, this coming to her knowledge, she remonstrated with him in reference thereto, upon which he became angry with her and ceased to live with her, and so it is she is living apart from him through his fault; that she is poor and without means to support herself and child; that since the month of February, 1908, he has failed to contribute to the maintenance of herself and his said child, and still refuses so to do, although he is employed in the city of Jacksonville, where he resides, at a salary of \$50 per week; that he lives in an expensive manner at the best of hotels, and owns or claims to own and runs an expensive automobile, and otherwise spends great amounts of money on himself and for his living expenses.

The defendant answered the bill, in which he denies every material averment therein, except the marriage to complainant and the birth of their child, and asserts that the complainant wife has willfully deserted and abandoned him without just cause except an unreasonable and groundless jealousy towards another woman, and asserts that his salary is only the sum of \$15 per week instead of \$50, as alleged. The defendant husband also filed a cross-bill, in which he prays for an absolute divorce from his said wife on the ground of her alleged willful, obstinate, and continuous abandonment and desertion of him for a period of more than a year prior to the filing of his cross-bill. By agreement of the attorneys for the respective parties the master appointed to take testimony as to the facilities and necessities of the respective parties reported to the court that \$8 per week from the date of the report would be a suitable alimony to be paid by the defendant husband, and the sum of \$50 for her attorney's fee, which report was confirmed by an order of the judge, also by consent of the attorneys for the parties.

The defendant wife to the cross-bill answered the same, denying in terms its every material allegation; and alleging that the husband deserted her, instead of she him as he alleged in his cross-bill, and further alleges illicit attentions on his part towards another woman named. Replications were filed to the respective answers, a master was appointed to take and report the evidence and his findings from such evidence, which was done and on the pleadings and evidence reported at the final hearing of the cause the chancellor entered a final decree, dismissing the original bill filed for alimony by the complainant wife and granting an absolute divorce on the defendant husband's cross-bill. This decree the complainant wife brings here for review by appeal.

There was no evidence offered on behalf of the complainant wife. The defendant hus-

band introduced quite a lot of evidence in support of his cross-bill, and without reiterating it here, we cannot say that the chancellor erred in his finding from the evidence that the complainant wife did, without just cause, willfully desert and abandon her said husband, and that such desertion continued obstinately for more than a year prior to the filing of the cross-bill herein.

The decree appealed from is therefore hereby affirmed, at the cost of the appellee husband.

SHACKLEFORD, C. J., and COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 299)

CAROLINA PORTLAND CEMENT CO. v. ROPER, et al.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. LIENS \S 12—VENDOR AND PURCHASER \S 233—UNRECORDED DEED—NOTICE—BURDEN OF PROOF.

The law is well settled that, under our recording laws, subsequent purchasers and creditors acquiring subsequent liens by judgment or otherwise without notice of a prior unrecorded deed will be protected against such unrecorded conveyance, unless the party claiming thereunder can show that such subsequent purchaser or lien creditor acquired his title or lien with notice of such unrecorded conveyance; and the burden of showing such notice is upon the party claiming under such unrecorded conveyance. All of the presumptions in such a case are in favor of the bona fides of such subsequent purchaser or lien creditor, and that they acquired their subsequent title or lien in good faith and without notice of the unrecorded prior conveyance.

[Ed. Note.—For other cases, see Liens, Cent. Dig. \S 18; Dec. Dig. \S 12; Vendor and Purchaser, Cent. Dig. \S 563-566; Dec. Dig. \S 233.]

2. EXECUTION \S 51—UNRECORDED DEED—LIENS—PRIORITY.

An execution creditor, equally with a subsequent purchaser, is protected under the statute against unrecorded deeds, and, in order to deprive such judgment creditor of the protection of the recording statute, it must be shown that he had notice in some recognized way of the rights of the party claiming under the unrecorded deed at the time of the rendition of his judgment.

[Ed. Note.—For other cases, see Execution, Cent. Dig. \S 119, 124-136; Dec. Dig. \S 51.]

3. VENDOR AND PURCHASER \S 232—NOTICE—UNRECORDED DEED—LIENS.

Actual possession of land is such notice to all the world or to any one having knowledge of such possession as will put upon inquiry those acquiring title to or a lien on the land, to ascertain the nature of the rights the occupant really has in the premises.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. \S 540-545, 548-562; Dec. Dig. \S 232.]

4. JUDGMENT \S 785—VENDOR AND PURCHASER \S 228—LIENS—RIGHTS OF OCCUPANT.

One who acquires title to or a judgment lien on land with constructive notice of the actual possession and occupancy of the land by one other than the vendor or judgment

debtor takes subject to such rights as proper inquiry will disclose the occupant of the land actually has therein.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1358-1362; Dec. Dig. \S 785; Vendor and Purchaser, Cent. Dig. \S 495-501; Dec. Dig. \S 228.]

5. NOTICE \S 5—CONSTRUCTIVE NOTICE—POSSESSION.

Possession, in order to be constructive notice of a claim of title to the land occupied, must be open, visible, and exclusive; and such occupancy may be shown by any use of the land that indicates an intention to appropriate it for the benefit of the possessor. Such use may be any to which the land is adapted, and is calculated to apprise the world that the property is occupied under a claim of right therein.

[Ed. Note.—For other cases, see Notice, Cent. Dig. \S 3, 8-12; Dec. Dig. \S 5.]

6. JUDGMENT \S 788—LIEN—PRIORITY.

Where parties claiming under unrecorded deeds have uncultivated and unoccupied land surveyed and have holes dug in it to test its quality, and take prospective purchasers on the land to examine it, such acts are not sufficient to show occupancy or as indicia of ownership to put the world upon inquiry as to the rights of those so using the land and to give such persons prior rights over the lien of a judgment obtained after the execution of the deeds of conveyance, but before the record of such deeds.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 1368, 1369; Dec. Dig. \S 788.]

Appeal from Circuit Court, Volusia County; James W. Perkins, Judge.

Suit by R. B. F. Roper and another against the Carolina Portland Cement Company, a corporation existing under the laws of South Carolina. From decree for complainants, defendant appeals. Reversed.

James H. Bunch, of Jacksonville, and Murray Sams, of De Land, for appellant. Landis & Fish, of De Land, for appellees.

WHITFIELD, J. This appeal is from a decree declaring a certain judgment not to be a lien upon stated real estate. It appears that in 1907 J. P. Turner and wife, to secure a loan, executed a trust deed upon the land to the State Bank of New Smyrna, which deed was recorded, and that on June 5, 1908, J. P. Turner and wife executed a deed of conveyance of the land to John T. Hammond, who, joined by his wife, on April 17, 1911, conveyed the land to appellees; that the deed from Turner and wife to Hammond was not recorded till September 25, 1908; and that on July 6, 1908, the Carolina Portland Cement Company obtained a judgment at law in the circuit court for Volusia county, in which the land was located, against J. P. Turner. The appellees, who received title by conveyance from the grantees of J. P. Turner, contend that the decree appealed from is erroneous in holding that the judgment obtained July 6, 1908, by the complainant company against J. P. Turner, is not a lien upon the land conveyed by Turner on June 5, 1908, even though the deed of conveyance was not recorded till September 25, 1908, aft-

er the judgment was rendered by the circuit court.

[1] In support of the decree appealed from, it is argued that the grantees, upon acquiring title from Turner on June 5, 1908, at once went into possession of the land, and remained in actual possession, thereby giving notice to the world that they claimed and held an interest in the land, which rendered the holder of the judgment obtained on July 6, 1908, not a creditor for value and without notice within the meaning of the recording statutes. The trust deed executed and recorded in 1907 does not appear to have any material bearing upon this controversy. It is not contended that the judgment creditor had notice of the execution by Turner of the unrecorded deed when the judgment was obtained.

Every judgment entered by the circuit court shall create a lien and be binding upon the real estate of the defendant in the county where rendered. Section 1600, Gen. Stats. 1906. No conveyance, transfer, or mortgage of real property shall be good and effectual in law or equity against creditors or subsequent purchasers for a valuable consideration and without notice, unless the same be recorded according to law. Section 2480, Gen. Stats. 1906. The creditors referred to in the above statute are creditors who "had obtained liens on the recovery of judgments." *Rogers v. Munnerlyn*, 36 Fla. 591, 18 South. 669.

The law is well settled that, under our recording laws, subsequent purchasers and creditors acquiring subsequent liens by judgment or otherwise without notice of a prior unrecorded deed will be protected against such unrecorded conveyance, unless the party claiming thereunder can show that such subsequent purchaser or lien creditor acquired his title or lien with notice of such unrecorded conveyance; and the burden of showing such notice is upon the party claiming under such unrecorded conveyance. All of the presumptions in such a case are in favor of the bona fides of such subsequent purchaser or lien creditor, and that they acquired their subsequent title or lien in good faith and without notice of the unrecorded prior conveyance.

[2] An execution creditor, equally with a subsequent purchaser, is protected under the statute against unrecorded deeds, and, in order to deprive such judgment creditor of the protection of the recording statute, it must be shown that he had notice in some recognized way of the rights of the party claiming under the unrecorded deed at the time of the rendition of his judgment. *Feinberg v. Stearns*, 56 Fla. 279, 47 South. 797, 131 Am. St. Rep. 119.

[3-5] Actual possession of land is such notice to all the world or to any one having knowledge of such possession as will put upon inquiry those acquiring title to or a lien on the land to ascertain the nature of the

rights the occupant really has in the premises. One who acquires title to or a judgment lien on land with constructive notice of the actual possession and occupancy of the land by one other than the vendor or judgment debtor takes subject to such rights as proper inquiry will disclose the occupant of the land actually has therein. Possession, in order to be constructive notice of a claim of title to the land occupied, must be open, visible, and exclusive; and such occupancy may be shown by any use of the land that indicates an intention to appropriate it for the benefit of the possessor. Such use may be any to which the land is adapted, and is calculated to apprise the world that the property is occupied under a claim of right therein. See *Tate v. Pensacola, Gulf, Land & Development Co.*, 37 Fla. 439, 20 South. 543, 53 Am. St. Rep. 251; *Massey v. Hubbard*, 18 Fla. 688; *McAdow v. Wachob*, 45 Fla. 482, 33 South. 702.

[6] The important question for determination here on the pleadings and evidence is whether the possession shown of the land before and at the time the judgment was rendered is of such a nature as to put the world in general, or the defendant company in particular, upon inquiry to ascertain the nature of the rights of those having possession or occupancy.

The complainants' testimony is that in April, 1908, under a contract to buy the land, which was not cultivated or occupied, the complainants' grantor, Hammond, went into actual possession of the land by having it surveyed and having holes dug in the land to test its quality, and by taking prospective purchasers on the land to examine it. These acts were not sufficient indicia of ownership to put the world, including the defendant foreign corporation, upon inquiry as to the rights of the complainants in the land. They did not constitute actual possession. Such acts might well have been performed by the agent of the former owner, or by a casual trespass. The acts asserted as constituting possession and occupancy being insufficient to indicate a claim of ownership of which the world should reasonably have taken notice, the decree that the judgment is not a lien upon the land cannot be sustained. See *Feinberg v. Stearns*, 56 Fla. 279, 47 South. 797, 131 Am. St. Rep. 119; *West Coast Lumber Co. v. Griffin*, 56 Fla. 878, 48 South. 36; *Hopkins v. O'Brien*, 57 Fla. 444, 49 South. 936; *Lusk v. Reel*, 36 Fla. 418, 18 South. 582, 51 Am. St. Rep. 32; *Doyle v. Wade*, 23 Fla. 90, 1 South. 516, 11 Am. St. Rep. 334.

The acts of possession here asserted are wholly different from those shown in *McAdow v. Wachob*, 45 Fla. 482, 33 South. 702. In *Mansfield v. Johnson*, 51 Fla. 239, 40 South. 196, 120 Am. St. Rep. 159, and *Jacobs v. Scheurer*, 62 Fla. 216, 57 South. 356, the question was the sufficiency of the record of the conveyances to protect the real owner

of the land from the lien of a judgment obtained against the apparent owner of the record title. In this case the question is the sufficiency of the possession of the grantee under an unrecorded deed to protect him and his successors in title from the lien of a judgment obtained by a third person against a former grantor after the conveyance by him was executed, but before it was recorded.

In *Mansfield v. Johnson*, supra, the deed of conveyance, as recorded, gave no indication of the right of the real owner of an interest in the land, and the credit leading to the judgment lien may have been given with reference to the title shown by the record. In *Jacobs v. Scheurer*, supra, the deed of conveyance was incorrectly recorded before judgment was obtained against the grantor, and a subsequent correct record of the deed of conveyance had relation to the original filing for record, which filing was before the indebtedness was incurred on which the judgment was obtained. See *Hunter v. State Bank of Florida*, 65 Fla. 202, 61 South. 497; *Ray v. Hocker*, 65 Fla. 265, 61 South. 500.

The decree is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 341)

BOLEY v. WYNN.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. PUBLIC LANDS §134—COMPENSATION FOR BETTERMENTS—RIGHT—"APPARENTLY GOOD LEGAL OR EQUITABLE TITLE."

One whose primary entry of public lands in the United States land office is canceled before commutation or the full five years elapse does not "hold under an apparently good legal or equitable title derived from the United States government," within the meaning of the betterment procedure statute.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 350; Dec. Dig. §134.]

2. EVIDENCE §335 — DOCUMENTARY EVIDENCE—"RECEIPT" OF LAND OFFICE RECEIVER.

The receipt of a receiver of a U. S. Land Office made by statute prima facie evidence that title had passed means the receipt or certificate given at the final entry, and not the receipt for the registration fee required at the original entry.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1273-1278; Dec. Dig. §335.]

For other definitions, see Words and Phrases, First and Second Series, Receipt.]

Error to Court of Record, Escambia County; Kirke Monroe, Judge.

Statutory proceeding for betterments by Henderson Wynn against Michael C. Boley, as executor of the will of Louis Boley, deceased. Judgment for petitioner, and defendant brings error. Reversed.

E. C. Maxwell, of Pensacola, for plaintiff in error. Watson & Pasco, of Pensacola, for defendant in error.

COCKRELL, J. This is a statutory proceeding for betterments, after the defendant had been cast in ejectment.

At the trial the right of the petitioner, Wynn, to recover for betterments was submitted to the court for adjudication upon an agreed statement of facts. We think the issue was fairly presented to the trial court, irrespective of the uncertainty in the pleadings, and that it is now fairly before us.

It appears from this statement that the petitioner's right depended wholly upon the fact that in 1906 he supposed the land was open to homestead entry under the United States laws, and had his primary entry thereof registered in the United States land office in Gainesville, Fla. In 1910 those in charge of the land office found that the land had theretofore been patented to Boley, predecessor in title, and canceled Wynn's entry. In the meantime the improvements had been made.

[1] The right to recover is given by the statute (Gen. Stats. § 1971) to one who held at the time of such improvements "under an apparently good, legal or equitable title, derived from the * * * United States government; * * * or under a legal or equitable title plain and connected upon the records of a public office, * * *" provided "he believed the title which he held or purchased to the land thus improved to be a good and valid title."

It is obvious that the petitioner had no claim amounting in dignity to a title legal or equitable. Until final entry of the homestead be made, either by the full five years required by the federal statute or commutation by payment, no equitable rights as against the United States accrue under its homestead laws; before that time the register of the land office is forbidden to issue any certificate as to the entry.

[2] The petitioner relies upon Gen. Statutes, § 1537, which reads:

"A receipt of a receiver of the United States land office shall in all cases be prima facie evidence that the title to the land covered by said receipt has passed from the United States to the person named in the receipt as having paid for the said land."

It is evident, however, that the receipt here mentioned is the receipt or certificate given by the receiver at the final entry, and the statute was passed with a view to obviating the inconvenience that ensued from the delays so frequently occurring in the issuance from Washington of the letters patent, and in recognition of the fact that the full equitable title had passed from the government to the entryman.

The statute had no reference to the receipt not shown here to have been given for

the \$5 registration fee required at the original entry. Such a receipt, if given and relied on, would of itself destroy the prima facies of evidence of the passing of title from the United States.

The cases relied upon by the defendant in error (Pulliam's Adm'r v. Robinson, 1 T. B. Mon. [Ky.] 229, and Russell v. DeFrance, 39 Mo. 506) are evidently based upon final homestead entries, while the statement of the case from Ohio (Shaler v. Magin, 2 Ohio, 235) is so meager that we cannot ascertain whether that court was considering the final entry or the original entry. The distinction we make controlled the decision in Central Branch Union Pac. R. Co. v. Hardenbrook, 21 Kan. 440.

There was error in the ruling that the petitioner, Wynn, had shown himself entitled to the benefits of the statute, and the judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 476)

MARYLAND CASUALTY CO. v. CITY OF PENSACOLA.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

DEPOSITARIES §13—BOND—CONSTRUCTION—MONEYS COVERED.

Where a surety company's bond refers to "and include all sums deposited with said bank as city depository during the year" and undertakes that the bank "shall well and truly keep and preserve the said funds, * * * and shall faithfully account for and pay over all moneys which have been, or may be hereafter, deposited with it by virtue of it having been designated as the depository of said funds," such bond covers money derived from city licenses collected by the bank for the city treasurer, and entries thereof are made "in the license book kept by the bank for the city," and afterwards such entries are "transferred from the treasurer's balance to the city account."

[Ed. Note.—For other cases, see Depositaries, Cent. Dig. § 27; Dec. Dig. §13.]

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by the City of Pensacola against the Maryland Casualty Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

E. C. Maxwell, of Pensacola, for plaintiff in error. Blount & Blount & Carter and J. B. Jones, all of Pensacola, for defendant in error.

WHITFIELD, J. The city of Pensacola obtained a directed verdict and a judgment thereon against the casualty company on a bond for \$75,000 given to secure deposits made by the city in a bank, and the defendant company took writ of error.

The condition of the bond is:

"That, whereas, heretofore, to-wit: On the 24th day of Oct., A. D. 1912, the said Pensacola

State Bank of Pensacola, Florida, pursuant to resolution of the city council of the city of Pensacola, was designated as a depository of said city's funds for the year beginning Nov. 1st, 1912, and ending Nov. 1st, 1913, which said funds are embraced in classes 1 to 3 inclusive, as mentioned in the resolution of the city council of said city, approved by the Mayor Sept. 26th, 1912, and include all sums deposited with said bank as city depository during the year dating Nov. 1st, 1911 to Nov. 1, 1912, which have not heretofore been withdrawn by, or repaid to, said city; and, whereas, said Pensacola State Bank, as such depository, is required by the resolution of the city council of said city to give as security for said funds a bond in the sum of seventy five thousand dollars (\$75,000.00).

"Now, therefore, if the said Pensacola State Bank of Pensacola, Florida, shall well and truly keep and preserve the said funds, which have heretofore, or may be hereafter deposited with it as aforesaid, and shall faithfully account for, and pay over all moneys which have been, or may be hereafter, deposited with it by virtue of it having been designated as the depository of said funds, and from time to time honor such warrants as may be lawfully drawn against said funds, not to exceed the amount on deposit at the time of the presentment of said warrants, then this obligation to be null and void, else to remain in full force and virtue.

"The above and foregoing obligation is executed pursuant to, and in conformity with, chapter 5335, Laws of Florida of 1907, and ordinances of the city of Pensacola to accomplish the purpose of said act."

All the questions herein presented that were determined by this court in the case of United States Fidelity & Deposit Company v. City of Pensacola, decided this term, will not be further discussed in this case.

It is contended that the trial court should not have directed a verdict for the full amount of the bond, for the reason that the obligation of the bond does not cover certain sums of money for city license taxes collected by the bank. According to the only witness, these items were received when "the bank collected licenses for the treasurer and afterwards would transfer the treasurer's balance to the city account." "In the license book that was kept by the bank for the city, this balance was shown although in some cases in the rush of business they just omitted it and did not give the city credit for it" till later.

The statute, chapter 5335, Acts of 1907, provides for a designation by the city of a depository of city funds, and requires the custodian of the funds for which a depository is designated "to place said fund or funds in the depository * * * so designated." The resolution under which the designation of the bank as depository of the city funds was made refers to "all funds coming into the treasurer's hands" except some not relevant here. By its terms the bond refers to "and include all sums deposited with said bank as city depository during the year," and undertakes that the bank "shall well and truly keep and preserve the said funds, * * * and shall faithfully account for and pay over all moneys which have been, or may be hereafter, deposited with it by

virtue of it having been designated as the depository of said funds."

It is clear that in view of the duty of the treasurer under the statute to place the city funds in the designated city depository, and the undertaking of the bond that, as to "all sums deposited with said bank as city depository during the year," the bank "shall well and truly keep and preserve and shall faithfully account for and pay over" the city license tax moneys collected by the bank for the treasurer, and entries thereof made "in the license book that was kept by the bank for the city," and which the bank would afterwards "transfer to the treasurer's balance to the city account," are "sums deposited with said bank as city depository" within the meaning and obligation of the bond. This being the construction of the bond as applicable to the facts in evidence, no error appears in directing a verdict for the plaintiff for the full amount of the bond, or in rendering judgment thereon.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 426)

STATE ex rel. RAILROAD COM'RS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

1. CARRIERS — 12 — RATES — RULES — CONSTRUCTION.

Rule 15A of the rules governing the transportation of freight promulgated by the Railroad Commissioners, and the mandate of this court enforcing such rule, contemplate that, where substituted cars are voluntarily used in rendering the service, the prescribed rate is applicable.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. —12.]

2. CONTEMPT — 65 — RULE — DISCHARGE — MANDAMUS.

Where the purpose of a rule in contempt proceedings is to secure a judicial determination of the application of a peremptory writ of mandamus under stated conditions, the rule may be discharged upon the payment of costs by the respondent.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 210-212; Dec. Dig. —65.]

Original contempt proceedings by the State, on the relation of the Railroad Commissioners, against the Atlantic Coast Line Railroad Company. Rule discharged.

F. M. Hudson, of Miami, for relator. W. E. Kay, of Jacksonville, for respondent.

PER OURIAM. [1] Upon application made, a rule was issued by the court requiring the respondent herein to show cause why it has not obeyed a peremptory writ of mandamus issued from this court. State ex rel. Railroad Com'rs v. Atlantic Coast Line R. Co., 64 Fla. 469, 60 South. 186.

The peremptory writ commanded the respondent:

"To observe the rate prescribed in Rule 15A of the 'Rules Governing the Transportation of Freight' by our Railroad Commissioners for switching cars of lumber over your own tracks only in the Jacksonville yards; that is to say, to charge and receive no more than the sum of two dollars per car for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards, and thence, after lumber is dressed, to any point in the same yards, when the said switching movement is over your own tracks only. And that you certify perfect obedience and due execution of this writ on or before the 1st day of February, 1913."

Rule 15A is as follows:

"The charge for switching cars of rough lumber consigned to and arriving at the city of Jacksonville from points in this state, to any planing mill in the Jacksonville yards, and thence, after lumber is dressed to any point in the same yard, shall not be more than \$2.00 per car; provided, that when the said switching movement is over the tracks of more than one railroad, a charge of not more than \$3.00 may be made. This rule shall not be interpreted as rescinding or modifying rule 15 except as herein specifically provided."

In the former opinion this court held that:

"Rule 15A clearly contemplates a service in which cars loaded with rough lumber and arriving at Jacksonville from within the state will transport the rough lumber to a planing mill in the railroad yards at Jacksonville, and that the same or substituted cars operated by the same carrier will transport the same or equivalent lumber in dressed form for the original consignee from the planing mill to points of ultimate delivery in the railroad yards at Jacksonville."

The contention here is that, in obeying the peremptory writ of mandamus, the respondent has no right to insist that the same cars be used instead of substituted cars in transporting each car load of lumber from the mill to the point of ultimate delivery in the Jacksonville yards. In other words, that the prescribed rates of service sought to be enforced by the peremptory writ should be applied where the rough lumber is carried to the planing mill in one car, and after being dressed the lumber is taken to point of delivery in a substituted car transported by the same company, as the prescribed rate is applied where a car takes the rough lumber to the planing mill and the same car then is loaded with and takes the dressed lumber to point of delivery.

When the validity of the rate prescribed by the Railroad Commission for the service being rendered was determined in previous proceedings herein, the use of substituted cars in transporting from the mill rough lumber taken there in other cars was regarded as being done by consent or acquiescence, and, if such a practice casts a burden upon the carrier, that circumstance was not made a factor in determining the validity of the rate for the service. As the opinion of the court filed when the peremptory writ was awarded is based upon a supposed consent practice, and

the opinion quoted above is subject to the construction that the substituted cars would be used by consent or acquiescence, the respondent is not ruled in contempt for not furnishing cars, but for charging more than the prescribed rate upon substituted cars that it has voluntarily furnished. The mandate of the court is not that the railroad company shall render the service to which Railroad Commission rule 15A applies, but that, in voluntarily rendering such service by the use of the same or substituted cars, the rate to be demanded should be as adjudged.

[2] As the purpose of this rule is to secure a judicial determination of the application of the peremptory writ of mandamus under stated conditions, the rule will be discharged upon the payment of costs by the respondent.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 316)

MUTUAL LIFE INS. CO. OF NEW YORK
v. MANASSE et al.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

INTERPLEADER §32 — PROCEEDINGS — SCOPE OF RELIEF.

Where interpleader is properly brought and the claims of all parties are fully presented by the pleadings and evidence, the court should adjudicate the entire matter involved in the cause.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 72, 73; Dec. Dig. §32.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill of interpleader by the Mutual Life Insurance Company of New York against Joseph Manasse and another. From a decree dismissing the bill, complainant appeals. Reversed.

J. C. Adkins, of Gainesville, for appellant. T. B. Ellis, Jr., and W. S. Broome, both of Gainesville, for appellees.

WHITFIELD, J. The Mutual Life Insurance Company of New York brought a bill of interpleader against Manasse and the Dutton Bank, in which it is alleged that in 1893 the insurance company issued a 20-payment life policy of insurance for \$3,000 upon the life of Joseph Manasse, he being the beneficiary; that in June, 1908, the wife of Manasse was made the beneficiary, if living, if not, to the insured's executors, etc.; that in July, 1908, a loan of \$810 was made to the beneficiaries; that the loan was never paid; that on June 29, 1910, Manasse and his wife executed an assignment of said policy, "in which they purported to assign, transfer, and set over all of their right, title, and interest in said policy * * * to the First National Bank of Gainesville, Fla.," subject to the loan above mentioned; that in June, 1912, the

First National Bank "purported to assign, transfer, and set over all of its right, title, and interest in said policy to the Dutton Bank"; that in November, 1912, the wife of Manasse died; that on May 22, 1913, the policy matured with a credit of a reserve value of \$1,302.19, also a cash dividend value of \$639.81, making a total cash value of \$1,942, against which amount there was a lien of \$810 loaned to the beneficiaries, leaving a net cash value of \$1,132, which amount is payable; that on May 17, 1913, Manasse notified the insurance company, "in writing, that he claimed an equity in the proceeds of said policy, in that he only assigned to the First National Bank of Gainesville, Fla., the dividends accruing under said policy; that he claimed the reserve value of said policy, less the loan of \$810," and that he would hold the company therefor; that on May 9, 1913, Manasse and the Dutton Bank made a joint request in writing for a check or draft for the \$1,132 to be made to them jointly; that a check was so made to them jointly and was returned to the insurance company; that the Dutton Bank has brought an action against the insurance company for the \$1,132; that the insurance company claims no interest in the fund and is embarrassed, and brings the amount into court and prays for interpleader, and that the mentioned action be enjoined, etc. By amendment it is alleged that, on the same day that the policy was assigned to the First National Bank, the said bank and Manasse "made and executed an agreement as to what value or proportion of the said policy was to be assigned to the said the First National Bank of Gainesville, and that said memorandum agreement appears to have been executed on the same date as the original assignment to the First National Bank herein; * * * that a copy of the above agreement was served upon the complainant herein before the maturity of the policy, and the complainant herein was notified that said agreement was in force and effect, and that the said Joseph Manasse notified the complainant herein that he claimed the reserve value of and on said policy; that the Dutton Bank took the assignment from the First National Bank with full knowledge of said agreement being in force." After demurring to the bill of complaint, the Dutton Bank, by answer, denied that it knew or had any notice or knowledge of the agreement between Manasse and the First National Bank, at the time of the assignment by said bank to the defendant, or that defendant took said assignment subject to said agreement. The Dutton Bank further averred that the request for a check to be made payable jointly to Manasse and the Dutton Bank was made at the request of Manasse; that the Dutton Bank on May 26, 1913, notified the insurance company, through its general manager, to have a check for the amount made to the Dutton Bank.

Manasse by answer avers that the Dutton Bank took its assignment from the First National Bank with knowledge of the qualified assignment to the latter bank and took no rights in the policy, except those held by the first assignee. Replication was filed and testimony taken. The court, at the final hearing, held that the bill of complaint was "insufficient to entitle the complainant to maintain its bill of interpleader"; and that, upon the evidence, the equities are with the defendants. From the decree dismissing the bill, an appeal was taken by the complainant, and error is assigned on the final decree.

The question whether the Dutton Bank is a bona fide holder for value of a valid assignment of the entire policy and its proceeds is fully presented in this proceeding to which Manasse is a party. If the Dutton Bank had no notice or knowledge of the agreement purporting to qualify the assignment to the First National Bank, it may have title as against Manasse, since the Dutton Bank has an absolute assignment, which was in the hands of the First National Bank with the policy, and such assignment made no reference to the agreement. The loss, if any, resulting from the possession by the First National Bank of the absolute assignment should fall on the one who is responsible for its existence, independent of the agreement, rather than upon the Dutton Bank, which took in good faith for value the outstanding absolute assignment without knowledge or notice of the agreement, if such is the case.

By analogy to the holding in *Sammis v. L'Engle*, 19 Fla. 800, *Morrill v. Manhattan Life Ins. Co.*, 183 Ill. 260, 55 N. E. 656, *Enterprise Lumber Co. v. First Nat. Bank of Dothan*, 181 Ala. 388, 61 South. 930, and to other cases cited in 23 Cyc. 11, 4 Cooley, Insurance Briefs, 3816, the allegations of the bill of complaint appear to be sufficient for the purposes of an interpleader. As the issues relative to both claims were fully made up by all the parties and testimony taken upon the issues made, the court was in a position to adjudicate the entire matter so as to be binding upon all the parties, without requiring further litigation of any nature. Under these circumstances, the decree dismissing the bill of complaint is reversed, and the cause is remanded for further proceedings to fully dispose of the entire controversy.

Reversed.

SHACKLEFORD, C. J., and TAYLOR, OOCKRELL, and HOCKER, JJ., concur.

(63 Fla. 343)

SYKES v. STATE.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. CRIMINAL LAW §823 — INSTRUCTIONS — ERROR CURED BY OTHER INSTRUCTION.

When, in a trial for murder, the trial judge has given the general law of this state as to self-

defense in several charges which were correct and clear, and has also given three additional instructions requested by the defendant, and one of the charges of the trial judge is attacked because it did not cover a phase of self-defense arising out of a supposed condition of the evidence, upon which the defendant did not request an instruction, the judgment of conviction will not be reversed by this court because of the alleged defect in one of the trial judge's instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995, 3158; Dec. Dig. §823.]

2. MANSLAUGHTER — SUFFICIENCY OF EVIDENCE.

The evidence given on the trial is sufficient to sustain the verdict of manslaughter.

Error to Circuit Court, St. Lucie County; J. W. Perkins, Judge.

Roy Sykes was convicted of manslaughter, and brings error. Affirmed.

Parker & Johnson, of Ft. Pierce, and Thomas Palmer, of Tampa, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

HOCKER, J. Roy Sykes was indicted at the fall term, 1913, of the circuit court of Saint Lucie county, Fla., for the murder of one Horace Matchett. He was tried at that term, convicted of manslaughter, and sentenced to the state prison at hard labor for two years. He has brought the judgment here for review on writ of error.

[1] The first question presented here challenges the following instruction by the trial judge to the jury:

"A defendant reasonably free from fault is under no duty to retreat from an assailant, where he reasonably believes that to retreat would increase his peril, but, in order to justify a killing under the claim of self-defense, the slayer must be reasonably free from fault in bringing on the difficulty. He must not have been the intentional aggressor in bringing on the difficulty, and he must have resorted to all reasonable means (within his knowledge) and at his command consistent with his own safety to avoid the necessity of taking human life. If the defendant was the intentional aggressor, or if the defendant was not reasonably free from fault in bringing on the difficulty, or if there were any other reasonable means at the defendant's command (within his knowledge) consistent with his own safety, to which he could have resorted instead of killing the deceased, if he did kill him, then he could not justify his act on the ground of self-defense."

It seems to us that this instruction is in substantial agreement with an instruction given by the trial judge in the case of *Peardon v. State*, 46 Fla. 124, text 134, 35 South. 204, and with the views of this court in other cases. But it is contended under the facts of this case it was harmful, inasmuch as the defendant was not required to retreat to the wall, as the homicide took place on a porch of the boarding house where the accused boarded, the same being his castle or home.

It is to be remarked that the defendant did not request an instruction modifying the instruction which was given and is now attacked. The judge's charges were exceeding-

ly full, and very clear upon the general law of self-defense. In addition, he gave three special instructions requested by the defendant, which was all he was requested to give. The facts in this case do not satisfy us that the defendant was entitled to any modification of the rule which was laid down in the instruction which is excepted to. At least we feel sure that, if the defendant desired the law of self-defense as applied to one defending himself in his own home to be given to the jury, he should have presented such an instruction to the trial judge, which was not done. *Carr v. State*, 45 Fla. 11, 34 South. 892.

[2] The next assignment questions the sufficiency of the evidence to support the verdict. A careful study of the evidence satisfies us that it is sufficient to sustain the verdict which was rendered.

The judgment below is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and WHITFIELD, JJ., concur.

(68 Fla. 400)

FLORIDA EAST COAST RY. CO. v.
KNOWLES.

(Supreme Court of Florida. Nov. 25, 1914.)

(Syllabus by the Court.)

1. PLEADING \S 18—REQUISITES.
The object of judicial proceedings is to ascertain and to decide upon disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The pleadings in an action at law are designed to develop and present the precise points in dispute, and they should be characterized with certainty, clearness, and conciseness. The administration of justice is a practical affair, and the pleadings should not be converted, or rather perverted, into logomachies or logic chopping.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 39, 64; Dec. Dig. \S 18.]

2. NEGLIGENCE \S 111—DECLARATION—REQUISITES.
In actions at law, where the negligence of the defendant is the basis of recovery, it is not necessary for the declaration to set out the facts constituting such negligence, but an allegation of sufficient acts causing injury to the plaintiff, coupled with an allegation that such acts were negligently done, will be sufficient.
[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 182-184; Dec. Dig. \S 111.]

3. PLEADING \S 232—PLEA—UNNECESSARY COUNTS—AMENDMENT.
Where a declaration is filed in an action at law containing unnecessary counts, the trial court is warranted in requiring a compulsory amendment thereof of its own motion, under the provisions of section 1433 of the General Statutes of 1906 of Florida.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 593; Dec. Dig. \S 232.]

4. PLEADING \S 364—PLEA—REPUGNANCY.
A special plea tendering an issue covered by the plea of not guilty should be stricken out either on motion of the plaintiff or by the court of its own motion, under section 1433 of the General Statutes of 1906, of Florida, as tending

to prejudice, embarrass or delay the fair trial of the action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 1156-1162; Dec. Dig. \S 364.]

5. APPEAL AND ERROR \S 722—ASSIGNMENTS OF ERROR.

The practice of assigning a large or unnecessary number of errors is disapproved.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2990-2996; Dec. Dig. \S 722.]

6. PLEADING \S 189, 341—DEMURRER—MOTION FOR COMPULSORY AMENDMENT.

There is a clear distinction in the functions performed by a demurrer to a pleading and a motion for the compulsory amendment thereof, and this distinction should be observed. They cannot be used interchangeably and indiscriminately employed, as they are governed by essentially different rules of procedure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 400, 1046, 1047; Dec. Dig. \S 189, 341.]

7. TRIAL \S 139—INSTRUCTED VERDICT—EVIDENCE.

A case should not be taken from the jury unless the conclusion follows from the evidence as matter of law that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 332, 333, 338-341, 365; Dec. Dig. \S 139.]

8. TRIAL \S 295—INSTRUCTIONS—CONSTRUCTION.

In passing upon a single instruction or charge it should be considered in connection with all the other instructions and charges bearing on the same subject, and if, when thus considered, the law appears to have been fairly presented to the jury, an assignment predicated upon the giving of such instruction or charge must fail, unless under all the peculiar circumstances of the case the court is of the opinion that such instruction or charge was calculated to confuse, mislead, or prejudice the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 703-717; Dec. Dig. \S 295.]

9. TRIAL \S 258—INSTRUCTIONS—REQUEST.

Only such instructions should be requested by either the plaintiff or defendant as bear upon the law of the case, and will aid the jury in trying and determining the issues, as unnecessary instructions afford opportunities for error, and are burdensome to the courts. When a large number of instructions are given, they are also well calculated to confuse and mislead the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 646, 647; Dec. Dig. \S 258.]

10. APPEAL AND ERROR \S 1001—VERDICT—EVIDENCE.

In passing upon an assignment based upon the ruling of the trial court in denying a motion for a new trial, which questions the sufficiency of the evidence to sustain the verdict, the guiding principle for an appellate court is not what it may think the jury ought to have done, or what such court may think it would have done had it been sitting as a jury in the case, but whether as reasonable men the jury could have found such verdict from the evidence adduced. If this question can be answered in the affirmative, the action of the trial court upon such motion should not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3922, 3928-3934; Dec. Dig. \S 1001.]

11. NEW TRIAL \Leftrightarrow 99—GROUNDS—NEWLY DISCOVERED EVIDENCE—ESSENTIAL CONDITIONS.

Applications for new trial upon the ground of newly discovered evidence are looked upon by the courts with distrust and disfavor, and are granted only under the following restrictions: (1) The evidence must have been discovered since the former trial; (2) the party must have used diligence to procure it on the former trial; (3) it must be material to the issue; (4) it must go to the merits of the cause, and not merely to impeach the character of a witness; (5) it must not be merely cumulative; (6) it must be such as ought to produce on another trial an opposite result on the merits. The party applying must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for negligence, have known of and produced it, he will not succeed in his application.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 201, 207; Dec. Dig. \Leftrightarrow 99.]

Error to Circuit Court, Putnam County; J. T. Wills, Judge.

Action by John Knowles against the Florida East Coast Railway Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Alex St. Clair-Abrams, of Jacksonville, and E. E. Haskell, of Palatka, for plaintiff in error. Hilburn & Merryday, of Palatka, for defendant in error.

SHACKLEFORD, C. J. [1-4] John Knowles brought an action against the Florida East Coast Railway Company, a corporation, to recover damages for personal injuries alleged to have been caused by the negligence of the defendant, which resulted in a verdict and judgment in favor of the plaintiff for the sum of \$3,000. The original declaration consists of four counts, to which the defendant interposed a demurrer upon a number of grounds, some of which were directed to the declaration as an entirety and others to the separate counts, which demurrer was overruled. Subsequent to such ruling the plaintiff, by leave of court, amended his declaration by adding four additional counts, making eight counts in all. To the declaration as amended the defendant filed nine pleas, some of which were designated as amended pleas, and were quite lengthy. The plaintiff joined issue upon all of the pleas, and a trial was had before a jury. Before taking up for consideration any of the assignments of error, we would call attention to our discussion in *Seaboard Air Line Railway v. Rentz*, 60 Fla. 429, 54 South. 13, as to the object of judicial proceedings, wherein we held:

"The object of judicial proceedings is to ascertain and to decide upon disputes between parties. In order to do this, it is indispensable that the point or points in controversy be evolved and distinctly presented for decision. The pleadings in an action at law are designed to develop and present the precise points in dispute, and they should be characterized with certainty, clearness, and conciseness. The administration of justice is a practical affair and the

pleadings should not be converted, or rather perverted, into logomachies or logic chopping."

We further held therein:

"In actions at law, where the negligence of the defendant is the basis of recovery, it is not necessary for the declaration to set out the facts constituting such negligence; but an allegation of sufficient acts causing injury to the plaintiff, coupled with an allegation that such acts were negligently done, will be sufficient."

See, also, *Warfield v. Hepburn*, 62 Fla. 409, 57 South. 618, wherein we discussed at some length the controlling principles in framing a declaration in an action seeking to recover damages for personal injuries occasioned by the negligence of the defendant. We shall not repeat what we said in these cited cases, but content ourselves with this reference to them. Still other decisions of this court will be found cited therein. We can conceive of no necessity for eight counts in this declaration. Such prolixity is violative of the principles of good pleading, and the declaration might well have been questioned by a motion for compulsory amendment, under section 1433 of the General Statutes of Florida, as tending to prejudice, embarrass, or delay the fair trial of the action. The trial court would have been warranted in requiring such compulsory amendment of its own motion. What we have said is also applicable to the prolixity of the pleas. As we have frequently ruled, special pleas tendering an issue covered by the issue of not guilty should be stricken out, either on motion by the plaintiff or by the court on its own motion. See *Atlantic Coast Line Railroad Co. v. Crosby*, 53 Fla. 400, 43 South. 318. No such motions were directed either against the declaration or the pleas, but the case proceeded to trial, with the result as stated.

[5] Twenty-six errors are assigned, but we shall treat only such as we think merit it, and before doing that would call attention to what we said concerning the practice of assigning errors in *Mitchell v. Mason*, 65 Fla. 208, 61 South. 579.

[6] No error was committed in overruling the demurrer to the original declaration, either as an entirety or the separate counts thereof, so the assignments predicated thereon must fail. There is a clear distinction in the functions performed by a demurrer to a pleading and a motion for the compulsory amendment thereof, as we held in *Seaboard Air Line Railway v. Rentz*, supra.

[7] We are also clear that the trial court did not err in refusing to instruct the jury to find a verdict in favor of the defendant, as requested by the defendant. As we have frequently held:

"A case should not be taken from the jury, unless the conclusion follows from the evidence, as matter of law, that no recovery can be lawfully had upon any view taken of facts that the evidence tends to establish." *Jacksonville Terminal Co. v. Smith*, 67 Fla. 10, 64 South. 354.

[8, 9] We find that the court gave a number of instructions to the jury at the plaintiff's request and also 22 separate instructions at the request of the defendant, and in addition thereto 4 "additional charges." Errors are assigned upon several of the instructions given at the request of the plaintiff, all of which we have examined, and are of the opinion that, construed in connection with all the other charges and instructions given at the trial, as must be done, no reversible error is made to appear therein. See *Atlantic Coast Line Railroad Co. v. Crosby*, 53 Fla. 400, 43 South. 318. The defendant also has an assignment based upon a requested instruction, which was refused. No error is made to appear here. We would call attention to our discussion concerning the practice of requesting a large number of instructions in *Atlantic Coast Line Railroad Co. v. Levy*, 67 South. 47, decided here at the present term.

[10, 11] We are also of the opinion that no error was committed in overruling the motion for a new trial. As to those grounds thereof which question the sufficiency of the evidence to support the verdict it is sufficient to say that we have examined all the evidence adduced, and are of the opinion that it is amply sufficient. See *Atlantic Coast Line Railroad Co. v. Levy*, supra, and authorities therein cited. As to the grounds based upon newly discovered evidence, it is sufficient to say that such evidence appears to be merely cumulative in its nature. See *Williams v. State*, 66 South. 424, decided here at the present term.

No reversible errors having been made to appear, the judgment must be affirmed.

TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 447)

PENSACOLA SANITARIUM v. WILKINS.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

1. HOSPITALS — 8 — INJURY TO PATIENT — NEGLIGENCE OF EMPLOYE—EVIDENCE.

Where, in an action for personal injuries, the damages claimed are solely for alleged actual negligence, it is not error to exclude evidence as to the competency of the negligent employee.

[Ed. Note.—For other cases, see *Hospitals*, Cent. Dig. § 14; Dec. Dig. — 8.]

2. WITNESSES — 236 — EXAMINATION — EXCLUSION OF QUESTION.

It is not error to exclude a question relative to the extent of the plaintiff's injury when it was coupled with matter relating to a settlement of the claim for damages, which latter was not material to the issues being tried.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 817-826; Dec. Dig. — 236.]

3. APPEAL AND ERROR — 1140 — EXCESSIVE RECOVERY—REMITTITUR.

Where the trial court has allowed a recommitment, the appellate court will not reverse the judgment for excessiveness in amount, where the award is not patently excessive.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. — 1140.]

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by Joseph D. Wilkins against the Pensacola Sanitarium, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Sullivan & Sullivan, of Pensacola, for plaintiff in error. R. P. Reese and John P. Stokes, both of Pensacola, for defendant in error.

WHITFIELD, J. A former judgment herein, awarding \$1,250 damages for a burn on the plaintiff's leg caused by leaving a hot water bottle in the bed where he was a patient in the sanitarium, was reversed because of the admission of mortuary table followed by an apparently excessive verdict for an injury not shown to be permanent in its nature. *Pensacola Sanitarium v. Wilkins*, 64 Fla. 407, 60 South. 128.

At a subsequent trial a verdict for \$1,500 was rendered. As an alternative for a new trial awarded, the amount of the verdict was reduced by recommitment to \$1,000, and the defendant took writ of error.

[1] As the damages were claimed for actual negligence of a nurse who was an employé of the private corporation for profit, there was no error in excluding evidence as to the competency of the nurse, or in refusing a charge as to the care used in selecting nurses at the sanitarium.

[2] It was not error to exclude a question relative to the extent of the plaintiff's injury, when it was coupled with matter relating to a settlement of the claim for damages which latter was not material to the issues being tried.

There was no error in permitting the plaintiff to testify as to how the burn was measured, the plaintiff's burned limb being at the time exhibited to the jury.

[3] As the evidence of the nature and extent of the injury sustained is more complete as shown by this record, and as the trial court has expressly considered the amount of the award in this second verdict, by permitting a recommitment in accordance with his judgment as to the proper amount to be recovered, the appellate court will not disturb the trial court's determination; the amount awarded in the judgment not being patently excessive.

Judgment affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 484)

BENNETT v. STATE.

(Supreme Court of Florida. Dec. 22, 1914.)

*(Syllabus by the Court.)***1. CRIMINAL LAW — 1178—ASSIGNMENTS OF ERROR—WAIVER—FAILURE TO ARGUE.**

Where there are assignments of error in a criminal case which are not argued, but merely repeated and insisted upon in the brief of plaintiff in error, an appellate court is not required to do more than read the record carefully in connection with such assignments, and if it discovers no plain or glaring error prejudicial to the plaintiff in error, under such assignments, the judgment will not be reversed because of such assigned errors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011-3013; Dec. Dig. — 1178.]

2. CRIMINAL LAW — 406—EVIDENCE—VOLUNTARY STATEMENT—LARCENY.

A statement voluntarily made by one prior to his arrest concerning a hand bag, for the larceny of which he was subsequently tried, is admissible in evidence against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. — 406.]

3. CRIMINAL LAW — 406, 517—EVIDENCE—ADMISSIONS AGAINST INTEREST.

The purpose of section 1 of chapter 5897 of the Laws of Florida, Acts of 1909, p. 45, is to permit the introduction in evidence of a bill of exceptions containing evidence adduced at a former trial, when certain evidence given at such former trial cannot be had. Such statute does not affect the rule that permits of the introduction of testimony as to confessions or admissions against interest, whether made in court or extrajudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927, 1146-1156; Dec. Dig. — 406, 517.]

4. CRIMINAL LAW — 753—INSTRUCTED VERDICT—RIGHT.

A defendant in a criminal case is not entitled as of right to an instruction to the jury to return a verdict of not guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. — 753.]

Error to Criminal Court of Record, Volusia County; Bert Fish, Judge.

Charley Bennett was convicted of larceny, and brings error. Affirmed.

A. G. Hartridge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, C. J. [1] Charley Bennett seeks relief here from a conviction of the crime of larceny. Ten errors are assigned, but we shall discuss only those which are argued, treating the others as having been abandoned. See *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, and *Pittman v. State*, 51 Fla. 94, 41 South. 385, 8 L. R. A. (N. S.) 509.

The fourth and fifth assignments are argued together and are as follows:

"Fourth. The court erred in permitting witness for state E. L. Smith to testify as to statements made by defendant while executing a

search warrant over the objection of attorney for defendant.

"Fifth. The court erred in denying motion of defendant's attorney to strike testimony of state's witness E. L. Smith on the ground that it is improper, the defendant never having been warned that any statement he made would be likely to be used against him; and on the further ground that it is not germane to the issue, and the witness is seeking to make the defendant testify through a third party and the witness' testimony is merely that of a contradiction of the state's witnesses. It is not a contradiction of anything the defendant has said himself, nor it is not a confession of any crime."

We find from the bill of exceptions that E. L. Smith was introduced as a witness for the state, and testified that he was the sheriff of Volusia county, and that he had gone to the house in which the defendant was living, in company with the defendant, with a search warrant, under which he was authorized to search such house for a black hand bag; that the defendant, who was not under arrest at that time and against whom no criminal prosecution had been instituted, voluntarily accompanied the witness to the house and showed him the room which the defendant occupied therein, also his brother's room, and exhibited to the witness a brown suit case, stating of his own accord to the witness, without any questions having been propounded to him, that such suit case was the only grip or piece of baggage that he had brought back with him from Jacksonville and that he had borrowed that case to use on the trip. We are of the opinion that these assignments have not been sustained. It had already been developed by the evidence that the black hand bag, with the larceny of which the defendant stood charged, had been taken from a passenger coach on a train running from Jacksonville to De Land Junction, in which coach the defendant was traveling at the time; that the defendant was seen to get off the train at De Land Junction with both a brown suit case and a black hand bag, to board the train for De Land with such two pieces of baggage, to arrive at De Land with them, and to go in a hack with them from the station to the house in which he roomed. As the defendant was not under arrest and no criminal proceeding charging him with such larceny was pending against him, there was no occasion to caution or warn him as to statements which he might make. What we have already said shows the relevancy of the statement which the defendant voluntarily made.

[2] The next assignment urged before us is the sixth, which is as follows:

"Sixth. The court erred in overruling the objection of defendant's attorney to any testimony of J. Lee McCrory, a witness for the state, sought to be introduced by the witness as to what testimony was given by the defendant in the preliminary trial as it is an effort to compel the defendant to testify, the law making it optional whether he takes the stand or not, and prohibiting the state to compel him to testify; and on the further ground that under the decision of this court in *Coley v. State*, 67 Fla. 178,

64 South. 751, no testimony given at a former trial of any cause in this state can be introduced except by a bill of exceptions."

J. Lee McCrory, a state witness, testified that he held the position of county judge of Volusia county, and that as such official he had caused the accused to be brought before him for an examination, in accordance with the provisions of section 3931 of the General Statutes of Florida, at which preliminary hearing or examination the defendant voluntarily took the stand as a witness in his own behalf and, after having been cautioned or warned as to any statements which he might make, testified:

"That he had only one suit case; that it was a yellow suit case, and belonged to his brother Lovin; that he did not have a black hand bag or satchel or suit case and knew nothing of it."

[3] We think that the defendant has placed an erroneous construction upon section 1 of chapter 5897 of the Laws of Florida, Acts of 1909, p. 45, which reads as follows:

"Section 1. That section 1523, of the General Statutes of Florida, in reference to use of former bills of exceptions be, and the same is amended, so as to read as follows, to wit:

"1523. Use of Former Bills of Exceptions.—In case any judgment at law rendered by any court of the state of Florida shall be reversed and a new trial awarded, and it be made to appear to the satisfaction of the court that any evidence used at the former trial, whether oral or written, and incorporated in the bill of exceptions, can not be had, then the bill of exceptions taken at the previous trial may be used as evidence upon any subsequent trial of the case, as to any matter in issue at the former trial; provided, that no evidence given upon a former trial of any case pending in any of the courts of the state of Florida shall be used in evidence upon the trial of any cause in any of the courts in the state of Florida, except as herein provided."

It is obvious that the purpose of this act is to permit the introduction in evidence of a bill of exceptions containing evidence adduced at a former trial, upon the reversal of a judgment rendered thereat, when certain evidence given at such former trial cannot be had. In other words, provision was made for the admission of the bill of exceptions when the testimony of a witness who had testified at a former trial could not be had by reason of the death, sickness, or insanity of such witness or by reason of the fact that he is out of the jurisdiction or cannot be found after diligent search. See the discussion in Putnal v. State, 56 Fla. 86, 47 South. 864. Such statute does not affect the rule that permits of the introduction of testimony as to confessions or admissions against interest, whether made in court or extrajudicial. This being true, the case of Coley v. State, 67 Fla. 178, 64 South. 751, relied upon by the defendant to support his contention, has no relevancy and could not be held to control. Therefore this assignment must fail.

[4] The eighth assignment is based upon the denial of the defendant's motion for an instruction to the jury to return a verdict of not guilty. No error is made to appear

here. We have several times held that a defendant in a criminal case is not entitled as of right to an instruction to the jury to return a verdict of not guilty. See Ryan v. State, 60 Fla. 25, 53 South. 448, and authorities there cited, and Hughes v. State, 61 Fla. 32, 55 South. 463.

The judgment must be affirmed.

TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 503)

PERKINS v. MORGAN LUMBER CO.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

1. PLEADING \S 193—DEATH OF EMPLOYE—DECLARATION—DEMURRER.

Where a declaration in a suit for damages for the death of an employé of a sawmill company shows upon its face that the occurrence by which the deceased lost his life was the result of an unavoidable accident for which the defendant mill company was in no way responsible, a demurrer to such declaration is properly sustained.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 425, 428-435, 437-443; Dec. Dig. \S 193.]

2. MASTER AND SERVANT \S 129, 219 — INJURY TO SERVANT—ASSUMPTION OF RISK—PROXIMATE CAUSE.

The declaration in a suit for damages for the death of an employé of a sawmill company showed upon its face that such employé, while holding the position of lumber inspector in and about the sawmill of the defendant company, and while standing beside a revolving platform designed and used for conveying timber or logs to a revolving circular saw by it to be cut in two, had his foot to slip, and fell upon such revolving platform, and was by it projected upon such revolving circular saw, and thus lost his life. Such declaration also expressly alleged that this slipping and falling by the deceased was unavoidable and without any default on the defendant's part. *Held*, that this slipping and falling by the deceased was the proximate cause of his injury, and not the exposed or unguarded condition of such saw, and that the defendant was not liable therefor: *Held*, further, that the deceased, being employed in a responsible capacity in and about such sawmill, and being familiar with the positions, workings, and connections of the different implements and machinery there in use that were patently obvious, must have known that if he permitted his body to get upon and remain upon such revolving platform that it would inevitably project him upon such revolving saw, and that it would result in his very great or fatal injury, and that by accepting and continuing in the employment of the defendant mill company with full knowledge of the patent dangers there surrounding him he assumed such obvious risks, and the defendant is not liable for the injury that resulted in his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. \S 257-263, 610-624; Dec. Dig. \S 129, 219.]

3. MASTER AND SERVANT \S 121—SAFEGUARDING MACHINERY—DUTY OF MASTER.

A sawmill company engaged in converting timber into merchantable lumber is not under any legal duty either to its employes or the public generally, nor is it practically possible for them, to keep all of the saws necessary to their business either covered in or guarded against

cutting into any object that may accidentally come in contact with them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.]

4. PLEADING § 364 — EVIDENCE — PHOTOGRAPHS.

Where a party suing for damages for the death of another undertakes to make photographs of the alleged scene of the tragedy a part of his declaration, such photographs, and all averments connecting them with the case, are properly stricken on motion, as it is contrary to all established rules for a party to thus plead his evidence, particularly so when to become admissible as evidence the matter so pleaded requires identification and authentication by some witness under oath and subject to cross-examination.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action by E. E. Perkins, as administrator of the estate of Lucian A. Speir, deceased, against the Morgan Lumber Company, a corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

A. H. & Roswell King, of Jacksonville, for plaintiff in error. Marks, Marks & Holt, of Jacksonville, for defendant in error.

TAYLOR, J. The plaintiff in error, as plaintiff below, sued the defendant in error, as defendant below, in the circuit court of Duval county. The first amended declaration in the case alleged as follows:

"That plaintiff has been duly constituted and appointed administrator of the estate of Lucian A. Speir, deceased, by the probate court in and for Duval county, Fla., then and therein having jurisdiction in the premises, and as such has duly qualified before such court; that at the time of the decease of Lucian A. Speir he left no widow and no child and no person dependent upon him for support.

"That the defendant corporation, on the 17th day of February, 1913, and for a long time theretofore, was the owner and operated a certain sawmill in the county of Duval and state of Florida; that at said mill of defendant, at the time and place hereinafter alleged, there was a conveyor which carried lumber and fed it to a saw located at the lower end of said conveyor; and plaintiff alleges that his decedent was, at said time and place employed by said defendant in and about said sawmill, and that on said date—to wit, the 17th day of February, 1913—deceased, while then and there in the performance of his duties of the said employment, accidentally lost his footing and fell upon said conveyor and rolled down and along it to and upon the said saw located as aforesaid, thereby so greatly wounding, bruising, and injuring said deceased, Lucian A. Speir, that he died from and as the result of the said injuries, inflicted as aforesaid; and plaintiff alleges that defendant was guilty of negligence in the premises in this to wit, that it failed to provide a sufficient guard or shield to cover said saw for the protection of deceased and other employes similarly situated as it was the duty of defendant to provide in the premises, from its dangerous effects; and plaintiff alleges that said dangerous condition was known, or should have been known to defendant in the exercise of reasonable care and diligence; that it failed in the premises to provide a safe place for decedent

and other employes to work; that defendant failed to equip its said mill with modern and improved machinery for the protection of deceased and its other employes; and plaintiff alleges that, by reason of the death of the said Lucian A. Speir, he has sustained damages in the sum of \$50,000; wherefore plaintiff brings this suit and claims \$50,000 damages of defendant."

To this amended declaration the defendant demurred on the following grounds:

"(1) Said declaration is vague, indefinite and uncertain.

"(2) Said declaration affirmatively shows that the alleged injury was the result of an accident.

"(3) Said declaration shows that the proximate cause of the alleged injury was the accidental losing of the deceased's footing and falling upon the said conveyor.

"(4) Said declaration shows no breach of duty on the part of the defendant.

"(5) It does not appear from said declaration that decedent was acting within the scope of his employment at the time of the alleged injury.

"(6) It affirmatively appears from said declaration that at the actual time of the alleged injury complained of the deceased was acting without the scope of his employment.

"(7) Said declaration affirmatively shows that the proximate cause of the alleged injury was not the alleged negligence of the defendant.

"(8) Said declaration affirmatively shows that the proximate cause of the alleged injury complained of was the negligence of the deceased.

"(9) It does not appear in and by said declaration that the said saw could have been so shielded or covered as to protect employes from its alleged dangerous effects.

"(10) It affirmatively appears that the alleged dangers were open, patent and obvious, and plainly and easily ascertainable to deceased.

"(11) There was no obligation on the part of defendant to guard against injury to the deceased or other employes who fell upon said conveyor and rolled down it to and upon the said saw."

"(12) It does not appear that the alleged breaches of duty were or that any of them was the proximate cause of the alleged injury complained of.

"(13) The declaration alleges an improper standard or degree of duty owing by the defendant to the plaintiff's decedent.

"(14) It affirmatively appears that the deceased by his negligent acts contributed proximately to his own injury.

"(15) The declaration fails to set forth facts sufficient to show the defendant guilty of the negligence complained of.

"(16) It does not appear that the deceased was necessarily or properly in the place or position from whence he fell upon the said conveyor.

"(17) The cause of the death of the deceased is not sufficiently shown.

"(18) It does not appear that a shield or cover for the said saw was necessary for the safety of the deceased while performing his duties as a lumber inspector.

"(19) It does not appear how or in what way the plaintiff has sustained the damages alleged."

This demurrer was, after argument, sustained by the court below with leave to the plaintiff to amend. The plaintiff then filed his second amended declaration, alleging therein as follows:

"That the plaintiff has been duly constituted and appointed administrator of the estate of Lucian A. Speir, deceased, by the probate court in and for Duval county, Fla., then and therein having jurisdiction in the premises, and as such has duly qualified before such court; that at the time of the decease of said Lucian A. Speir he

left no widow and no child and no person dependent upon him for support.

"That the defendant corporation, on the 17th day of February, 1913, and for a long time theretofore, was the owner of and operated a certain sawmill in the county of Duval and state of Florida; that as part of said mill of defendant at the time and place hereinafter alleged there was a conveyor constructed and used for the purpose of carrying lumber and feeding it to a butting saw located at the lower end of said conveyor; and plaintiff alleges that his decedent was at said time and place employed by said defendant in and about said sawmill, and that on said date—to wit, the 17th day of February, 1913—deceased, while then and there in the performance of his duties in the said employment, fell upon said conveyor and was carried down and along it to and upon the said saw located as aforesaid, by reason whereof deceased was so greatly wounded, bruised, and injured that he, on or about said day, died from and as a result of said injuries inflicted as aforesaid; and plaintiff says that said fall was occasioned by circumstances unforeseen and unforeseeable to and by decedent while in the performance of his duties to and for the defendant and without the negligence of deceased or the defendant; that said fall was occasioned by circumstances in the premises which were not foreseen nor apprehended by deceased in the exercise of due care and caution; that deceased was, at the time of said unforeseen and unforeseeable fall in the performance of his duties, engaged in attending to the passage of lumber along said roller bed at or about the place where the figure of a man is seen standing in photograph No. 1, herewith filed as part hereof, and walking or standing on the unobstructed floor of the mill, where no danger could be or was foreseen or apprehended by deceased, and where there was no danger to deceased in the performance of his duties to defendant; and plaintiff alleges that defendant was guilty of negligence in the premises, in this, to wit, that it failed to provide a sufficient guard or rail to cover said saw for the protection of deceased and other employes similarly situated in the premises from its dangerous effects, as it was in duty bound to do in the exercise of due care and caution for the safety and protection of deceased and other employes similarly situated; and plaintiff alleges that said dangerous condition was known by defendant, or should have been known to the defendant in the exercise of reasonable care and diligence for the safety and protection of the deceased and other employes similarly situated; and plaintiff alleges that defendant failed in its duty in the premises to provide then and there a reasonably safe place for decedent and other employes similarly situated to perform the duties of their employment to defendant, but, on the contrary, defendant carelessly and negligently left its said saw exposed, to wit, 16 inches beyond and outside of any barrier or guard whatever, as appears by and from two photographs of said saw and its arrangement herewith filed and made a part of this declaration, the same as if embodied herein, numbered, respectively, 1 and 2, said saw so appearing on said photographs at the words written thereon in quotations 'Saw'; and plaintiff alleges that, had the guard or barrier extended to or beyond or throughout the circumference of said saw, such injuries would not have been inflicted upon the deceased, from the result of which he died as aforesaid; and plaintiff alleges that modern, adequate, customary, or up-to-date construction in the premises required defendant to so construct said saw and its incident machinery that said saw ought, in the exercise of due care and caution by defendant, to have been protected by a barrier guard or inclosure extending throughout the exposed face or breadth of said saw, or by so arranging said saw that in its operation it would have disappeared below said roller bed as defendant had provided at all other places along said roller

bed for the safety of its employes, as will be seen by reference to photographs marked 3 and 4 herewith filed and made a part hereof the same as if embodied herein, the saw in No. 3 showing as raised in No. 4 as having disappeared below the surface of said roller bed where it is free from all danger; but plaintiff alleges that defendant failed to so construct or arrange its said machinery and the saw which caused the death of the deceased, as will appear from said photographs 1 and 2.

"And plaintiff alleges that by reason of the death of the said Lucian A. Speir he has sustained damages in the sum of \$50,000; wherefore plaintiff brings his suit and claims \$50,000 damages of defendant."

To this second amended declaration the defendant again demurred, upon the same grounds as set forth in the demurrer above to the first amended declaration. This demurrer was, after argument, also sustained by the circuit judge. The defendant also moved to strike certain parts of the second amended declaration as follows:

"Comes now the defendant and moves the court for an order requiring the plaintiff to strike from its declaration the portions thereof hereafter stated, the said portions being so framed as to prejudice, embarrass, and delay the fair trial of the action.

"Plaintiff first moves to strike the four photographs numbered 1 to 4, inclusive, filed with the declaration and by reference made a part thereof, upon the following grounds:

"(1) Each of said photographs shows and contains much that is not relevant to the supposed cause of action sued upon.

"(2) Neither of the said photographs has been properly or sufficiently identified.

"(3) By attempting to make the said photographs a part of the said declaration, the plaintiff is merely seeking to plead his evidence.

"(4) If the photographs or any of them are allowed to remain a part of the declaration, the plaintiff might thus get before the jury without proper authentication or identification matters and things that amount to mere evidence, without giving defendant opportunity to object thereto.

"(5) It is not sufficiently shown that the physical conditions portrayed by the said photographs or any of them are as they existed at the time of the accident.

"(6) Photographs 3 and 4 are invoked in the attempt to limit the defendant to one method or arrangement of its machinery, which is an effort to impose upon the defendant an improper standard or degree of duty.

"Defendant further moves the court for an order requiring the plaintiff to strike from his declaration the portions thereof hereafter stated, the same being so framed as to prejudice and embarrass the fair trial of this action:

"The words: 'At or about the place where the figure of a man is seen standing in photograph No. 1 herewith filed as a part hereof.'

"The words: 'As appears by and from two photographs the said saw and its arrangement herewith filed as and made a part of this declaration, the same as if embodied herein, numbered respectively 1 and 2, said saw so appearing on said photographs at the word written thereon in quotations 'Saw.'

"The words: 'Or by so arranging saw that in its operation it would have disappeared below said roller bed as defendant had provided at all other places along said roller bed for the safety of its employes, as will be seen by reference to photographs 3 and 4 herewith filed and made a part hereof, the same as if embodied herein, the saw in No. 3 showing as raised and in No. 4 as having disappeared below the surface of said roller bed, where it is free from all danger. But plaintiff alleges that defendant failed to so

construct or arrange its said machinery and the saw which caused the death of the deceased, as will appear from said photographs 1 and 2.

"Grounds of Motion.

"(1) The words, phrases, and allegations sought to be stricken are immaterial and irrelevant to the supposed cause of action sued upon.

"(2) It is sought by the language objected to to subject the defendant to an improper standard or degree of duty owing to the plaintiff's decedent or other employé.

"(3) By the last collection of words sought to be stricken, plaintiff attempts to limit the defendant to one particular method or arrangement of its machinery, which, if allowed, would subject the defendant to improper standard or degree of duty owing to its employées."

This motion was also granted by the circuit judge. Thereafter, the plaintiff declining to further amend his declaration, final judgment upon the demurrer to the declaration was entered in the defendant's favor. For review of this judgment the plaintiff below brings the case here by writ of error. The rulings of the court below sustaining the demurrers to the first and second amended declarations, and granting the motion to strike certain parts of the second amended declaration and the entry of final judgment on the last demurrer, are assigned as error.

[1-3] There was no error in any of these rulings. Both declarations show upon their face that the tragic occurrence by which the deceased intestate lost his life was the result of an unavoidable accident for which the defendant was in no way responsible. The deceased was an employé of the defendant company, holding a position of responsibility in and about their milling works, familiar with the positions and workings and connections of the different implements and machinery that were patently obvious, and must have known that, if he permitted his body to get upon and remain upon the revolving platform, designed and used for conveying stick of timber to a revolving circular saw by it to be cut in two, such moving platform would inevitably project him upon such revolving saw, and that it would result in his very great or fatal injury; and he assumed the obvious risks by accepting and continuing in the employment of the defendant with full knowledge of the patent dangers there surrounding him. The pith of the negligence alleged against the defendant company is that it negligently left or kept the saw that produced the death of the deceased openly exposed, instead of having it covered in or guarded against cutting into objects accidentally exposed to its cutting edge, and that this negligence was the proximate cause of the fatal accident to the deceased. We do not understand that it is the legal duty of sawmill companies engaged in

converting timber into merchantable lumber, owed either to their employés or to the public generally, or that it is practically possible for them to keep all of the saws necessary to their business either covered in or guarded against cutting into any object that may accidentally come in contact with them. And this supposed duty, assumed by the declaration to have been violated in this case, is one that does not in reality exist in law. Both declarations show upon their face that the proximate cause of the injury to the deceased was the fact of his accidentally slipping from his footing on the floor beside the moving carriage designed and used for conveying timber to the alleged exposed saw, and thereby being thrown upon such moving timber conveyor and by it being projected upon such revolving saw. If he had not accidentally slipped and fallen on the moving lumber conveyor, he would not have met with any injury whatsoever. And yet this slipping and falling is alleged in the declarations to have been unavoidable and without any default on the defendant's part. That this accidental falling was the proximate cause of the injury to the deceased, see the following authorities: *P. H. & F. M. Roots Co. v. Meeker*, 165 Ind. 132, 73 N. E. 253; *Crawford & McCrimmon Co. v. Gose*, 172 Ind. 81, 87 N. E. 711; *Leynes v. Tampa Foundry & Machine Co.*, 56 Fla. 488, 47 South. 918.

[4] As to the ruling striking out from the second amended declaration those paragraphs thereof that undertook to exhibit four photographs of the mill where the accident was supposed to have occurred, as parts of the declaration, there was no error. At best, these photos may have become evidence at the trial of the cause if properly identified and shown to be pertinent to any issue in the cause, but to permit them to be interjected into the case as part of the plaintiff's initial pleading was nothing more than an attempt on the plaintiff's part to plead his evidence, and thus to get it before the jury without the precedent step of proper identification and authentication by the oath of some witness subject to cross-examination. It is contrary to all established rules for a party to plead his evidence in a cause; particularly so when, to become admissible as evidence, the matter so pleaded requires identification and authentication by some witness under oath and subject to cross-examination.

The judgment of the court below in said cause is hereby affirmed, at the cost of the plaintiff in error.

SHACKLEFORD, C. J., and COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 546)

LAND v. TAMPA TIMES PUB. CO.

(Supreme Court of Florida. Dec. 22, 1914.)

*(Syllabus by the Court.)***1. LIBEL AND SLANDER — LIBEL — RIGHT OF ACTION.**

A civil action for libel will lie when there has been a false and unprivileged publication by letter or otherwise which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business, or employment.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. ¶6.]

2. LIBEL AND SLANDER — LIBELOUS PUBLICATION — WHAT CONSTITUTES.

Where a publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong and injury are presumed or implied, and such publication is actionable per se.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. ¶6.]

3. LIBEL AND SLANDER — PLEADING — SPECIAL DAMAGES.

The malicious publication in a newspaper article containing a false statement that the plaintiff "hangs around in a disreputable part of" a named city is not privileged, and, its natural and proximate consequences being to cause an injury to him in his personal, social, or business relations in life, such a publication is libelous per se, making an allegation of special damages unnecessary.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 113, 213, 214; Dec. Dig. ¶¶84, 89.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action for libel by Samuel Land, by next friend, against the Tampa Times Publishing Company, a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

S. V. Ray, of Tampa, for plaintiff in error.
K. I. McKay, of Tampa, for defendant in error.

WHITFIELD, J. An action for libel was brought against the company for "wickedly and maliciously intending to injure the plaintiff and bring him into public scandal and disgrace * * * wickedly and maliciously did compose and publish, and cause to be composed and published, of and concerning the plaintiff, in a certain newspaper called the Tampa Daily Times * * * a certain false, scandalous, malicious, and defamatory libel, containing, among other things, the false, scandalous, malicious, defamatory, and libelous matters following, of and concerning the plaintiff, viz.: * * * 'The lad [meaning the plaintiff] * * * hangs around in a disreputable part of' a stated city. * * * 'It is alleged that plaintiff had enjoyed the esteem and good opinion of his neighbors and other worthy citizens of

the state, and that by means of the publication he has been and is greatly injured in his good name, credit, and reputation, and brought into public scandal and disgrace, and has been shunned by divers persons. Plaintiff claims substantial damages. No special damages are alleged. A demurrer to the declaration was sustained, and, the plaintiff declining to further plead or amend, final judgment for the defendant was rendered, and the plaintiff took writ of error. This action is for libel, not slander.

[1] A civil action for libel will lie when there has been a false and unprivileged publication by letter or otherwise which exposes a person to distrust, hatred, contempt, ridicule, or obloquy, or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business or employment.

[2] Where a publication is false, and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations of life, wrong and injury are presumed or implied, and such publication is actionable per se. *Briggs v. Brown*, 55 Fla. 417, 46 South. 325; *Montgomery v. Knox*, 23 Fla. 595, 3 South. 211; *Jones v. Greeley*, 25 Fla. 629, 6 South. 448.

[3] The malicious publication in a newspaper article containing a false statement that the plaintiff "hangs around in a disreputable part of" a named city is not privileged, and its natural and proximate consequences are to cause an injury to him in his personal, social, or business relations in life, and such a publication is libelous per se, making an allegation of special damages unnecessary.

The judgment is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 441)

WHITTLE et al. v. LONG.

(Supreme Court of Florida. Dec. 1, 1914.)

*(Syllabus by the Court.)***EQUITY — DECREE PRO CONFESSO.**

Where a suit is irregularly brought in the name of a deceased person as sole complainant, and after decree pro confesso a real party is made sole complainant, no notice thereof being served on the defendants and they in no wise appear in the cause, the defendants not having had their day in court as to the amendment, a decree against the defendants is erroneous.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 952-971; Dec. Dig. ¶418.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Suit by Addie Long, as administratrix, etc., against Durwood Whittle and others. From a decree for complainant, defendants appeal. Reversed.

H. P. Baya and E. B. Drumright, both of Tampa, for appellants. C. C. Whitaker, of Tampa, for appellee.

WHITFIELD, J. A suit to enforce a mortgage lien upon land was brought in the name of the mortgagee, who was then deceased, and service of process was made upon the defendants who did not appear. A decree pro confesso was entered for failure to plead, answer, or demur. Subsequently the successor in title to the mortgagee, upon petition, no notice of which was served on the defendants, was admitted and made the sole complainant. Testimony was taken for the complainant, the defendants not appearing in the cause before final decree against them, from which they appealed.

As the suit was irregularly brought in the name of a deceased person as the sole complainant, and as after decree pro confesso a real party was made the sole complainant, no notice thereof being served on the defendants, and they in no wise appeared in the cause, and the appellants not having had their day in court as to this amendment, the decree against them is erroneous, and on their appeal such decree is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 231)

BARNES et al. v. STATE.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. COURTS — 65 — TERMS — TERMINATION.

Under statutory direction that terms of a circuit court shall begin on certain Mondays in the several counties, the term in one county does not ipso facto end the Saturday at midnight preceding the Monday fixed for the beginning of the term in another county.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 230, 246; Dec. Dig. 65.]

2. SUNDAY — 1 — JUDICIAL FUNCTION ON SUNDAY.

It is not unlawful to impose a sentence or to perform a judicial function after midnight on Saturday and before sunrise of Sunday.

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 1; Dec. Dig. 1.]

3. MOTIONS — 36 — TIME FOR HEARING — DISCRETION.

Courts have a large discretion in fixing the time for hearing pending motions.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 45, 46; Dec. Dig. 36.]

4. MURDER IN THE SECOND DEGREE.

The evidence justified the verdict.

Error to Circuit Court, Holmes County; D. J. Jones, Judge.

Joe Barnes and another were convicted of murder in the second degree, and bring error. Affirmed.

J. W. Kehoe, of Panama City, for plaintiffs in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. The plaintiffs in error were convicted of murder in the second degree and sentenced to life imprisonment.

[1] The main assignments of error are placed upon the fact that the verdict was received and sentence passed after midnight of Saturday, about half past 2 o'clock.

It is urged, first, that the term of court expired at midnight, and that therefore a mistrial should have been ordered. The statute does not fix the term of the court. It merely directs that the term begin on a certain Monday, and that on the Monday succeeding this Saturday a term be held in another county of the circuit. Should, however, the circuit judge see fit to continue the Holmes county term into the following week, the jurisdiction of the court would be in no wise affected; the only possibility of embarrassment being that the judge might, under the statute, be penalized should he fail to appear, without sufficient excuse, at the time set for the opening of the term in the other county.

[2] Did the action of the court in overruling the motion for a new trial and imposing the sentence violate the common-law maxim that Sunday is dies non juridicus?

The plaintiffs in error rely upon the statement by this court in *Hodge v. State*, 29 Fla. 500, 10 South. 556, that, while a verdict may be received and entered on Sunday, yet it seems that judgment or sentence cannot be entered on that day. In that same case, however (29 Fla. 508, 10 South. 556) there is another simile that the Sunday on which judicial action is forbidden begins with sunrise and ends with sunset. Again, in *Hanley v. State*, 50 Fla. 82, 39 South. 149, while the record did not present the point so as to make a decision necessary, we very plainly intimated that such was the law of this state. It is but a slight step to the declaration that such is the law. In the olden days it was difficult to fix the exact time when midnight arrived, while sunrise was of easy observation. Again, in holding courts during the daylight those in attendance were kept from public worship, and the exhibition of secular activity was offensive to those engaged in religious duties. These and perhaps other considerations prevented the application of the prohibition to the courts who were unable to finish their serious labors by the midnight hour.

[3] The postponement beyond the term of the hearing of a motion for a new trial is largely discretionary. Practically the sole ground to be presented or saved on that motion was the sufficiency of the evidence. The law fixed rigidly the sentence to be imposed. After seven months, counsel for the plaintiffs in error practically abandons any suggestion of error at the trial other than an insistence that the evidence does not measure up to murder in the second degree, for it is clear

that the refused charges had no sufficient foundation of fact.

[4] There are many contradictions in the testimony, but the state's case made out a reckless shooting without reasonable excuse or justification, and the judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(88 Fla. 515)

RING v. MERCHANTS' BROOM CO.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

COURTS —121—JURISDICTION—"AMOUNT INVOLVED"—DECLARATION.

Where a promissory note for \$400 principal, that expressly promised to pay interest at 8 per cent. per annum and attorney's fees for collection, was sued upon in the circuit court, the declaration specifically claiming such interest and attorney's fees, which combined with the principal of such note amounted, according to the verdict of the jury trying the case, to the total sum of \$528 exclusive of the court costs taxed in the case, *held*, that the circuit court rightly entertained jurisdiction in such case, the amount involved in the controversy between the parties being over \$500, and this in a county where a county court was established by law, which county court under the Florida Constitution had exclusive jurisdiction of all suits at law in which the demand or value of the property involved shall not exceed \$500. *Held*, further that, attorney's fees being expressly promised in said note and specifically sued for and demanded in the declaration, became as much a part of the amount involved in the suit for the purpose of determining the jurisdiction of the court, as were the principal and interest of said note.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 413-428, 428, 437, 450, 452, 458, 459, 466; Dec. Dig. —121.

For other definitions, see Words and Phrases, First and Second Series. Amount Involved.]

Error to Circuit Court, Duval County; George Couper Gibbs, Judge.

Action by the Merchants' Broom Company, a corporation, against Hira A. Ring. Judgment for plaintiff, and defendant brings error. Affirmed.

P. H. Odom, of Jacksonville, and Hilburn & Merryday, of Palatka, for plaintiff in error. Johnson & McIlvaine, of Jacksonville, for defendant in error.

TAYLOR, J. The defendant in error, as plaintiff below, sued the plaintiff in error, as defendant below, in the circuit court of Duval county for the enforcement of the following promissory note:

"\$400.00 Oct. 27th, 1911.
"Ninety days after date I promise to pay to the order of Merchants' Broom Co. or bearer four hundred and no/100 dollars. For value received, payable at Jacksonville, Fla., with interest from date at the rate of 8 per cent. per annum with all costs of collection, including ten per cent. attorney's fees, and for security of the payment of the aforementioned amount hereby mortgage the following, to wit, — and each of us, whether maker, security or endorser

on this note hereby waives and renounces for himself and family, any and all homestead and exemption rights to which he or they may in any event be entitled under any provision of the constitution or laws state or federal as against this note or any renewal thereof.

"Witness—hand and seal

"[Signed] Hira A. Ring.
"Witness: P. G. Russell."

There was judgment final upon the following verdict by a jury:

"We, the jury, find a verdict in favor of plaintiff and assess damages at \$528.00 as follows: Note \$400.00. Int. \$88.00. Atty. fees \$40.00.
"[Signed] L. T. Gregory, Foreman."

The final judgment including an additional sum of \$21.44 for costs taxed in the case. This judgment the defendant below brings here for review by writ of error.

After verdict rendered, the defendant below moved in arrest of judgment as follows:

"Now comes the defendant in the above-entitled cause and moves the court to arrest and vacate the judgment herein on the following grounds:

"(1) The circuit court has no jurisdiction in this cause for the reason that the demand or value of the property involved does not exceed \$500.

"(2) The attorney's fees were not a part of the matter involved before the institution of this suit, and were not fixed and determined until after the verdict was rendered by the jury.

"(3) The attorney's fees should be considered as a part of the costs in the case, and not as the amount of the demand or value of the property involved in determining the jurisdiction of this court."

This motion was denied, and this ruling is the only assignment of error that is argued or presented here. There was no error here.

The contention of the plaintiff in error is that the county court established in Duval county under the provisions of section 18 of article 5 of the Florida Constitution had exclusive jurisdiction of the cause because the demand or value of the property involved did not exceed \$500. The note sued on expressly promises to pay interest and attorney's fees in case of its enforced collection. The plaintiff's declaration specifically sues for and claims both interest and attorney's fees so promised to be paid. Without this express agreement to pay attorney's fees in the case, none could either be sued for, claimed, or recovered, either as costs or otherwise, so that the recovery of attorney's fees was a part of the specific demand sued for in the declaration, and, based solely on the express promise contained in the note sued on, it became, as much a part of the demand sued for as either the principal or interest recovered under the defendant's promise made in the note sued on. Had the same judgment been rendered in the county court for \$528 besides the court costs assessed in the case, it would have been void as being in excess of its jurisdiction, as was held in the case of *Wilson v. Sparkman*, 17 Fla. 871, 35 Am. Rep. 110.

The judgment of the court below is hereby affirmed, at the cost of the plaintiff in error.

SHACKLEFORD, C. J., and COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 253)

NATIONAL UNION FIRE INS. CO. v. CUBBERLY.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. INSURANCE — 179 — "SEVERABLE CONTRACT"—BREACH—EFFECT.

In the absence of misrepresentations and fraud, where a fire insurance policy covers different classes of property, each of which is separately valued and is insured for a distinct amount, the contract is severable, and a breach of the contract of insurance that relates to and directly affects only one of the classes of the property insured does not invalidate the policy as to the other class of property, unless it appears that such was the intention of the parties; and an intent that the policy shall be indivisible is not shown by the facts that the premium for all the classes of property insured is payable or paid in gross, and the policy provides that the entire policy shall be void if the contract is violated in any one of several stated particulars by the insured.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 384-390; Dec. Dig. —179.]

2. INSURANCE — 179, 268—DIVISIBLE CONTRACT—BREACH—EFFECT.

Where the property covered by a policy of insurance consists of different kinds of property, such as realty and personalty, or of different items, such as separate buildings or different articles of personal property, and the different kinds or articles of property are separately valued, or are insured for separate amounts, and the premium charged is the aggregate of the separate premiums to be charged whether in a joint or several policies, the contract is divisible, and a breach of warrant or condition as to one kind or class of property will not affect the insurance on the remainder of the property

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 384-390, 568, 569; Dec. Dig. —179, 268.]

Error to Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Action by Fred Cubberly against the National Union Fire Insurance Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

Blount & Blount & Carter and W. A. Blount, Jr., all of Pensacola, for plaintiff in error. F. W. Marsh, of Pensacola, for defendant in error.

SHACKLEFORD, C. J. A judgment is brought here for review which the defendant in error, as plaintiff in the court below, recovered against the plaintiff in error as defendant upon a fire insurance policy. The pleadings were amended and several rulings were made thereon, but it is unnecessary to set forth any of the proceedings except the following: The insurance policy, which formed the basis of the action and was annexed as an exhibit to the declaration and made a

part thereof, was issued by the plaintiff in error to one Isom Vann, and attached thereto was an agreement to the effect that the loss, if any, should be payable to Fred Cubberly, the defendant in error. The plaintiff withdrew the first count of his declaration and elected to stand upon the second count which is as follows:

"Fred Cubberly, plaintiff, by his attorney, sues the National Union Fire Insurance Company, of Pittsburgh, Pa., a corporation, defendant, for that in consideration of the sum of \$36.40, to it paid and payment acknowledged, the said defendant issued to one Isom Vann its policy of insurance, and thereby promised the said Isom Vann, in term of said policy, and upon the conditions thereto annexed, to insure the said Isom Vann against loss or damage by fire to an amount not exceeding \$1,400, and to make good unto the said Isom Vann the loss or damage that should happen by fire, not exceeding the said sum of \$1,400, for the term of three years, from the 12th day of September, A. D. 1909, to the 12th day of September, A. D. 1912, on four one-story frame buildings, situated on the east side of Palafox street between Jordan and Maxwell streets, in Pensacola, Fla., valued in said policy as follows, to wit: Building No. 1, \$350; building No. 2, \$350; building No. 3, \$350; building No. 4, \$350—the loss to be paid 60 days after due notice and proof made by the said Isom Vann and received by the said defendant, and in the said policy sundry provisions, conditions, prohibitions, and stipulations were and are contained, and thereto annexed as by original policy, filed with original declaration, and made a part hereof, will more fully appear.

"And that thereafter the plaintiff, Fred Cubberly, loaned the said Isom Vann a sum of money exceeding said policy of insurance, payable by the said Isom Vann to plaintiff in one year from date thereof, and to secure the payment of said sum of money, the said Isom Vann executed and delivered to plaintiff a certain mortgage upon the property described in said policy of insurance, which mortgage was in full force and effect, and unpaid at the time of the happening of the fire and loss hereinafter mentioned.

"And after the execution and delivery of the aforesaid policy of insurance by the defendant to the said Isom Vann, and after the execution of the mortgage aforesaid by the said Isom Vann to plaintiff, and while said mortgage was in full force and effect and unpaid, to wit, on October 23, A. D. 1909, the defendant, through its duly authorized agent, indorsed on the said policy the following agreement, to wit:

"Pensacola, Florida, Oct. 23, 1909.

"The interest of Mrs. C. Kahn, having been satisfied, loss, if any, now payable to Fred Cubberly as his interest may appear, subject nevertheless to all the conditions of this policy. To attach to, and form part of policy No. 664 of the National Union Fire Ins. Co., Pittsburgh, Pa.

"[Signed.] Knowles Bros.,

"Knowles Hyer,

"V. P. & Genl. Manager, Agents."

"And afterwards, to wit, on the 27th day of August, A. D. 1911, one of the said one-story frame buildings hereinbefore more particularly described, so assured and in said policy described, was burned and destroyed by fire, and damage and loss was thereby occasioned to the said plaintiff to an amount exceeding \$350, in such circumstances as to come within the promises and undertakings of the said policy, and to render liable and oblige the said defendant to insure the said plaintiff to the said amount of \$350 on the property aforesaid, of which loss the said defendant had due notice and proof; and although all conditions have been perform-

ed and fulfilled, and all events and things existed and happened, and all periods of time have elapsed to entitle the plaintiff to a performance by the defendant of said contract and to entitle plaintiff to the said sum of \$350, and nothing has occurred to prevent the plaintiff from maintaining this action, yet the said defendant has not paid or made good to said plaintiff the said amount of loss and damage aforesaid, or any part thereof, but refuses so to do.

"Wherefore, said plaintiff sues to recover the said sum of \$350, and interest thereon from date of suit, and a reasonable attorney's fee, to be fixed in accordance with the statutes of the State of Florida, in such cases made and provided.

"And plaintiff claims damages in the sum of \$500."

Various and sundry pleas, replications, and demurrers were filed, but we copy only the fourth plea and the second replication:

"The defendant, for pleas to the second count, says:

"(4) That in and by the said policy sued on it is provided that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, should be void, if the assured, at the time of the issuance of the said policy, or thereafter, should make or procure any other contract of insurance, whether valid or not, upon the property covered in whole or in part by the said policy, and defendant avers that after the issuance of the said policy, and while the same was in full force and effect, the assured, the said Isom Vann, did procure another contract of insurance, upon a part of the property covered by the said policy, to wit, a contract of insurance for \$900 in the Hamburg-Bremen Insurance Company, upon two of the houses insured in and by the policy sued on; and defendant also avers that there was not, and has not, been provided by agreement indorsed upon the said policy sued on, or added thereto, any consent to the taking of the said additional insurance, and that the said three houses insured in and by the policy of insurance sued on were located in a row, and within a few feet of each other, and so close to each other that any fire destroying one would probably destroy the others, and they were all subject to the same fire risk."

The second replication is as follows:

"That each of the said houses mentioned in the said fourth plea were on separate and distinct divisions or lots in said city of Pensacola, and proper subjects of insurance under separate policies of insurance, and at the same rate of premium as that paid for in the insurance evidenced by the policy herein sued on; that it was the custom of fire insurance companies doing business in the city of Pensacola and vicinity, which custom was known to the defendant herein, and sanctioned and followed by it, to fix uniform rates on given risks according to the proximity of other buildings to that upon which the risk was assumed, and the proximity of the building to hydrant water; and that under said custom each of the buildings insured under the policy herein sued on was insurable in any company doing business in the City of Pensacola, each building under a separate policy, and as a separate and distinct risk, for a premium rate identical in amount with the premium rate, paid by the said Isom Vann on each of the houses insured under the policy herein sued on; and that the rate of premium which the defendant demanded of, and received from, the said Isom Vann, was uniform in amount as to each of the said houses, without respect to whether the said houses were jointly or severally insured, or whether the premium was to be taken on one or several of said houses."

The defendant interposed a demurrer to this replication on the ground that it set forth no facts which would make divisible the policy of insurance sued upon. The overruling of this demurrer formed the basis for the second assignment, which is the only one urged before us.

[1, 2] It is conceded that the sole point to be determined by us is as to whether or not the insurance policy in question is divisible; the plaintiff in error frankly admitting in its brief that, if we should hold that such policy is divisible, then the ruling of the trial court was correct. We had occasion to consider this question to some extent in *Hartford Fire Ins. Co. v. Hollis*, 64 Fla. 89, 59 South. 785, wherein we held:

"In the absence of misrepresentations and fraud, where a fire insurance policy covers different classes of property, each of which is separately valued and is insured for a distinct amount, the contract is severable, and a breach of the contract of insurance that relates to and directly affects only one of the classes of the property insured does not invalidate the policy as to the other class of property, unless it appears that such was the intention of the parties; and an intent that the policy shall be indivisible is not shown by the facts that the premium for all the classes of property insured is payable or paid in gross, and the policy provides that the entire policy shall be void if the contract is violated in any one of several stated particulars by the insured."

We stated that "there is a diversity of judicial opinion as to the divisibility of policies of insurance," but we reached the conclusion announced above and cited a number of authorities, to which we would again refer. We do not feel called upon to discuss this point now at any length. We approve of the following rule laid down by Mr. Cooley on page 1896 of his *Briefs on the Law of Insurance*:

"Where the property covered by a policy of insurance consists of different kinds of property, such as realty and personalty, or of different items, such as separate buildings or different articles of personal property, and the different kinds of articles of property are separately valued, or are insured for separate amounts, the contract is divisible, and a breach of warranty or condition as to one kind or class of property will not affect the insurance on the remainder of the property."

We also think that the author was justified in drawing the following conclusion, which is found on page 1925:

"Though in some jurisdictions the fact that the consideration for the policy is entire has led the courts to declare the contract entire, an examination of the cases justifies the statement that the rule established by the weight of authority is that, if the policy covers separate classes or items of property, separately valued and insured for separate amounts, the contract is divisible, and a breach of warranty or condition which affects only one of the classes or items covered will not avoid the insurance on the other classes or items. The fact that the policy contains a declaration that the entire policy shall be void on a breach of condition does not change the rule. Reason and justice require, however, that the rule should be modified when the various classes of property are so situated in respect to each other that the risk is

substantially the same on all, and in such case a breach of condition or warranty which increases the risk on one class or item of the property insured should forfeit the whole insurance."

In view of what we said in *Hartford Fire Ins. Co. v. Hollis*, supra, and of our approval of the quoted passages from Mr. Cooley's work, it necessarily follows that we are of the opinion that the insurance policy in the case is divisible; therefore the ruling of the court complained of is correct, and the judgment must be affirmed.

TAYLOR, COCKRELL, HOOKER, and
WHITFIELD, JJ., concur.

(68 Fla. 433)

CLARK v. STATE.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

1. EMBEZZLEMENT §26—INDICTMENT—SUFFICIENCY.

An indictment should not be quashed on account of any defect in the form thereof, unless the court shall be of the opinion that the indictment is so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him, after conviction or acquittal, to substantial danger of a new prosecution for the same offense.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 37, 38; Dec. Dig. §26.]

2. CRIMINAL LAW §393—PRIVILEGE OF ACCUSED—INCRIMINATING TESTIMONY—BANKRUPTCY.

Testimony given by a bankrupt in bankruptcy proceedings, under the provisions of the seventh section of the United States Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 548 [Comp. St. 1913, § 9591]), is not admissible against such bankrupt in a criminal prosecution instituted against him for embezzlement in the state court.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 871-874; Dec. Dig. §393.]

Error to Circuit Court, Jackson County;
D. J. Jones, Judge.

J. C. Clark was convicted of embezzlement, and brings error. Reversed.

Price & Price, of Marianna, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

SHACKLEFORD, C. J. J. C. Clark and P. S. Forrester were indicted for the crime of embezzlement, alleged to have been committed by them while engaged in the mercantile business as copartners under the firm name and style of Clark & Forrester. The defendants were alleged to be the agents, servants, and trustees of the American Agricultural Chemical Company, a corporation, and, while acting as such agents, servants, and trustees of such company, were charged with the embezzlement of the sum of \$1,391.90 in money, the property of such company, which the defendants had collected and failed and refused to pay over on demand. A motion for severance was granted, and J. C. Clark was

tried and convicted and sentenced to pay a fine of \$1,000 and the costs of the prosecution, or, in default of such payment, to confinement in the county jail at hard labor for a period of six months.

[1] The first assignment is based upon the overruling of the motion to quash the indictment, which is based upon several grounds, all of which question the sufficiency of the indictment in certain specified particulars. We do not copy either the indictment or the motion. Suffice it to say that the indictment, which is obviously based upon section 3308 of the General Statutes of Florida, though rather loosely drawn and by no means a model, we think, sufficiently complies with the requirements of such statute to warrant the overruling of the motion to quash. It is not characterized by the defects which we held in *Townsend v. State*, 63 Fla. 46, 57 South. 611, to be of such a nature as to vitiate the indictment; therefore this case, which is cited by the defendant in support of this assignment, is not controlling. Following the policy of the Legislature as expressed in section 3962 of the General Statutes of Florida, we have several times held:

"An indictment should not be quashed on account of any defect in the form thereof, unless the court shall be of the opinion that the indictment is so vague, indistinct, and indefinite as to mislead the accused and embarrass him in the preparation of his defense or expose him after conviction or acquittal to substantial danger of a new prosecution for the same offense."

See *Dickens v. State*, 50 Fla. 17, 38 South. 909; *Strobhar v. State*, 55 Fla. 167, 47 South. 4; *Mills v. State*, 58 Fla. 74, 51 South. 278.

We must hold that this assignment has not been sustained.

[2] We next take up for consideration the tenth assignment of error, which is as follows:

"The court erred in permitting the witness Nannie E. McAilley, court reporter in and for the Ninth judicial circuit of Florida, to read as evidence before the jury her notes of the testimony of the defendant Clark, which was given by him in the bankruptcy proceedings of Clark & Forrester when he was being examined at the meeting of the creditors, by them, and in overruling the objections of the defendant to the reading of such notes as evidence against the defendant."

We find that to the introduction of this proffered testimony of the stenographer's notes as to the testimony given by the defendant in the bankruptcy proceedings instituted by the defendant and his copartner, Forrester, whereby they sought to be adjudged bankrupts, the defendant interposed several grounds of objection, all of which were overruled, and such testimony admitted, which was of material nature and necessarily harmful to the defendant. We think that this error is well assigned. The seventh section of the Bankruptcy Act relating to the "Duties of Bankrupts," and requiring the

bankrupt to attend the first meeting of his creditors, if directed by the court or a judge to do so, and to submit to an examination at such time, and at such other times as the court shall order, contains the following provision:

"But no testimony given by him shall be offered in evidence against him in any criminal proceeding."

We would refer to the discussion in *Jacobs v. U. S.*, 161 Fed. 694, 88 C. C. A. 554, and *Alkon v. U. S.*, 163 Fed. 810, 90 C. C. A. 116. Even if it be true that this inhibition applies only to federal, and not to state, courts, under the principle announced in *Forchheimer v. Holly*, 14 Fla. 239, which may be doubted, though it is not necessary to be determined in this case, it would not avail the prosecution. To permit the introduction of such proffered testimony would be violative of the provision of section 12 of the Declaration of Rights in our state Constitution in compelling, indirectly at least, the defendant in a criminal case to be a witness against himself. See *Daniels v. State*, 57 Fla. 1, 48 South. 747. For the error in admitting this testimony, the judgment must be reversed; therefore it becomes unnecessary to discuss the other errors assigned. We think it well to say, however, that in other respects the evidence is not as satisfactory as it should be.

Judgment reversed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(68 Fla. 446)

BARNARD v. KING et al.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

EQUITY §263—PLEADING—STRIKING CROSS-BILL.

Where one pleading in equity is filed as answer and cross-bill, and the matters involved are adjudicated at a hearing on bill and answer, and no appeal is taken, there is no harmful error in striking the cross-bill feature of the pleading, or in refusing leave to file an amended cross-bill setting up matters not materially different from those that have become res adjudicata.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535-540; Dec. Dig. §263.]

Appeal from Circuit Court, Pinellas County; F. M. Robles, Judge.

Bill by Frances M. King and others against Erastus A. Barnard. From orders striking cross-bill and denying application to file an amended cross-bill, defendant appeals. Affirmed.

Herman Merrell, of St. Petersburg, for appellant. McMullen & McMullen, of Tampa, for appellees.

WHITFIELD, J. A bill in equity was filed to have canceled a stated deficiency decree

as a cloud upon title to real estate alleged to be the homestead of a decedent, whose widow and heirs were complainants. An answer and cross-bill in one instrument was filed, in which it is alleged that the property to which the title sought to be quieted is not in whole, if it is in part, a homestead, and that a portion of the land at least is subject to the lien of the decree. The cross-bill feature of the instrument filed as an answer and cross-bill seeks to affirmatively subject the land not found to be a homestead to the lien of the deficiency decree. The cause was heard on bill and answer, and the deficiency decree was by decree "declared null and void as a cloud upon the title of the complainants to the above described lots." This latter decree was not appealed from. An order denying a motion to strike a lis pendens filed upon the cross-bill was affirmed here. *King v. Barnard*, 66 Fla. 252, 63 South. 429. Subsequently the trial court on motion struck the cross-bill and denied an application to file an amended cross-bill. From these orders this appeal is taken.

The answer and cross-bill was one pleading and stated the same facts for answer and for cross-bill. The matters stated therein were adjudicated as between the parties by the decree made on bill and answer. Such decree rendered the matter res adjudicata, and it is final, since no appeal was taken therefrom. This being so, there was no harmful error in striking the cross-bill. The application for leave to file an amended cross-bill presented no matters that would make a case materially different from that presented by the answer and finally adjudicated against the appellant here, so there was no error in denying leave to file the amended cross-bill, if it were otherwise proper practice.

Orders affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 451)

NORTHUP et al. v. REESE.

(Supreme Court of Florida. Dec. 3, 1914.
Rehearing Denied Jan. 4, 1915.)

(Syllabus by the Court.)

MORTGAGES §244—LIENS—PRIORITIES—UN-AUTHORIZED CANCELLATION OF RECORD.

Where a duly recorded mortgage is given to secure the payment of a negotiable note, and for full consideration the note and mortgage are assigned before the maturity of the note, and the record of the mortgage is unauthorizedly canceled, and a second negotiable note and a mortgage on the same property to secure the note are executed and are assigned for value before the maturity of the note, but after the cancellation of the record of the first mortgage, the assignee of the latter note and mortgage has no priority over the assignee of the first note and mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. §244.]

Cockrell, J., dissenting.

Appeal from Circuit Court, Escambia County; J. Emmet Wolfe, Judge.

Suit by J. S. Reese, trustee, against H. S. Northup and others. From decree for complainant, defendants appeal. Reversed.

Geo. P. Wentworth and John P. Stokes, both of Pensacola, for appellants. Watson & Pasco, of Pensacola, for appellees.

WHITFIELD, J. It appears that on May 3, 1910, the owner of land executed a mortgage thereon to secure the payment of a negotiable promissory note made by the mortgagor payable in one year to the order of Leslie E. Brooks Company, a corporation, the mortgagee. The mortgage was duly recorded on May 3, 1910, and on the same day the note and mortgage were assigned to Mrs. H. S. Northup. On November 3, 1911, the Leslie E. Brooks Company took another mortgage on the same property from subsequent owners of the land to secure the payment of a negotiable promissory note payable in one year. On January 24, 1912, the mortgage first above mentioned was without authority canceled on the record by the Leslie E. Brooks Company, the original mortgagee; the note and mortgage being held for value by the assignee, Mrs. H. S. Northup, who did not authorize and did not know of the cancellation of the mortgage on the record by the Leslie E. Brooks Company. On January 31, 1912, the mortgage and the note executed on November 3, 1911, were assigned to J. S. Reese, trustee. The assignment does not state any consideration therefor. On June 24, 1914, J. S. Reese, trustee, brought proceedings to enforce the lien of the mortgage assigned to him as trustee, making the mortgagor of the last mortgage and the assignee of the first mortgage and her husband defendants. The defendant H. S. Northup, as assignee for value of the note and mortgage before the maturity of the note, by answer claimed priority over the complainant trustee, the assignee of the last mortgage.

At a hearing on bill and answer, the chancellor decreed in favor of the assignee of the last mortgage, and the defendants H. S. Northup, the assignee of the first mortgage, and her husband, appealed.

The question presented is whether the assignee of the first mortgage or the assignee of the last mortgage has priority.

When an equity cause is heard on bill and answer, every fact stated in the bill and not denied by the averments of the answer must be taken as true. And facts stated in the answer must be taken to be true as pleaded. *Hart v. Sanderson's Adm'rs*, 18 Fla. 103.

The transfer of a note secured by a mortgage carries the mortgage, for the former is the principal and the latter the incident. *Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621; *Carter v. Bennett*, 4 Fla. 283; 27 Cyc. 1286; *Taylor v. Am. Nat. Bk.*, 63 Fla. 631, 57 South. 678, Ann. Cas. 1914A, 309.

The registry statutes provide for the record of such assignments of mortgages as are "presented * * * for record," but do not require such a record to be made; and the statutes do not expressly subordinate such assignments when not recorded to the rights of subsequent purchasers for value who take without notice of the assignment. *Garrett v. Fernauld*, 63 Fla. 434, 57 South. 671.

An unauthorized cancellation of the record of a mortgage is not contemplated by the registry statutes. And an unauthorized cancellation on the record of a mortgage does not destroy the lien of the unsatisfied mortgage or affect the rights of a bona fide holder for value who does nothing to mislead or deceive subsequent purchasers or mortgagees. This is particularly so where the indebtedness is evidenced by a negotiable instrument.

The answer admits the allegation that the last note and mortgage for \$1,500, executed on November 3, 1911, were by the payee and mortgagee, the Leslie E. Brooks Company, on January 31, 1912, indorsed and assigned to the complainant trustee assignee "for valuable consideration and prior to the maturity of the note." In response to the allegations that the complainant trustee took the note and mortgage without notice or knowledge of any claim of the defendant, and that the claim of the defendant is inferior to complainant's mortgage, the answer avers that the first negotiable note for \$1,500 and the mortgage to secure its payment, executed on May 3, 1910, were on the same day, "in consideration of the payment of \$1,500" to the payee and mortgagee Leslie E. Brooks Company, indorsed and assigned to H. S. Northup. The answer denies that the mortgage owned by the complainant is prior in dignity to the defendant's mortgage, and expressly avers that the defendant's lien which was duly recorded, and for which she paid full value on the day it was executed, is superior to that of the complainant, which the complainant alleges was assigned to him as trustee "for valuable consideration." The issue thus made is to be determined by the efficacy of the allegations of fact contained in the bill of complaint to show that the complainant is a bona fide holder for full value of a mortgage that is in equity superior to the defendant's lien. If, on a hearing on bill and answer, the allegations of the bill that are not controverted or not expressly or impliedly denied by the answer do not show the complainant's lien to be equitably entitled to priority over the defendant's lien, the defendant should prevail. The complainant ultimately alleges:

"That by reason of such cancellation of said mortgage appearing on the records as aforesaid, he is in equity entitled to a first lien as against such canceled mortgage."

The defendant gave full value for her note and mortgage, which mortgage was duly recorded, and she did not authorize the cancellation on the record of the mortgage. She

was not required to record the assignment of the mortgage made to her, and the complainant's note and mortgage were made subsequent to those held by the defendant. The interest on the first mortgage was regularly paid, and the defendant did not know that her mortgage had been unauthorizedly canceled on the record. Nor was she required to enforce her lien at the maturity of the note. If the circumstances under which the complainant took an assignment of the later note and mortgage were such as reasonably should have put a bona fide purchaser for value upon inquiry, which would probably have disclosed the existence of an older outstanding negotiable note and accompanying mortgage, the complainant cannot equitably claim priority over the defendant, in the absence of a showing that he is a bona fide holder of the last note and mortgage for full value, and that he exercised at least some diligence to ascertain whether the prior negotiable note secured by mortgage on the property was outstanding in the hands of a bona fide holder for value. The complainant had notice by the record of the first mortgage, which was canceled on the record without authority or right, that the mortgage was given "to secure the payment of a promissory note * * * payable to the order of" the mortgagee payee, and the complainant is in law held to know that the title to the note could be transferred by indorsement, which would carry the mortgage as an incident thereto. The complainant must also be held to know that an unauthorized cancellation on the record of the first mortgage would not destroy the rights of a bona fide holder of the note and mortgage for value. It therefore devolved upon the complainant, when he took the note and mortgage, to exercise at least some diligence to ascertain whether the negotiable note and mortgage to secure its payment were still outstanding; and this diligence was not obviated by the mere facts that the first note had matured for payment before the last note and mortgage were executed and that the record of the first mortgage had been canceled, there being nothing shown except the cancellation to indicate that the mortgagee making the cancellation was then the owner of the negotiable note and the mortgage, or was authorized to make the cancellation, and the mortgagee canceling the record of the first mortgage and assigning the last mortgage being a corporation which may act through various agents. Even if the equities between the complainant and the defendant be regarded as equal, that of the defendant is prior in point of time. But the equities as shown by the record are not equal. While the complainant might well have had recorded the assignment of the first mortgage made to her as the statute permitted her to do, she was not expressly required by the statute to do so for the preservation of her rights even against bona

fide purchasers for value. The unauthorized cancellation on the record of the first mortgage did not destroy the mortgage or the rights of the bona fide assignee thereof for value. The defendant's mortgage having been duly recorded, she was not required to examine the records for an unauthorized cancellation on the record of her mortgage or for the record of subsequent mortgages on the same property. If the defendant has done nothing to mislead or deceive the complainant, she is not at fault. The complainant does not disclose his cestui que trust, who may be the original mortgagee of both mortgages or someone in privity with such mortgagee. The assignment of the mortgage made to the complainant does not state any consideration paid therefor, and the answer only admits that the assignment was made "for valuable consideration." It is alleged that, when the complainant purchased the last mortgage indebtedness, he had no notice or knowledge of the claim of the defendant, but acted on the faith of the records. It is further alleged that the first mortgagor had, with full warranties both as to title and against incumbrances, conveyed the property to Leslie E. Brooks, who conveyed the same to the last mortgagor. But if such conveyances could aid the complainant it is not alleged that the stated conveyances were duly recorded, or that the complainant knew of the conveyances when he took the assignment of the last note and mortgage. The complainant does not allege that he had any assurance or evidence other than the unauthorized cancellation of the record of the first mortgage by the corporation mortgagee; that the first note and mortgage had been satisfied. The second mortgage was executed November 3, 1911, but the first mortgage was not canceled on the record till January 24, 1912, a few days before the assignment of the second note and mortgage to the complainant; and the record of the first mortgage, though canceled without authority, showed that it was given to secure the payment of a negotiable promissory note. These circumstances were, even though the note secured by the first mortgage had matured for payment, sufficient to put the trustee assignee of the last note and mortgage upon inquiry that reasonably may have developed the information that the cancellation of the record of the first mortgage was unauthorized and that the first note and mortgage were in fact still outstanding and unsatisfied. There is no allegation or showing that the complainant made any effort or used any diligence whatever to ascertain whether the first negotiable note and the mortgage expressly given to secure its payment were still unsatisfied, or that the complainant trustee paid full value for the assignment to him, or that he is in fact not a trustee for the original mortgagee of both mortgages.

Priority cannot fairly be decreed to the

trustee assignee of the last note and mortgage who took under the circumstances stated above, as against the assignee of the first negotiable note and duly recorded mortgage who paid full value for the assignment made the day the note and mortgage were executed.

The decree is reversed, with directions to decree the priorities in favor of the defendant H. S. Northup.

SHACKLEFORD, C. J., and TAYLOR and HOCKER, JJ., concur.

COCKRELL, J., dissents.

(65 Fla. 407)

SEABOARD AIR LINE RY. v. ROBINSON.
(Supreme Court of Florida. Nov. 25, 1914.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW \S 38—VALIDITY.

A statute may be valid as applied to one state of facts, though under another state of facts an application of the statute may violate rights secured by the organic law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 36; Dec. Dig. \S 38.]

2. RAILROADS \S 444—KILLING OF STOCK—FAILURE TO PAY CLAIM—PENALTY—VALIDITY OF STATUTE.

The statute authorizing a recovery of double damages and attorney fees for failure of a railroad company to pay for live stock killed by a train of the railroad company, within 60 days after presentation of the claim for such stock killed, is not invalid in its application, where a verdict is rendered for the amount agreed to have been demanded and to be the value of the live stock killed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. \S 1621-1626; Dec. Dig. \S 444.]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by J. R. Robinson against the Seaboard Air Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

L. N. Green, of Ocala, for plaintiff in error.
W. K. Zewadski, of Ocala, for defendant in error.

WHITFIELD, J. This writ of error was taken to a judgment awarding double damages and attorney fees for failure of the railroad company to pay within 60 days after presentation a claim for a mule killed by the railroad company at a point where, under the statute, the company should have had, but did not have, its track fenced. The declaration alleges the value of the mule killed to be \$125, and also alleges that:

"The plaintiff gave notice in writing of the time, place, and value of the said mule" to the agent of the company, "but the said defendant has not paid the same or any part thereof, or offered so to do, and more than 60 days have passed since the giving of the said notice, and the said defendant has become liable to the plaintiff for the sum of \$250, being double the amount of damages caused by the killing of the mule aforesaid, and all

costs, expenses, and a reasonable attorney's fee incurred by the plaintiff in collecting the same by suit."

A demurrer to the declaration was properly overruled, since the declaration was not subject to the criticism that it does not appear whether the railroad line was constructed before or after the enactment of the statute, and, if subsequently constructed, it does not appear that the road was in practical operation. It is alleged that the defendant "was possessed of, operating, and using a certain railroad." This is a sufficient allegation that the road was in "practical operation," within the meaning of the statute. Section 2868 et seq., Gen. Stats. 1906. Whether the road was constructed before or after the statute became effective, a cause of action was alleged.

By motion in arrest of judgment the constitutional validity of the statute is assailed in so far as it provides:

"That upon the failure to pay the claim within sixty days after its presentation the said railroad companies, person or persons owning or operating said roads not fenced as herein provided shall be liable for double the value of the animal killed or injured and for attorney's fees."

In *St. Louis, I. M. & S. R. Co. v. Wynne*, 224 U. S. 354, 32 Sup. Ct. 493, 56 L. Ed. 799, 42 L. R. A. (N. S.) 102, it was held that a statute allowing double damages for failure within a stated reasonable time after presentation to pay claims for live stock killed or injured by trains could not be constitutionally applied where the demand is for an amount greater than that for which the action is brought. In *Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165, 34 Sup. Ct. 301, 58 L. Ed. 554, it was held that a statute declaring a railroad company to be liable in double damages unless the claim is paid in full as demanded within 60 days could not be enforced where the plaintiff demanded more than he recovered and the railroad company had offered less than was recovered, the court holding that:

"The rudiments of fair play required by the fourteenth amendment are wanting when a defendant is required to guess rightly what a jury will find, or pay double if that body sees fit to add one cent to the amount that was tendered, although the tender was obviously futile because of an excessive demand."

In *Kansas City S. Ry. Co. v. Anderson*, 233 U. S. 325, 34 Sup. Ct. 599, 58 L. Ed. 983, it was held that double damages and a reasonable attorney's fee may be recovered where the company fails to pay within a stated time after notice of the claim, "where the prior demand is fully established in the suit following the refusal to pay." *Seaboard Air Line Ry. v. Seegers*, 207 U. S. 73, 28 Sup. Ct. 28, 52 L. Ed. 108; *Yazoo & M. V. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 33 Sup. Ct. 40, 57 L. Ed. 193.

In this case the defendant by stipulation "agrees and admits that all the material al-

legations of fact contained in said declaration are true, and may be considered as true and proven, * * * and that the sum of \$50 would be a reasonable fee for the services rendered by * * * attorney for plaintiff." The plaintiff acted on this agreement made a part of the record in the cause. The declaration alleges the value of the mule killed by the defendant's train to be \$125, and that "the plaintiff gave notice in writing of the time, place, and value of the said mule killed as aforesaid," that "more than 60 days have passed since the giving of the said notice," and that "the said defendant has not paid the same or any part thereof, or offered so to do."

The court gave judgment for "\$250, being double damages assessed by the jury, together with his cost in this behalf expended, including an attorney's fee of \$50 fixed by the court upon testimony as to it being a reasonable attorney's fee to allow the plaintiff herein."

Under the allegations of the declaration, which are expressly admitted "as true and proven," it must be considered that in this proceeding "the prior demand is fully established in the suit following the refusal to pay," within the principle announced in the *Anderson Case*, supra.

This being so, the statute (sections 2868 et seq., General Statutes of 1906) may be constitutionally and validly applied to the facts here admitted.

A statute may be valid as applied to one state of facts, though under another state of facts an application of the statute may violate rights secured by the organic law. *Kansas City S. Ry. Co. v. Anderson*, supra; *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 South. 282.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 463)

CO-OPERATIVE HOMESTEAD CO. et al. v. DICKMAN.

(Supreme Court of Florida. Dec. 9, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR § 875—SCOPE OF REVIEW—ORDER CONFIRMING A SALE.

Upon an appeal from an order confirming a sale, errors assigned upon the final decree will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3541-3548; Dec. Dig. § 875.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Suit by Albert P. Dickman, trustee, against the Co-operative Homestead Company and others. From an order confirming a sale consequent on a final decree on foreclosure, defendants appeal. Affirmed.

W. H. Jackson, of Tampa, for appellants. Admer D. Miller, of Ruskin, for appellee.

COCKRELL, J. This is an appeal from an order confirming a sale, consequent upon a final decree in foreclosure. Nearly six months had elapsed between the entry of that order, and much more than six months after the final decree. All the assignments as argued question the propriety of the final decree and interlocutory orders entered before that decree.

While an appeal from a final decree opens up all preceding orders, an appeal from a supplemental order merely carrying out that decree does not bring up the final decree. *Judson Lumber Co. v. Patterson*, 66 South. 727, decided this term.

Order affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 522)

SHIELDS v. ENSIGN.

(Supreme Court of Florida. Dec. 22, 1914.)

(Syllabus by the Court.)

HUSBAND AND WIFE § 74—SEPARATE PROPERTY OF MARRIED WOMAN—RIGHTS OF PURCHASER.

Though a contract for the sale of a married woman's separate property may not be specially enforceable by reason of informalities, the vendee may not breach the contract and charge the property in equity for a partial payment thereon, in the absence of a showing that the married woman was unwilling or unable to complete the contract to convey.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 309-312; Dec. Dig. § 74.]

Appeal from Circuit Court, Orange County; James W. Perkins, Judge.

Suit by Annie E. Shields, by her next friend and husband, against Helen Ensign. From a decree dismissing the bill, complainant appeals. Affirmed.

V. S. Starbuck, of Orlando, for appellant. Massey & Warlow, of Orlando, for appellee.

COCKRELL, J. This is a bill to charge certain real estate, the separate property of a married woman, in the sum of \$1,000 alleged to be due upon an agreement made by her in writing for the benefit of her separate estate. The agreement is as follows:

"Proposition of Mrs. A. E. Shields to Mrs. Helen Ensign on 42 acres of grove and land.

"Farming implements for grove work, all chickens and turkeys, all fruit now in grove and any other growing crops, rowboat and all household furniture, except keepsakes, rug, books, bric-a-brac and bed and table linens.

"One thousand cash, balance of nineteen thousand within thirty days from date upon delivery of abstract of title and general warranty deed.

"Accepted [Signed] Helen Ensign.

"[Signed] Mrs. A. E. Shields.

"(Exhibit A.)"

The theory of the bill is that as the writing was not signed by the husband of Mrs. Ensign, nor acknowledged by her and properly witnessed, it was not binding on her, and that as it could not therefore be specifically enforced as against Mrs. Ensign, there was no consideration for the thousand dollars paid, and that it became immaterial that Mrs. Ensign was willing and able, despite the informality of the agreement, to carry it out to the letter and convey a perfect title to the property upon the payment of the balance of the purchase money, as stipulated.

While the bill alleges facts to show that by certain misrepresentations the property was priced too high, yet Mrs. Shields admits that she has not made a showing sufficiently strong to entitle her to a rescission of the contract on that theory. The real theory of her bill is that the agreement, though in writing and signed by Mrs. Ensign, was absolutely void, a nudum pactum, utterly without consideration, and therefore subject to be ignored by either party to it.

There are reputable authorities holding that where money is paid upon an option, made void by statute by reason of a failure to comply in formalities with the statutory requirement, the one who has so paid his money may recover it back as for money had and received, even though the receiver may be willing to perform. We have not such a case before us.

Our Constitution (article 11, § 2) declares: "A married woman's separate real or personal property may be charged in equity and sold, * * * for money or thing due upon any agreement made by her in writing for the benefit of her separate property"

—while Gen. Stats. § 2594, reads:

"Coverture shall not prevent a decree against husband and wife to specifically perform their written agreement to sell or convey the separate property of the wife, or to relinquish her right of dower in the property of the husband, but no agreement for the sale or conveyance of her real property or for relinquishment of dower, shall be specifically enforced unless it be executed and acknowledged in the form prescribed for conveyances of her real property and for relinquishment of dower."

It will be readily observed that the statute does not make the written agreements of a married woman, otherwise executed, absolutely void and nonchargeable upon her estate, but merely that they shall not be specifically enforced, a much higher equity than the mere charging for a breach of contract.

The agreement in writing being then not absolutely void by statute, but only not to be specifically enforced, we will examine the complainant's bill in the light of the Constitution.

Is it equitable to charge Mrs. Ensign's separate estate with this thousand dollar advance payment made upon the faith of the written agreement? It might well be that, had the consideration been reversed and the unprotected married woman been seduced in-

to making an improvident contract, a court of equity would not grant its relief to one who had overreached her, but will she be penalized because despite her coverture, she has proved the better bargainer? If a feme sole had executed the option, she would not be held liable for the thousand dollars, unless she breached the contract, and we can see no reason why coverture should render her liable. How can it be that a court of equity will reward a breach of an agreement, as a benefit to the separate estate, when its performance would admittedly, largely increase the value of that estate?

It seems to us that the bill is without equity, and was properly dismissed.

SHACKLEFORD, C. J., and TAYLOR HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 356)

A. R. HARPER PIANO CO. v. CUMBIE.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

APPEAL AND ERROR—1018—JUDGMENT OF REFEREE—EVIDENCE.

Where, under the law applicable to the case, the evidence does not sustain the finding of a referee, the judgment will be reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. ¶ 1018.]

Error to Circuit Court, Suwanee County; F. V. Rees, Referee.

Replevin by the A. R. Harper Piano Company against J. A. Cumble. Judgment for defendant, and plaintiff brings error. Reversed.

J. F. Harrell, of Live Oak, and Carter & McCollum and John T. Crawley, all of Jacksonville, for plaintiff in error. J. P. Lamb, of Live Oak, for defendant in error.

WHITFIELD, J. In an action of replevin to recover a piano, or its value, there was judgment by a referee for the defendant, and the plaintiff took writ of error.

The evidence discloses that the defendant traded an automobile to an agent of the plaintiff for the piano. The defendant knew the agent was acting as agent only. It is clear that the defendant knew, or reasonably should have known, that the agent was authorized to sell and not to barter pianos. The circumstances made it incumbent upon the defendant to ascertain if the agent was authorized to barter as well as to sell; and in bartering with the agent under the circumstances he was charged with the duty to ascertain the extent of the agency. Under the law the evidence does not sustain the finding and judgment in favor of the defendant.

Judgment reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 438)

BRITTON v. STATE.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW §274—PLEA OF GUILTY—LEAVE TO WITHDRAW—REFUSAL.

It is not error to refuse leave to withdraw a plea of guilty, voluntarily entered, upon an admission by the accused of facts conclusively and fully making out the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 632, 633; Dec. Dig. §274.]

Error to Circuit Court, Citrus County; W. S. Bullock, Judge.

J. E. Britton was convicted of perjury, and brings error. Affirmed.

H. J. Dame, of Inverness, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. The plaintiff in error was convicted of the crime of perjury and sentenced to the state prison for 14 months.

While the record before us is somewhat confused, we find that upon arraignment Britton offered to plead guilty, but the court declined to entertain the plea until his attorney could be brought into court. Afterwards in the presence of his counsel, and after the effects of the plea were fully explained to Britton, he again tendered the plea of guilty, and it was accepted.

Before the passing of the sentence, Britton moved that he be permitted to withdraw his plea of guilty and to plead not guilty. Upon being examined by the court upon this motion, he testified in effect that his attorney in the civil case, out of which this charge of perjury arose, told him it would be necessary for him to perjure himself in order to win the case, and that therefore he had sworn falsely. He does not claim that his attorney advised him that the false testimony would not be perjury, assuming that such advice might palliate or excuse the offense, but merely that false swearing was essential to the competency of certain evidence upon which he wished to rely.

It does not appear that Britton was induced to plead guilty upon the advice of the attorney who was alleged to have advised, as it were, the commission of the offense; on the contrary, he had other counsel when his plea of guilty was entered, and there had been a complete breach with his former counsel.

We do not understand upon what theory a judge should be held in error for refusing to set aside a plea of guilty upon the admission of facts conclusively and fully making out the crime. *Pope v. State*, 56 Fla. 81, 47 South. 487, 16 Ann. Cas. 972.

Judgment affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 436)

BROOKINS v. STATE.

(Supreme Court of Florida. Dec. 1, 1914.)

(Syllabus by the Court.)

CRIMINAL LAW §1018—APPEAL—JURISDICTION—MISDEMEANORS.

The circuit court, not the Supreme Court, has appellate jurisdiction over conviction of misdemeanors in the criminal courts of record. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2577; Dec. Dig. §1018.]

Error to Criminal Court of Record, Orange County; T. P. Warlow, Judge.

Gilbert Brookins was convicted of assault and battery, and brings error. Writ of error dismissed.

Jones & Jones, of Orlando, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. Brookins was convicted in the criminal court of record of assault and battery, a misdemeanor, and takes writ of error from this court.

This court has appellate jurisdiction (Const. art. 5, § 5) "in cases of conviction of felony in the criminal courts," while the circuit courts have final appellate jurisdiction "of all misdemeanors tried in the criminal courts."

It will then be seen that "conviction of a felony" is the basis for our jurisdiction over the criminal courts of record. While the information upon which Brookins was tried included felonious assault as well as those lesser ones, the verdict of the jury wiped out the felony charges, and the conviction was for a misdemeanor.

It follows that the writ of error was improvidently sued out from this court, and that it should be dismissed.

So ordered.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 329)

VARN v. WHITE.

(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. USURY §47 — USURIOUS NOTE — WHAT CONSTITUTES.

A note bearing interest at the rate of 10 per cent. per annum, payable semiannually, is not usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 100; Dec. Dig. §47.]

2. APPEAL AND ERROR §909—JUDGMENT—EVIDENCE—PRESUMPTION—BILL OF EXCEPTIONS.

In the absence of a bill of exceptions, upon a trial before a jury, it will be presumed that there was evidence supporting the plaintiff's demand for an attorney's fee, which the judgment awards.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3875; Dec. Dig. §909.]

Error to Circuit Court, Hernando County; W. S. Bullock, Judge.

Action by Samuel H. White against L. B. Varn. Judgment for plaintiff, and defendant brings error. Affirmed.

F. B. Coogler, of Brooksville, for plaintiff in error. Gary W. Alexander, of Jacksonville, for defendant in error.

COCKRELL, J. This is an action on a promissory note for principal, interest, and an attorney's fee.

[1] The notes call for 10 per cent. interest per annum, payable semiannually. Varn sought to plead usury as a partial defense, upon the theory that making the 10 per cent. interest, the maximum allowed by the law, payable semiannually offended the statute. In line with practically all other courts, we have held that this does not constitute usury. See *Graham v. Fitts*, 53 Fla. 1046, 43 South. 512, 13 Ann. Cas. 149; *Myer v. City of Muscatine*, 1 Wall. 384, 17 L. Ed. 564; *Mowry v. Bishop*, 5 Paige (N. Y.) 98; *Monnett v. Sturges*, 25 Ohio St. 384.

[2] The declaration clearly demanded an attorney's fee, and as there was a trial before a jury, with both parties present, we must assume, in the absence of a bill of exceptions, that there was sufficient evidence upon which the amount of this fee was fixed, so as to support the finding of the total amount then due, as fixed by the verdict.

This case is wholly unlike that of *Robinson v. Aird*, 43 Fla. 30, 29 South. 633, where an indorser without notice of the dishonor of the note was sought to be held for an attorney's fee.

Judgment affirmed.

SHACKLEFORD, C. J., and TAYLOR, HOCKER, and WHITFIELD, JJ., concur.

(68 Fla. 368)

SILVERS, City Treasurer, v. STATE ex rel. STATE BANK OF NEW SMYRNA.

(Supreme Court of Florida. Nov. 24, 1914.)
(*Syllabus by the Court.*)

MANDAMUS \S 15—WARRANTS—PAYMENT—WANT OF FUNDS.

Where an alternative writ of mandamus commands a city treasurer to pay designated city warrants, and it does not appear that the treasurer has funds with which to pay the warrants, but it does appear that he had no such funds, it is error to award a peremptory writ.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. \S 47, 49; Dec. Dig. \S 15.]

Error to Circuit Court, Volusia County; J. W. Perkins, Judge.

Mandamus by the State, on the relation of the State Bank of New Smyrna, against D. C. Silvers, City Treasurer. Judgment for relator, and defendant brings error. Reversed.

Murray Sams and E. Bly, both of De Land, for plaintiff in error. Landis & Fish, of De Land, for defendant in error.

WHITFIELD, J. An alternative writ of mandamus was issued from the circuit court of Volusia county, alleging that the relator bank duly presented 20 city warrants to the respondent city treasurer for payment; "that the said D. C. Silvers at the time of such presentment did have in his possession, custody, or control funds of the said city of New Smyrna sufficient to pay all, or at least a large part, of said warrants, yet wholly neglected or refused to pay said warrants, or any of them." The alternative writ commanded the city treasurer to pay the 20 warrants, or to show cause for not doing so. A demurrer to the alternative writ was interposed; one ground being that it is not alleged "that the respondent has the ability to perform the acts" commanded. The demurrer was overruled, an answer or return was made, and testimony taken. A peremptory writ of mandamus was issued, and the respondent took writ of error.

It does not appear by the alternative writ that the respondent had funds to make the payments when the writ was issued, and the return supported by the evidence shows that the respondent did not have funds to pay the 20 warrants. There was consequently error in issuing the alternative writ and in awarding the peremptory writ of mandamus. The relator must show the respondent's duty and ability to comply with the mandatory writ, as was done in *Ray v. Wilson*, 29 Fla. 342, 10 South. 613, 14 L. R. A. 773. See *County Commissioners of Duval County v. City of Jacksonville*, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416.

The judgment awarding the peremptory writ is reversed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

(68 Fla. 499)

COOMBS v. RICE.

(Supreme Court of Florida. Dec. 22, 1914.)

(*Syllabus by the Court.*)

1. APPEAL AND ERROR \S 1097, 1099—LAW OF THE CASE—SUBSEQUENT PROCEEDINGS.

All points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration, but this principle has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon the former writ of error, and consequently were not before the appellate court for adjudication.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. \S 4358-4368, 4370-4379, 4427; Dec. Dig. \S 1097, 1099.]

2. BAILMENT \S 31—DESTRUCTION OF PROPERTY—PLEADING AND PROOF.

Where the allegations of a declaration show a relation of bailor and bailee for mutual benefit between the plaintiff and defendant, out of which relation there arose a duty to use ordinary care for the preservation of a boat, the subject of the bailment, and state that the "defendant did, by his negligence in fastening said

boat or vessel and leaving it unattended at a place exposed to imminent danger from fires, negligently permit said boat or vessel to be burned and destroyed by fire," a cause of action is stated, and in such a case a recovery must be predicated upon proof, by a preponderance of the evidence, of the burning of the boat as a result of the particular negligence alleged, viz., that the defendant was negligent in fastening the boat and leaving it unattended at the place where it was burned.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 124-131; Dec. Dig. ¶31.]

3. BAILMENT ¶14—NEGLIGENCE—LIABILITY OF BAILEE.

Where a bailment is for mutual benefit, the bailee is held to the exercise of ordinary care in relation to the subject-matter thereof, and is responsible only for ordinary negligence.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 45-55; Dec. Dig. ¶14.]

4. NEGLIGENCE ¶119 — PLEADING AND PROOF.

In an action to recover damages for a negligent injury to property, if the evidence does not support the specific allegations of negligence from which the injury proximately resulted, a verdict for the plaintiff is unauthorized and should be set aside.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 200-216; Dec. Dig. ¶119.]

5. NEGLIGENCE ¶138—INSTRUCTIONS—CARE REQUIRED.

A charge or instruction to the jury should not impose a greater burden upon either the plaintiff or the defendant than the law requires.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 354-370; Dec. Dig. ¶138.]

Error to Circuit Court, Franklin County; John W. Malone, Judge.

Action by R. R. Rice against Chauncey Coombs. Judgment for plaintiff, and defendant brings error. Reversed.

Fred T. Myers, of Tallahassee, and R. F. Burdine, of Miami, for plaintiff in error. C. H. B. Floyd and R. Don McLeod, Jr., both of Apalachicola, for defendant in error.

SHACKLEFORD, C. J. [1] For the second time Chauncey Coombs has brought here for review by a writ of error a judgment recovered against him by R. R. Rice. For the opinion rendered on the former writ of error see *Coombs v. Rice*, 64 Fla. 202, 59 South. 958. As we have several times held, all the points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration, but this principle has no applicability to, and is not decisive of, points presented upon a second writ of error that were not presented upon the former writ of error, and consequently were not before the appellate court for adjudication. See *Ross v. Savage*, 66 Fla. 106, 63 South. 148, where prior decisions of this court will be found. It is important, then, for us to ascertain and keep in mind just what points were determined upon the former writ of error. The pleadings and issues remained unchang-

ed at the second trial, so as to them it is only necessary to refer to our former opinion wherein they will be found stated.

[2-4] Our holding upon the former writ of error was as follows:

"Where the allegations of a declaration show a relation of bailor and bailee for mutual benefit between the plaintiff and defendant, out of which relation there arose a duty to use ordinary care for the preservation of a boat, the subject of the bailment, and state that the defendant did, by his negligence in fastening said boat or vessel and leaving it unattended at a place exposed to imminent danger from fires, negligently permit said boat or vessel to be burned and destroyed by fire," a cause of action is stated, and in such a case a recovery must be predicated upon proof, by a preponderance of the evidence, of the burning of the boat as a result of the particular negligence alleged, viz., that the defendant was negligent in fastening the boat and leaving it unattended at the place where it was burned.

"Where a bailment is for mutual benefit, the bailee is held to the exercise of ordinary care in relation to the subject-matter thereof, and is responsible only for ordinary negligence.

"In an action to recover damages for a negligent injury to property, if the evidence does not support the specific allegations of negligence from which the injury proximately resulted, a verdict for the plaintiff is unauthorized and should be set aside."

We would also refer to *Williamson v. Philipoff*, 66 Fla. 549, 64 South. 269, wherein we cited *Coombs v. Rice*, supra, and approved and followed the principles of law therein enunciated. While additional testimony was adduced at the last trial, it was largely cumulative, and throws but little, if any, additional light upon the issues being tried, so what we said in our former opinion concerning the evidence and its probative effect is equally applicable to this last trial. We still think that "negligence of the defendant in the particulars alleged in the declaration is not shown by the evidence." As reluctant as we are to disturb a second verdict rendered in favor of the plaintiff, since we are firmly convinced that the evidence adduced failed to measure up to the requirements which we laid down in our former opinion, the law of this case, we must do so, and hold that the trial court was in error in overruling the motion for a new trial. There is no occasion for us to discuss the numerous errors assigned.

[5] We will add that the general charge given by the trial court imposed a greater burden upon the defendant as to the care required of him in the use and preservation of the boat than the law requires in the case of a hiring for a mutual benefit, such as was the contract upon this evidence. Again we would refer to our former opinion and to *Williamson v. Philipoff*, supra.

Judgment reversed.

TAYLOR, COCKRELL, HOCKER, and WHITFIELD, JJ., concur.

(108 Miss. 614)

MAGEE v. LINCOLN COUNTY.**SAME v. BRISTER et al.**

(No. 16630.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

APPEAL AND ERROR ⇨817—ADVANCEMENT OF HEARING—PREFERENCE CASES.

Code 1906, § 4907, providing that appeals from judgments quo warranta to try the right to public office, and in mandamus in cases where the public interest is concerned, may be advanced for hearing, does not entitle all cases where the public interest is concerned, to preference, since such construction of the statute would render meaningless the enumeration of the particular actions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3198; Dec. Dig. ⇨817.]

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Separate actions between J. M. Magee and Lincoln County and C. M. Brister and others. From judgments against him, J. M. Magee appeals. Motion to advance appeals for hearing as preference cases overruled.

Whitfield & Whitfield, of Jackson, and Jones & Tyler, of Brookhaven, for the motion. A. A. Cohn, of Brookhaven, opposed.

COOK, J. This is a motion to advance and hear the above-styled cases as preference cases under section 4907, Code of 1906. Neither case is an appeal from judgments against persons deprived of their liberty in cases of habeas corpus, or from judgments on information in nature of quo warranta to try the right to public office, or in actions of mandamus, in cases where the public interest is concerned, or involving taxes claimed by the state, county, or municipality.

The soundness of the decision in Jackson Loan & Trust Co. v. State, 96 Miss. 347, 54 South. 157, is challenged.

It is contended that section 4907 makes five classes of cases preference cases, instead of four, as was decided in the above-mentioned case. It is claimed that the section in question contemplates that the court must treat as preference cases all cases where the public interest is concerned. We cannot agree to that construction of the statute. To so read it would be tantamount to saying that the Legislature was guilty of cumbering the statute with language entirely unnecessary to accomplish its purpose. If appellant is correct, all that portion of the statute referring to quo warranta and suits involving taxes was surplusage. Indeed, all except that part which refers to habeas corpus could have been left out of the statute. The Legislature is presumed to have meant just what it said, and that no more words were employed to express its meaning than were necessary. If appellant is right, it would have been only necessary to have said that all habeas corpus cases involving personal liberty and all other cases where the public interest is concerned shall be preference cases.

Jackson Loan & Trust Co. v. State, supra, seems to have received the indorsement of the legislative department, inasmuch as it has not been amended since the decision of that case in 1909.

We have, as a matter of grace, and in the exercise of what seemed at the time to be a wise discretion, advanced a number of cases not strictly within the statute, but we have been so burdened with applications of this kind that we have decided in the future to refuse to advance any case which does not come within the strict terms of the statute or rules of this court.

Motion overruled.

(108 Miss. 616)

ILLINOIS CENT. R. CO. v. FORD et al.

(No. 16635.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

MASTER AND SERVANT ⇨131 — INJURIES — STATUTES.

Code 1906, § 4043, prohibits the running of locomotives and cars through cities, towns, and villages at a rate in excess of six miles per hour. Laws 1908, c. 194, provides that employees of railroad companies shall have the same rights and remedies for any injury suffered by reason of the act or omission of the company or its employees as are allowed persons not employed. A track laborer, who was assisting in the removal of a hand car, was killed by a train running at an excessive speed through a town. *Held*, that the six-mile statute applies to laborers of the railroad company and furnishes a basis for recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 265, 279; Dec. Dig. ⇨131.]

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action by Molly Ford and others against the Illinois Central Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. L. L. Pearson, of Sardis, for appellees.

REED, J. Dave Ford, one of a section crew of appellant company, was killed in the town of Batesville when a locomotive collided with a hand car. The hand car was being removed from the track by the crew under the direction of the foreman when struck. The locomotive was passing through the town at a very high rate of speed, much in excess of six miles an hour, when the collision occurred and Ford was killed. The engineer testified that he was going at 45 miles an hour. Other witnesses testified to a higher rate of speed.

In this action to recover damages for death, the jury returned a verdict in favor of appellees in the sum of \$3,000, and, from the judgment entered thereon, this appeal was taken by appellant.

Counsel for appellant present to the court only one ground for reversal which they state in their brief "is single and narrow."

It is that the statute (section 4043, Code of 1906) against the running of locomotives and cars through cities, towns, and villages at the rate of over six miles an hour is not applicable to this case, where the party injured was an employé of the railroad company and working on its track. To sustain their position they refer us to the following decisions: *Railroad Co. v. Hughes*, 49 Miss. 258; *Dowell v. Railroad Co.*, 61 Miss. 519; *Farquhar v. Railroad Co.*, 78 Miss. 193, 28 South. 850. It was held in these cases that the six-mile statute did not apply to employés of the railroad company. This holding followed the common law touching the liability of the master to employés for conduct of fellow servants. But a change has been effected in this rule by statute passed since the decision in the *Farquhar Case*. At the time of the injury in the *Farquhar Case*, the statute then in force (chapter 87 of the Laws of 1896; chapter 66 of the Laws of 1898, Sp. Sess.) provided that an employé should have the same rights and remedies as others, where the injury resulted from the negligence of a superior agent or officer or of a person having the right to control and direct the services of the party injured. In that case the injury was to a yardmaster, who was thrown from a car which was being pulled by an engine through the city of Vicksburg at the rate of speed of about 25 miles an hour. The court held that the engineer was not a superior agent or officer to the yardmaster, and that the statute did not apply.

After the *Farquhar Case* the Legislature, by chapter 194 of the Laws of 1908, provided that employés of railroad corporations should have the same rights and remedies for injuries suffered as are allowed to others not employed. The right and remedies were no longer limited, as in the laws of 1896 and 1898. They applied in all cases of injuries to employés. We quote from the act as follows:

"Every employé of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employés, as are allowed by law to other persons not employed."

The law as announced in the statute controls. Appellee, an employé of the railroad corporation, had the same rights and remedies, for an injury suffered by him from the act or omission of the railroad corporation or its employés, as are allowed by law to other persons not employed. The intention of the Legislature to make a change in the fellow-servant rule is very clear in this statute. The six-mile statute is applicable in this case.

Affirmed.

(106 Miss. 623)

LEE et al. v. CLEVELAND STATE BANK.
(No. 16756.)

(Supreme Court of Mississippi. Dec. 14, 1914.
Suggestion of Error Overruled
Jan. 11, 1915.)

1. GUARANTY — 89 — BURDEN OF PROOF.

In an action on a bond given to secure overdrafts for the purchase of cotton, the sureties have the burden of showing that checks honored by the bank were not given for the purchase of cotton, but for other purposes.

[Ed. Note.—For other cases, see *Guaranty*, Cent. Dig. § 102; Dec. Dig. — 89.]

2. APPEAL AND ERROR — 1028 — REVIEW — HARMLESS ERROR.

In an action on a bond to secure overdrafts for cotton, the defendant sureties cannot complain of an erroneous construction of the bond, where, had it been construed as they desired, the result would have been the same, and they would have been held liable for an equal amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 4034; Dec. Dig. — 1028.]

Appeal from Circuit Court, Bolivar County; T. B. Watkins, Judge.

Suit by the Cleveland State Bank against J. B. Lee and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Appellee began this suit by declaration in the circuit court, by which he sought to recover the penalty in a bond executed by one J. H. Lee, upon which appellants were sureties. J. H. Lee was in the cotton business at Cleveland, Miss., and, desiring accommodation at the Cleveland State Bank, frequently overdraw his account. The bank informed him that they could not carry his overdraft without security. Thereupon Lee executed the following bond, to wit:

"State of Mississippi, County of Bolivar.

"Know all men by these presents, that we, J. H. Lee, as principal, and J. J. Walker, J. B. Lee and —, as sureties, are held and firmly bound to the Cleveland State Bank, of Cleveland, Miss., in the penal sum of thirty-five hundred dollars, \$3,500.00, the payment of which well and truly to be made we do hereby bind our heirs, executors and administrators by these presents firmly forever.

"The condition of the above bond is such that whereas the said J. H. Lee is now engaged in the buying of cotton and in the payment of the same is giving checks on the said Cleveland State Bank, a corporation doing business under the laws of the state of Mississippi and domiciled at Cleveland. Upon the sale of said cotton by him, he is to deposit the proceeds in said bank. Now should the said J. H. Lee make good and sufficient deposits in said bank to cover all overdrafts incurred by him, then this obligation to be null and void, otherwise to remain in full force and virtue.

"Given under our hands and seals this 16th day of Dec. 1910.

"J. H. Lee, of Merigold, Miss.

"J. J. Walker, of Merigold, Miss.

"J. B. Lee, of Merigold, Miss."

Thereafter the bank paid his checks and overdrafts until, J. H. Lee having become insolvent, the bank demanded payment of the sum of \$2,601.42, the amount of the overdraft. Demand being made first upon the

principal, and then upon the sureties who refused to pay the account, this suit was brought. The principal, being insolvent, made no defense. The sureties filed a plea and gave notice, in which they set out the fact that they were guarantors for the purpose of guaranteeing that the principal would turn over the proceeds of the sale of all of the cotton sold by him to said bank after the time of the sale of said cotton, and that plaintiff knew of the sale of the cotton made by their principal, and that they knew of his insolvency, and that they had failed to notify the sureties within a reasonable time that their principal had failed to deposit the proceeds of the sale of all of his cotton with the plaintiff, so as to enable the guarantors to protect themselves against loss.

J. H. Lee testified at the trial that a large number of the checks given by him covered personal items, and were not drawn out for cotton; and it is the contention of the sureties that they were sureties only for the overdrafts incurred by the principal in the cotton business, and were not responsible for money withdrawn from the bank by their principal for his personal expenditures; while the bank contends that the sureties were liable for all overdrafts incurred by J. H. Lee; and that they were not required to inquire of the purpose of each check drawn by J. H. Lee, or to investigate how the money drawn from the bank was spent by him; but that the bond covered the dealings between it and J. H. Lee, and served as an indemnity against loss by all overdrafts incurred by J. H. Lee.

Proof also showed that the total amount of checks J. H. Lee drew for his personal use was \$2,330.06, which amount, being deducted from the total number of checks of \$10,696.58, left an amount paid for cotton, to wit, \$8,366.52. It was shown that the amount deposited from sales of cotton was \$5,617, which, subtracted from amounts paid out for cotton, left a balance of \$2,749.52, as an overdraft on cotton. And the books showed that he also deposited the sum of \$2,478.16 which had not come from the sale of cotton. Taking from this amount his personal checks of \$2,330.06 leaves an excess in his personal checks of \$148.10, which taken from the overdraft on the cotton account, to wit, \$2,749.52, left a cotton overdraft of \$2,601.42—the amount sued for.

The plaintiff therefore contends that, even if the contention of the defendants that they were not liable for the overdraft incurred by plaintiff for his personal expenditures be true, the result is the same, since all of the \$2,601.42 overdraft, as shown on the books, is in fact the exact amount of the overdraft on the cotton business.

The court gave a peremptory instruction for this amount, plus interest and costs, and entered a verdict against the sureties.

Green & Green, of Jackson, and T. S. Owen, of Cleveland, for appellants. Cutrer & Johnston, of Clarksdale, for appellee.

COOK, J. [1, 2] In our opinion it makes no difference whether we adopt the rule of construction of the bond sued on contended for by appellant, or the one contended for by appellee, because the result reached by the trial court was the proper result under either construction.

According to the testimony of Mr. Lee, the principal in the bond, the judgment was correct. He was put on the witness stand to prove what checks and drafts drawn by him were not for cotton transactions, and, after giving him credit for all specified by him, he still owed the bank the amount recovered by it. True, he said there were other debits not for cotton, but he could not point out the items. If Mr. Lee could not point out debits which were not for cotton, we do not believe that the law would require the bank to point out each check which was drawn for cotton. In the very nature of things this would be a practical impossibility. This would be to require the bank to do that which Mr. Lee, who drew the checks, could not do. All the parties will be held to know how the banking business must be conducted, and that the bank could not know whether checks drawn were to pay for cotton, or not. The man who was guaranteed knew, and no one could know better than he what he drew the checks for; and therefore all depended upon him for the information. He admitted that all the checks charged to him were for cotton bought, except those specified by him, and some other which he could not specify.

In the practical administration of justice there can be no doubt that, if the jury had been instructed to solve the question according to rule of construction advanced by appellant, the result would have been the same. Affirmed.

(108 Miss. 627)

JOHNSTON, State Revenue Agent, v. HARRISON NAVAL STORES CO. (No. 17970.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

MUNICIPAL CORPORATIONS—966—TAXATION—PROPERTY SUBJECT TO.

Where a corporation had its principal place of business in a city, and the agent in charge of the business held a lease representing money invested in the turpentine business, the corporation could be taxed on the lease as money invested in the business, notwithstanding the leased property was without the city.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2045-2061; Dec. Dig. ¶ 966.]

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Action between J. C. Johnston, State Revenue Agent, and the Harrison Naval Stores Company. From judgment for the latter,

the former appeals. Reversed and remanded.

J. B. Harris and S. W. Davis, both of Jackson, for appellant. W. J. Gex, of Bay St. Louis, and Ford & White, of Bascagoula, for appellee.

COOK, J. The only difference in this case and *Harrison Naval Stores Co. v. Adams*, Revenue Agent, 61 South. 417, is that this case seeks to recover municipal taxes for the city of Biloxi, while the other case sought to recover state and county taxes. The principal place of business of the corporation is the same here as there, to wit, Biloxi, Harrison county.

In *Harrison Naval Stores Co. v. Adams*, Rev. Agt., supra, it is held that the lease in question represented "money invested or employed in the turpentine business." The agent conducting the business of the corporation resides at the domicile or principal place of business of the company, and the lease representing the investment was in his custody and under his control. The investment represented by the lease was a proper subject of taxation, and it was within the territorial limits of the state. The main office of the company owning the property assessed was within the state, and the property was therefore taxable in the state. The corporation had a substantial right—a thing of value, an investment of money in a business carried on in this state—and this right, or investment, was represented by a lease which was kept by the agent of the owner at its place of business. It is by this lease that the investment is valued and may be enjoyed. The property to be taxed must have a situs within the jurisdiction of the taxing power, before it is a proper subject of taxation; and it was upon this principle that we held the property involved in *Harrison Naval Stores Co. v. Adams*, supra, was taxable in this state.

In this case the business in which the money of the corporation was invested was located at Biloxi, and the evidence of the investment was kept at this place, the main office, where the business of the corporation was conducted. The subjects of the business, or the things in which the money is invested, are outside of the city, but the business is within the city limits, and so also is the investment. This is not a tax on real estate, or an interest in real estate; it is not a tax on the output of the business, or upon the machinery or other instrumentalities necessary to the conduct of the business; but it is a tax on the investment in the business being conducted from Biloxi. In the former case the court discussed the character of the investment, and whether it was a tangible property liable to taxation. The court necessarily assumed that the property was within the state. It had to be in

the state before the state could list it for taxation.

We did not hold in *Harrison Naval Stores Co. v. Adams*, supra, that the property was assessable in this state because the trees from which the turpentine was to be extracted, under the lease, were growing upon land situated in the state. We did necessarily hold that aside from the tax on real estate, and aside from the tax on the machinery, ways, means, and appliances used in the prosecution of the business, there was an additional property represented by an investment of money in a turpentine lease. If the decision in that case is sound, it follows that this property for the same reasons is assessable for city taxes. It has its situs in the state and in the city of Biloxi.

In *Redmond v. Commissioners*, 87 N. C. 122, 123, the court said:

"The plaintiffs are domiciled in the state of New York, but were owners of lands lying in several of the counties of this state, which had been sold by their agent, who keeps an office in the town of Rutherfordton, in this state, and had power to sell and execute covenants for title and to collect the money. * * * These covenants for the purchase money amount to many thousands of dollars, and are all kept in the office of said agent at Rutherfordton; and the single question presented in the record is whether they are liable to a state, county, and corporation tax. * * * The debts due to the plaintiffs upon their land contracts are personal estate, the same as if they were due upon notes or bonds; and, so far as they have any substantial existence, they are in this state and not elsewhere. Their validity and protection, and the remedies for their enforcement, all depend upon the laws of this state, and in neither respect (or in any other that we can now think of) do they take any benefit from the laws of the plaintiffs' domicile. It is but just, therefore, that they should contribute towards the support of the only government which affords them protection, and help to defray the expenses incurred in so doing. The actual situs and control of the property within this state, and the fact that it enjoys the protection of the laws here, are conditions which subject it to taxation here; and the legal fiction, which is sometimes for other purposes indulged, that it is deemed to follow the person of the owner, and to be present at the place of his domicile, has no application. In such case, the maxim, 'Mobilia personam sequuntur,' gives way to the other maxim, 'in fictione juris semper equitas existat.'"

That case, we think, illustrates the principle controlling this case, and the facts are of the same general character of the facts of this case.

Reversed and remanded.

SMITH, C. J., expressed no opinion.

JAMISON v. H. K. MULFORD CO.
(No. 16753.)

(108 Miss. 639)

(Supreme Court of Mississippi. Feb. 1, 1915.)
JUSTICES OF THE PEACE §181—APPEAL—ANSWER OF GARNISHEE.

Under Code 1906, § 2347, requiring a garnishee in actions before a justice of the peace to answer within a certain time, unless the court shall extend the time, the garnishee cannot file

his answer for the first time in the circuit court on appeal from a judgment rendered against him by the justice.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 704; Dec. Dig. ☞ 181.]

Appeal from Circuit Court, Quitman County; T. B. Watkins, Judge.

Garnishment by the H. K. Mulford Company against A. H. Jamison and a judgment of a justice of the peace. Judgment against the garnishee was affirmed on appeal to the circuit court, and the garnishee appeals. Affirmed.

P. H. Lowrey, of Marks, for appellant. E. C. Black, of Marks, for appellee.

REED, J. Appellant failed to answer a writ of garnishment issued by a justice of the peace on a judgment in his court in favor of appellee and duly served on appellant. Several days after the judgment was entered against him in accordance with the statute (section 2345, Code of 1906), appellant appealed the case to the circuit court. He presented an answer to the garnishment in the circuit court with motion for leave to file. Appellee objected to the filing of an answer for the first time in the circuit court. The trial judge sustained the objection, and refused leave to file the answer. This is assigned as error by the appellant.

The ruling in this case refusing to permit the answer to be filed for the first time in the circuit court, where the case was on appeal from the justice of the peace court, is fully sustained by the decisions in the cases of *G. & S. I. R. R. Co. v. Ramsey*, 98 Miss. 863, 54 South. 440; *Lumber & Mfg. Co. v. Mallett*, 101 Miss. 135, 57 South. 548.

We are frankly told by counsel for appellant that we will have to affirm this case if we follow the two cases just cited. We cannot agree with counsel in his contention that the cases should not be followed. The decisions in the cases simply redeclare the statute (section 2347, Code of 1906), which is clearly stated and positive in its terms, and we therefore follow them.

Affirmed.

(108 Miss. 647)

POWELL et al. v. TUSCUMBIA DRAINAGE DIST. (No. 16718.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

DRAINS ☞ 17 — COMMISSIONERS — COMPENSATION—DISCRETION OF COURT.

The chancellor, in auditing the accounts for services and expenses of drainage commissioners, may not reduce the sums demanded without an investigation on the merits, where the accounts are not on their face grossly excessive, and accounts for services and expenses ranging from \$650 to \$695, and running over a period of two years, cannot be reduced by the chancellor, except after a hearing on the merits.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 11, 12; Dec. Dig. ☞ 17.]

Appeal from Chancery Court, Alcorn County; J. Q. Robins, Chancellor.

Proceedings by M. A. Powell and others against the Tuscumbia Drainage District for allowance of compensation and expenses as drainage commissioners. From a decree of the chancellor fixing the compensation and expenses, the commissioners appeal. Reversed and remanded.

W. C. Sweat, of Corinth, for appellants. T. H. Johnston, of Corinth, for appellee.

COOK, J. The Tuscumbia drainage district was organized under chapter 39, Code of 1906, and appellants were duly elected as drainage commissioners for Alcorn county, the county in which is located said drainage district. The commissioners filed in the chancery court an itemized account of the expenses incurred by them in the performance of their duties, together with an itemized statement of each day's actual service rendered by them to the district. This account was presented to the chancellor for allowance, and his refusal to allow same, or, rather, his action in cutting down the amount, is the cause of this appeal.

The decree in question, after stating the matter before the court, says:

"The court is of the opinion that the aggregate accounts of Commissioner P. Hanley should be reduced in the sum of \$220, and the aggregate of the accounts of Commissioner W. W. Hinton should be reduced in the sum of \$210, and that the aggregate accounts of Commissioner M. A. Powell should be reduced in the sum of \$210, for time which in the opinion of the court was not necessary."

The record affirmatively shows that there was nothing before the court, except the written reports of the commissioners, and statements of each day's service rendered to the drainage district by each of them, and expenses incurred in the performance of their duties. No evidence was heard; the chancellor merely inspected the accounts and shaved same, because, in his opinion, the commissioners consumed too much time in the work assigned to them. This is the record before us. It may be that the statements of account do not sufficiently itemize the expense accounts, but it will be observed that the court did not base its action upon any failure to properly itemize expenses.

The court refused to allow the per diem of the commissioners for the reasons stated. Section 1716, Code of 1906, fixes "five dollars per day for each day's actual service, and all necessary traveling and other expenses," as the amount to be allowed the commissioners. The items are like this: "8 days' inspection of district, \$40.00, and expenses \$1.25." They vary somewhat in form, but they all state the number of days served.

The precise point here is: Does the law authorize the chancellor to fix and determine the number of days' service for which drain-

age commissioners are entitled to claim the per diem fixed by the statute? Stated differently, may the chancellor take judicial cognizance that the number of days' service is in excess of the necessities of the work?

Within certain limits, the chancellor would, of course, be warranted in disallowing an account for services, and he should require a showing from the commissioners as to the necessity for taking so much time about a work which apparently should have been performed in a much shorter time. We do not wish to be understood as holding that the chancellor must allow a per diem account which, upon its face, appears to be grossly excessive. The chancellor, in the auditing and in the allowance of the accounts in question, is not a mere figurehead with no discretion in the premises, but, inasmuch as the accounts disallowed in this instance do not appear to be of that character, we think he was not warranted in reducing same without any investigation of the merits of the claims.

We are unable to find any rule or principle upon which the reduction was made, and it therefore seems to have been arbitrary in the sense that nothing appears to justify the decree.

The accounts are for days of service and expenses incurred over a period of two years, and range from about \$650 to \$695. This may or may not have been excessive, but there is nothing before us, and there was nothing before the chancellor to indicate that the one account should be reduced \$220 and the others \$210, and, when so reduced, the balance would be the proper allowance. It seems to us that these accounts should be tested upon their merits, and not upon the opinion of the court unaided by any of the circumstances and conditions which induced the commissioners to consume the time in performing the duties imposed upon them by the law.

The taxpayers should be protected, but the "laborer is worthy of his hire," and we believe this matter should be sent back for the further investigation of the court, and for the consideration of each item upon its merits.

Reversed and remanded.

(108 Miss. 650)

YAZOO & M. V. R. CO. v. DAMPEER.
(No. 17904.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

APPEAL AND ERROR 807—REINSTATEMENT OF APPEAL—SUFFICIENCY OF SHOWING.

Where an appeal was dismissed for failure to file the stenographer's transcript or to present a bill of exceptions to the judge, a motion to reinstate, made after the stenographer filed the transcript, accompanied by an affidavit of probable error, which shows that appellant's counsel used due diligence in endeavoring to secure a transcript of the notes, which was delayed because of the sickness of the stenographer, that there would be only a slight, if any, delay in

the hearing resulting from the delay in securing the transcript, and that the failure to present the bill of exceptions was due to the fact that appellant's counsel overlooked that provision in the law, will be granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3177-3188; Dec. Dig. 807.]

Smith, C. J., dissenting.

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

Action by Carrie Dampier against the Yazoo & Mississippi Valley Railroad Company. An appeal by defendant from a judgment against it was dismissed (66 South. 814), and defendant moves to reinstate the case. Motion sustained.

Mayes & Mayes, of Jackson, for the motion. P. H. Lowrey, of Marks, opposed.

REED, J. This hearing is upon a motion to reinstate. On a former day we sustained a motion to docket and dismiss this case. See *Y. & M. V. R. Co. v. Dampier*, 66 South. 814. The grounds for that holding were the failure to file the stenographer's notes as required by law and the failure by appellant, when unable to obtain the transcribed notes to be filed, to have prepared and presented to the trial judge a bill of exceptions as if the evidence had not been taken by a stenographer. Chapter 111, Laws of Mississippi 1910.

We said in our opinion when we sustained the motion to dismiss that the appeal bond was filed and approved on March 9, 1914, and the cause was returnable on April 13, 1914. It appears that the time allowed the stenographer to transcribe his notes had not expired on April 13th, and therefore the transcript of the record in the case might have been properly filed by the clerk of the circuit court at any time up to the convening of this court on October 12, 1914.

The record is now on file in this court, having reached the clerk on January 18, 1915. The motion to reinstate is accompanied by affidavit setting forth probable error in the proceedings as required by rule 18 (59 South. 1x).

We learn from the motion and the carbon copies of letters from the stenographer annexed that diligent effort was made by counsel for appellant to obtain the transcribed notes and perfect the appeal, and that the delay was caused by long illness of the stenographer; he having been sick and in a hospital for about two months, suffering repeated surgical operations, during the past summer.

Counsel for appellant state that there will be only a short delay in the final hearing of this case on account of the failure to have the record on file when our court met last fall; that because of the congested condition of our docket, and of the fact that a year or more would necessarily pass before the

case would be reached, the delay will be immaterial, and appellee's injury therefrom slight; while, on the other hand, the dismissal of this case will work a great hardship on appellant in not permitting a hearing of its appeal on the merits.

Counsel plead very earnestly for us to reinstate the cause. They take upon themselves all blame for failure to prepare and present to the trial judge a bill of exceptions in the absence of the stenographer's transcribed notes. They plead oversight of this provision of the statute, and show that it is the general custom at the present to make up the record from the stenographer's notes. They state that there has been no intentional delay in this case on the part of appellant or its counsel, and that they are willing for the case to be heard at such early day as the court may fix.

We approve the dismissal of the case and the opinion of the court then delivered. In view however, of the showing made on this hearing, we believe that the case should be reinstated so that appellant can have its cause heard and determined on its merits.

The motion is therefore sustained, the case reinstated and placed on the docket as though filed on the day when the motion was made to docket and dismiss.

SMITH, C. J. (dissenting). I agree with my Associates in approving the "dismissal of the case and the opinion of the court then delivered," but am unable to agree with them in now setting aside that order of dismissal and reinstating the case on the docket, for the reason that all of the facts set forth in the majority opinion were before us when the case was dismissed, except that since then the stenographer has filed his transcribed notes, and the clerk of the court below has filed the record here. The stenographer's transcript was filed with the clerk of the court below on the 2d day of January, 1915, and the record was filed in this court on the 18th day of the same month. This transcript was not approved either by the trial judge or by agreement of counsel, and had not remained on file with the clerk of the court below for a sufficient length of time for it to become a part of the record by operation of law. Paragraph "a" of chapter 111 of the laws of 1910 is as follows:

"It shall be the duty of the stenographer to forthwith upon the completion of the transcript of his notes and the mailing or delivery of the notices aforesaid, to deliver in person or forward the transcribed notes by registered mail, to the clerk of the court where the case was tried. For fifteen days after the day of mailing of the notice by the stenographer, the appellant's counsel shall have the use of the notes for the purpose of examination and correction, at the expiration of which time appellant's counsel shall deliver or mail the notes to one firm or attorney representing the appellee, ap-

pending to the notes or indorsing thereon a certificate showing the date when the notes were so delivered or mailed. The appellant's attorney shall also append any written suggestions to proposed corrections in the notes. The appellee's counsel shall be entitled to have the use of the notes for ten days from the date of the mailing or delivery of the same by the appellant, for the purpose of examination or suggesting corrections therein and at the end of the ten days the notes shall be returned to the circuit clerk. If neither party shall suggest any corrections, the notes shall, upon their return to the clerk by the appellee, at once become by operation of law a part of the record."

Since this transcript was filed with the clerk of the court below on the 2d of January, and the record was by him filed here on the 18th thereof, necessarily the 15 days allowed appellant's counsel within which to examine and correct the transcript had not expired when the record was forwarded here by the clerk of the court below; but, even conceding that this 15 days had expired, counsel for appellee had, under this statute, 10 days thereafter in which to examine the transcript and suggest corrections he might desire to have made therein, which, if not agreed to by opposing counsel, would then be passed upon by the trial judge. This right, which in my judgment is a most substantial one, may now be denied appellee's counsel without fault on his part by reason of the provision of paragraph "d" of chapter 111, Laws of 1910, which provides that:

"No stenographer's transcript of his notes shall be stricken from the record by the Supreme Court, for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record by operation of law."

Of course, this question is not now before the court, and I mention it simply to point out one of the hardships that may be imposed upon appellee by the reinstatement of this cause. The delay in filing this record may not have postponed the hearing of this cause any great length of time beyond the time when it would have been regularly reached on the docket; on the other hand, it may result in postponing it for at least six months beyond that time, depending upon the position the cause occupies on the docket when the court finishes the call thereof for the particular district from which it comes. But, conceding that the hearing will be postponed only a short time by reason of this delay, I do not think that that fact alone is controlling; and, of course, the fact that counsel overlooked the provision in the statute requiring them "to prepare and present to the trial judge a bill of exceptions in the case as if there had not been a stenographer therein" constitutes no excuse, and under well-recognized principles should not be taken into consideration.

(108 Miss. 653)

PEDEREE v. STATE. (No. 17381.)

(Supreme Court of Mississippi. Jan. 11, 1915.)

CRIMINAL LAW \S 372—**EVIDENCE**—**OTHER OFFENSES.**

In a prosecution for the unlawful selling and retailing of intoxicants, evidence of several sales before the institution of the prosecution is admissible; the state not being confined to one particular act.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 833, 834; Dec. Dig. \S 372.]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Rosa Pederee was convicted of unlawful selling of liquor, and she appeals. Affirmed.

The indictment upon which appellant was tried alleged that she "did unlawfully sell and retail intoxicating liquors." Evidence of several sales alleged to have been made prior to the date laid in the indictment was introduced. It is contended by appellant that the state should have been confined to one particular instance.

Currie & Currie, of Hattiesburg, for appellant. Frank Johnston, Asst. Atty. Gen., for the State.

COOK, J. The brief for appellant in this case assumes that appellant was charged with "keeping for sale intoxicating liquors," and upon this erroneous assumption is built the entire argument for reversal.

If appellant had been charged with the misdemeanor which she evidently thinks she was, her argument might have some weight, but even this is doubtful. Unfortunately she is charged with more than keeping booze for sale. She is charged with selling it, and, unless she was grievously misrepresented, she was rightfully convicted in the manner and in the form prescribed by the law of the land.

Affirmed.

(108 Miss. 663)

GRAND LODGE COLORED K. P. v. BARLOW. (No. 17243.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

APPEAL AND ERROR \S 124—**JUDGMENTS REVIEWABLE**—"JUDGMENT BY CONFESSION."

A judgment rendered pursuant to a peremptory instruction granted at the request of both parties pursuant to an agreement between them is a "judgment by confession," within Code 1906, § 33, and no appeal lies therefrom, though the peremptory instruction was assented to by defendant solely because he was unable to secure the presence of witnesses.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 882; Dec. Dig. \S 124.]

For other definitions, see Words and Phrases, First and Second Series, Judgment by Confession.]

Appeal from Circuit Court, Copiah County; D. M. Miller, Judge.

Action by H. H. Barlow against the Grand Lodge Colored Knights of Pythias. From a

judgment for plaintiff, defendant appeals. Appeal dismissed.

Webster Millsaps, for the motion. W. J. Latham, of Jackson, opposed.

SMITH, C. J. This is a suit upon a life insurance policy issued by appellant. At the close of the evidence the court below peremptorily charged the jury to find for the plaintiff in the sum of \$125, and there was a verdict and judgment accordingly. An appeal was taken to this court, and the cause now comes on to be heard on motion of appellee to dismiss on the ground that the judgment appealed from was "a judgment by confession."

The judgment does not recite that it is "a judgment by confession"; but it appears from the allegations of the motion for a new trial, and from the order by which this motion was overruled, that the peremptory instruction was granted at the request of counsel, both for plaintiff and defendant, pursuant to an agreement between them that this should be done, and judgment be rendered for the plaintiff for \$125, instead of \$165, the amount originally demanded by him.

It may be true, as alleged in the motion for a new trial, that counsel for appellant agreed to this disposition of the case solely because he was unable to secure the presence of the witness by whom he expected to support his client's contention. Nevertheless the fact remains that the peremptory instruction was granted at his request; consequently the judgment rendered was, to all intents and purposes, "a judgment by confession," and from such a judgment no appeal will lie. Section 33, Code 1906.

The motion will be sustained, and the appeal dismissed.

(108 Miss. 656)

YAZOO & M. V. R. CO. v. JAMES et al. (No. 17979.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

1. APPEAL AND ERROR \S 358 — **NECESSITY OF LEAVE—FINAL DECREE.**

If the decree appealed from is final, and not interlocutory, granting of leave to appeal is unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1932-1935; Dec. Dig. \S 358.]

2. APPEAL AND ERROR \S 458 — **GRANTING SUPERSEDEAS—FINAL DECREE.**

If a supersedeas does not on compliance with Code 1906, § 50, as matter of right, follow an appeal from a final decree, a judge of the Supreme Court has right to grant it, under section 56, authorizing him to do so in any case of appeal, where no special provision is made by law for a supersedeas of the decree appealed from.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. \S 453.]

3. APPEAL AND ERROR \S 359 — **POWER TO ALLOW—INTERLOCUTORY DECREE.**

Appeal from an interlocutory decree, when necessary to settle the principles of the cause,

if not allowed by the chancellor under Code 1906, § 35, may, by provision of section 4908, be allowed by a judge of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1936-1940; Dec. Dig. ☞ 359.]

4. APPEAL AND ERROR ☞92—INTERLOCUTORY DECREE—NECESSITY FOR SETTling PRINCIPLES.

In determining whether or not an appeal from an interlocutory decree is properly granted under Code 1906, §§ 50, 4908, as necessary to settle the principles of the cause, the merits of the suit are not to be considered, but the only question is whether the appeal will settle such principles, and so furnish the trial court a definite guide in the trial; and the fact that the abstract principles involved in the appeal have previously been decided by the Supreme Court is not necessarily controlling in such determination, though the discretion to grant the appeal should be exercised only when some good purpose will be accomplished by settling the principles of the cause before it has proceeded to final judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 642; Dec. Dig. ☞ 92.]

5. APPEAL AND ERROR ☞92—INTERLOCUTORY DECREE—SETTLING JURISDICTION.

A typical case for granting plaintiff an appeal from an interlocutory decree, as necessary to settle the principles of the cause, is presented, where the defendants claim, and the chancellor seems to hold, that the court is without jurisdiction to grant the relief sought by the suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 642; Dec. Dig. ☞ 92.]

6. APPEAL AND ERROR ☞365—INTERLOCUTORY DECREE—ORDER GRANTING APPEAL.

The order of the chancellor, granting, under Code 1906, § 35, an appeal from an interlocutory decree, need not state the purpose for which it is granted, but it will be upheld if authorized by any of the provisions of such section.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1784, 1977-1988; Dec. Dig. ☞365.]

7. APPEAL AND ERROR ☞477—INTERLOCUTORY DECREE—GRANTING SUPERSedeas.

Under Code 1906, § 4908, providing that a judge of the Supreme Court may grant an appeal from an interlocutory decree if refused by the chancellor, and if necessary he may allow a supersedeas, where an appeal is given, the chancellor granting an appeal, but refusing a supersedeas, the judge may grant it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247-2249; Dec. Dig. ☞ 477.]

8. APPEAL AND ERROR ☞458—INTERLOCUTORY DECREE—SUPERSedeas.

As necessary to prevent defeat of the purpose for which an appeal by complainant from an interlocutory decree, in a suit to enjoin prosecutions of actions at law, is granted, a supersedeas is properly granted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2224; Dec. Dig. ☞ 458.]

Appeal from Chancery Court, Tallahatchie County; Joe May, Special Chancellor.

Suit by the Yazoo & Mississippi Valley Railroad Company against T. G. James and others. From an interlocutory decree, plaintiff appealed. Heard on motions to dismiss appeal and to discharge the supersedeas. Motions overruled.

A. H. Stephen, of Sumner, Gary & Rice, of Charleston, and Outrer & Johnston, of Clarksdale, for the motion. C. N. Burch, of Memphis, Tenn., Jas. Stone, of Oxford, and Mayes & Mayes, of Jackson, opposed.

SMITH, O. J. Appellant filed its bill in the court below alleging that appellees had each instituted separate suits at law against it; that J. H. Lay and numerous parties, whose names are not given, were threatening so to do, and praying that the suits instituted and the one threatened by Lay be enjoined, and that all of the controversies therein sought to be litigated be adjudicated by decree of the court below; the ground upon which this relief is sought being that thereby a multiplicity of suits will be prevented. A preliminary injunction having been granted in response to the prayer of this bill, a motion to dissolve was filed by appellees, the six grounds of which may be reduced to two: First, that the bill fails to present a case for the exercise of the jurisdiction of equity to prevent a multiplicity of suits. Second, that the bond given is insufficient.

On the hearing of this motion, which took place on December 10, 1914, the injunction was dissolved without reference to the sufficiency or insufficiency of the injunction bond. The decree recites that:

"The said injunction heretofore issued herein against the said defendants, Thomas G. James and George L. Marshall, and their agents and attorneys, is hereby dissolved and for naught held; and this day, this came on also to be heard on the suggestion of damages filed herein against the said complainant by the said defendants; because of the wrongful suing out of the injunction herein, it is considered and ordered that the suggestion of damages be continued to some further day to be fixed by the chancellor."

Appellant then prayed for an appeal to this court with supersedeas, which appeal was granted but the supersedeas denied. On the 17th of December, following, an application for a supersedeas was made to a member of this court, and was by him granted. On December 22d appellees filed a motion in this court praying for a dismissal of the appeal, "because the same was not allowed and granted by the chancellor within the time and in the manner, and for the reasons stated by law, and because the said appeal was improvidently and improperly granted"; and on December 28th filed another motion praying that the supersedeas be discharged. The grounds upon which this supersedeas is requested to be discharged seem to be: First, that the judge of this court who granted it was without power so to do; and, second, that the court below is without jurisdiction to grant the relief prayed for. The record in the cause was filed in this court on January 6, 1915. Both of these motions were submitted, and will be disposed of, together and in the order named.

The return day of this cause is yet to be

fixed by order of this court under sections 4902 and 4906 of the Code, and one of appellant's contentions is that this court is without jurisdiction to entertain a motion to dismiss until after the return day of the cause in which the motion is made. Since the motion, however, must be overruled on other grounds, we will pretermit any discussion of this question, and reserve its determination until such time as it may become necessary for us to do so.

[1,2] These motions have been argued, both for appellant and appellees, on the theory that this is an appeal from an interlocutory decree; is controlled by section 35 of the Code, and should be dismissed unless "proper in order to settle the principles of the cause." While the decree appealed from does not in express terms retain the cause solely for the assessment of damages, it is manifest that that is the only question left open by it, and therefore it may be that this cause comes within the rule announced in *Dreyfus v. Gage*, 79 Miss. 403, 30 South. 691, wherein, although the appeal had been granted in order to settle the principles of the cause, the court declined to so treat it, and instead of dismissing the appeal decided the questions therein raised, reversed the decree appealed from, and remanded the cause evidently upon the theory that the decree appealed from was final. If it follows from that case that the appeal here was from a final, and not an interlocutory, decree, then the granting of leave to appeal was unnecessary, and the motion to dismiss must therefore be overruled. In event it should be held that a supersedeas does not follow such an appeal as a matter of right upon compliance with section 50 of the Code, as to which we are not called upon to express an opinion, the motion for a discharge of the supersedeas must still be overruled, for the reason that any judge of this court clearly had the right to grant it under section 56 of the Code.

[3,4] It will not be necessary for us to determine whether or not this cause is ruled by *Dreyfus v. Gage*, for, assuming for the sake of the argument that the appeal is from an interlocutory decree and lies only under the provisions of section 35, the same result will follow. By this section a chancellor before whom a cause is on trial, and upon his refusal so to do, a judge of this court, by section 4908 of the Code, is given power to grant an appeal from any interlocutory order or decree "when he may think it proper to settle the principles of the cause, or to avoid expense and delay." In determining whether or not an appeal was properly granted under these sections, the merits of the controversy between the parties to the cause is immaterial, and will not be looked into in order to ascertain whether or not the appeal should have been granted. *State v. Woodruff*, 83 Miss. 111, 36 South. 79, 37 South. 706; *Kimball v. Alcorn*, 45 Miss. 147.

The only question to be determined is whether or not the appeal will settle the principles of the particular cause, so that the court below may thereafter have a definite guide which it must follow in the trial thereof. If a decision of the questions raised on the appeal will result in settling the principles of the cause, it will be retained and heard; otherwise it will be dismissed. *Clay County v. Chickasaw County*, 63 Miss. 289. That the abstract proposition of law involved in the appeal may have been heretofore decided by this court is not necessarily controlling in determining whether it should be granted; the object of the statute being to settle the law of the particular cause. *Bierce v. Grant*, 91 Miss. 791, 45 South. 876, seems to be in conflict herewith, and, if so, it is hereby overruled. That this is the correct and logical interpretation of the statute will be demonstrated by an examination of that case, for the court there arrived at the conclusion that the appeal should not have been granted and therefore should be dismissed, by examining into the merits of the appeal and deciding the question presented by it adversely to the appellant, thereby in fact settling "the principles of the cause" in so far as the matters involved in the decree appealed from were concerned. Of course, an appeal of this character is not a matter of right, but rests in the discretion of the chancellor or of a member of this court, which discretion should be cautiously exercised, and an appeal granted only when some good purpose will be accomplished by settling the law of the particular cause before it has proceeded to final judgment. *Ward v. Whitfield*, 64 Miss. 754, 2 South. 493; *Ames v. Williams*, 73 Miss. 772, 19 South. 673; *Insurance Co. v. Morrison*, 95 Miss. 639, 48 South. 178.

[5] If the decree here in question is interlocutory, a typical cause is presented for the exercise of the power granted by the sections of the Code hereinbefore referred to, for the reason that if the court below is without the power to grant the relief prayed for, as contended by counsel for appellees, that fact should be ascertained and determined before the parties to the cause have been forced to incur unnecessary trouble and expense. Moreover, since the court below seems to have held that it was without such jurisdiction, the cause, should this holding be affirmed, will be thereby practically brought to an end.

[6] In the order granting this appeal, the chancellor failed to state the purpose for which it was granted. The failure of the order to so state is immaterial. If the decree appealed from is final, leave so to do was not necessary; and, if it is interlocutory, it will be upheld if authorized by any of the provisions of section 35 of the Code, it not being, in our judgment, necessary for the decree to recite the purpose for which the appeal was granted. The statute does

not expressly require that this be done, and there is no principle, or rule of practice, of which we are aware, which requires courts below to indicate the reasons upon which they act in passing upon matters submitted to them for adjudication.

[7, 8] Coming now to the motion for the discharge of the supersedeas, on the theory that the decree appealed from is interlocutory, it will be sufficient to say that power to grant such a supersedeas, when it has been denied by the chancellor, is expressly conferred upon a member of this court by section 4908 of the Code (Wilson v. Pugh, 61 Miss. 449; Buckley v. George, 71 Miss. 580, 15 South. 46), and that this power was here properly exercised for the reason that without a supersedeas the prosecution of the suits at law, sought to be enjoined, may be proceeded with and judgments therein probably obtained before the appeal can be submitted to and determined by this court, resulting in the defeat of the purpose for which it was granted. Kimball v. Alcorn, 45 Miss. 149.

Motions overruled.

(108 Miss. 664)

WHIDDEN v. BROADUS, Superintendent of Education. (No. 17186.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

APPEAL AND ERROR § 781 — **DISMISSAL — GROUNDS—MOOT QUESTION.**

An appeal from a judgment denying mandamus to compel a county superintendent to employ petitioner as a school teacher for a certain term will be dismissed as involving only a moot question, where the school term for which employment was demanded has expired.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80, §122; Dec. Dig. § 781.]

Appeal from Circuit Court, Lamar County; A. E. Weathersby, Judge:

Mandamus by G. W. Whidden against A. Q. Broadus, County Superintendent of Education. From a judgment denying the relief prayed for, the plaintiff appeals. Appeal dismissed.

This is a motion to dismiss the appeal from a judgment on a petition filed by the appellant for a writ of mandamus seeking to compel the appellee, superintendent of education of Lamar county, to contract with appellant to teach a public school in said county for a term beginning on the first Monday in October, 1913, and extending over a period of six months. The motion to dismiss recites the fact that the time has passed for teaching said school, as is shown by the record, and that the question before the court now is simply a moot question, since appellant could not be benefited by a reversal.

Salter & Hathorn, of Purvis, for the motion. T. W. Davis, of Purvis, and Tally & Mayson, of Hattiesburg, opposed.

SMITH, C. J. This case is ruled by *McDaniel v. Hurt*, 92 Miss. 197, 41 South. 381, and *Paffhausen v. State*, 94 Miss. 103, 47 South. 897; consequently the motion to dismiss must be, and is, sustained.

(108 Miss. 667)

CATO v. CRYSTAL ICE CO. (No. 16827.) (Supreme Court of Mississippi. Feb. 1, 1915.)

1. **EXCEPTIONS, BILL OF** § 39—**TIME FOR SIGNING BY JUDGE—FAILURE OF STENOGRAPHER.**

Under Code 1906, § 797d, enacted by Laws 1910, c. 111, providing, in effect, that if the official stenographer fails to file the transcript in the time limited appellant shall have 40 days thereafter to prepare and present a bill of exceptions as if there had been no stenographer, and the judge shall sign it in a certain time, namely, that which the stenographer had for filing the transcript, signing in such time being a physical impossibility, the only limit of time for signing is that prescribed by section 796, where there is no stenographer; that is, "promptly."

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 51, 52, 54-56, 60; Dec. Dig. § 39.]

2. **APPEAL AND ERROR** § 938—**PRESUMPTION—TIME OF PRESENTING BILL OF EXCEPTIONS.**

In the absence of evidence to the contrary, the record not showing when the bill of exceptions, signed and approved by the judge, was presented to him, it will be presumed that it was presented seasonably.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3795-3803; Dec. Dig. § 938.]

Appeal from Circuit Court, Lincoln County; D. M. Miller, Judge.

Action between A. C. Cato and the Crystal Ice Company. There was an appeal, and appellee moves to strike the bill of exceptions. Motion overruled.

J. H. Sumrall, of Brookhaven, for the motion. H. V. Wall and J. W. McNair, both of Brookhaven, opposed.

SMITH, C. J. This cause comes on to be heard on motion of appellee "to strike from the record herein the bill of exceptions," for the reason that "said bill of exceptions was not signed and approved by the trial judge within the time allowed by law."

It appears from the record that the stenographer who took down the evidence in the court below was notified on the 11th day of February, 1913, that a transcript thereof was desired. On the 2d day of April thereafter, the judge before whom the cause was tried granted this stenographer "an extension of 60 days from April 6, 1913, * * * in which to transcribe and file the testimony." Afterwards, the stenographer lost his notes, and therefore was unable to transcribe the same. On the 14th day of July, 1913, counsel for appellant filed with the clerk of the circuit court a bill of exceptions prepared "as if there had not been a stenographer" in the case. This bill of exceptions was approved and signed by the trial judge on the 16th

day of July, 1913, 41 days after the expiration of the extension of time granted the stenographer within which to file a transcript of the evidence.

[1] Paragraph "d" of chapter 111, Laws of 1910 (page 95, L. 1910), provides that:

"In case of the death of the stenographer before filing a copy of his notes of the evidence and proceedings in any case, or of his failure to file the same within sixty days after notice served upon him by appellant, or within any extended time, the party taking the appeal may, within forty days after the forty, sixty, ninety, or other extended time, prepare and present to the judge a bill of exceptions in the case as if there had not been a stenographer therein, and the judge shall examine, correct if necessary, and sign the same within the time prescribed, sixty or ninety days after the end of the term, or within the extended time aforesaid."

It seems clear from this statute that an appellant has 40 days within which to "prepare and present to the judge a bill of exceptions in the case, as if there had not been a stenographer therein," after the expiration of the time within which the stenographer, either by operation of law or by virtue of an order of extension, must file his transcript; that is to say, 40 days after the expiration of this time, within which to prepare and present to the judge a bill of exceptions prepared in accordance with section 796 of the Code. The Legislature seems also to have intended by this statute to limit the time within which the trial judge could approve and sign such a bill of exceptions; but the language in which this intention is couched renders it impossible for it to be put into effect, for the requirement is that he examine and sign it "within the time prescribed, sixty or ninety days after the end of the term, or within the extended time aforesaid," the clear meaning of which is that he must approve and sign it within the time allowed the stenographer to file the transcript of his original notes, and until this time has expired, and the stenographer has failed to file such a transcript, a bill of exceptions of the character here in question cannot be tendered. This being true, it is physically impossible for this provision of the statute to be complied with; consequently, the only limitation upon the power of the judge to approve and sign such a bill of exceptions, if any such limitation in fact there be, is that prescribed in section 796 of the Code, which is, not that he must do so within any definitely prescribed time, as was pointed out in *Allen v. Levy*, 59 Miss. 613, but that he must do so "promptly."

[2] This record discloses that this bill of exceptions was filed with the circuit clerk before it was approved by the trial judge, but it does not disclose when it was presented to the judge. Since he approved and signed it, however, in the absence of evidence to the contrary, we must presume that it was presented to him within the time allowed by law; in other words, we must presume that he discharged his duty in the matter, and

therefore did not approve and sign a bill of exceptions tendered to him after the expiration of the time provided by law for so doing.

Overruled.

(108 Miss. 670.)

PRATHER v. GOOGE, Sheriff. (No. 17907.)
(Supreme Court of Mississippi. Feb. 1, 1915.)

1. HIGHWAYS ⇨95—HIGHWAY LAW—VALIDITY.

Const. § 170, divides each county into districts for the election of the board of supervisors which shall have full jurisdiction over roads and bridges. Laws 1914, c. 176, § 1, provides that the board of supervisors of any county may construct and maintain highways in one or more supervisors' districts, or part of one or more districts, and for that purpose may issue and sell bonds, and levy and collect taxes to pay bonds issued to maintain and construct such highways. Section 3 declares that the returns of elections shall be canvassed by the election commissioners and the result certified to the board of supervisors; that, should the election be carried in favor of the issuance of bonds, the supervisors shall issue bonds not to exceed 10 per cent. of the assessed value of the taxable property of the district. *Held*, that the act does not violate the Constitution by depriving the board of supervisors of its general jurisdiction over highways; the board having complete jurisdiction notwithstanding the act authorized the construction of highways in parts of the supervisors' district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 309-312; Dec. Dig. ⇨95.]

2. CONSTITUTIONAL LAW ⇨291—COUNTIES ⇨178—DUE PROCESS OF LAW—HIGHWAY BONDS.

Laws 1914, c. 176, in so far as it provides for elections to issue highway bonds, is not invalid as working a deprivation of property without due process, for it does not discriminate against nonresident voters.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 870-876; Dec. Dig. ⇨291; Counties, Cent. Dig. §§ 269-273; Dec. Dig. ⇨178.]

3. HIGHWAYS ⇨90—DISTRICTS—STATUTE.

Laws 1914, c. 176, expressly authorizes the organization of a road district less than one supervisors' district.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. ⇨90.]

4. HIGHWAYS ⇨90—HIGHWAY DISTRICTS—LAWS.

Laws 1914, c. 176, authorizing the formation of road districts, is not impracticable as not providing for the ascertaining of the will of the electors.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 301, 302; Dec. Dig. ⇨90.]

5. COUNTIES ⇨183—BONDS—ROAD DISTRICTS—STATUTES.

While Laws 1914, c. 176, § 3, does not expressly provide that bonds issued by a road district less than a supervisors' district shall be a lien only on the property within the district, yet the obvious intent of the Legislature, as shown by section 1, being that highways may be laid out in a portion of a supervisors' district, bonds issued where the road district was less than a whole district will be treated as bonds of the board of supervisors, but liens only upon the property within the road district.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 275-281, 283, 284; Dec. Dig. ⇨183.]

6. STATUTES —181—CONSTRUCTION—INTENT OF LEGISLATURE.

Effect will be given to the intent of the Legislature, if possible.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. —181.]

Appeal from Chancery Court, Prentiss County; T. L. Lamb, Chancellor.

Bill by Forest Prather against J. D. Googe, Sheriff and Tax Collector. From a decree for defendant, complainant appeals. Affirmed.

Robins & Thomas, of Tupelo (J. A. Cunningham, of Booneville, and Jas. R. McDowell, of Jackson, of counsel), for appellant. Cox & Cox, of Baldwin, for appellee.

COOK, J. Appellant, a taxpayer, filed his bill of complaint against the board of supervisors, the sheriff and tax collector, and the road commissioners of road district No. 1 for the Third supervisors' district of Prentiss county.

The purpose of the litigation is to test the validity of chapter 176, Laws of 1914, entitled:

"An act to amend chapter 145, of the Laws of 1912, entitled 'An act to amend chapter 149, acts of 1910, entitled "An act to authorize the board of supervisors to construct and maintain public roads in one or more supervisors' districts of the various counties of the state, to issue bonds and levy taxes for that purpose; and providing for the manner in which the said roads shall be constructed and maintained; and how bonds shall be issued and taxes levied for that purpose," so as to provide that the board of supervisors of any county in which one or more supervisors' districts, or parts of districts, which have or may come under the operation of said chapter 149 of the acts of 1910, may elect, by an order on its minutes to that effect, to work all of the public roads in such district or districts, or parts of districts, by contract, and to provide the manner in which the same shall be done,' so as to provide for maintenance and upkeep of roads by other methods than by contract," etc.

The bill sets out in detail the proceedings leading up to the establishment or creation of the road district in question, and it appears that the procedure was in strict compliance with the provisions of chapter 176, Laws of 1914, and that the district is composed of certain described lands in the Third supervisors' district of Prentiss county, but does not embrace the entire district. The area embraced in and composing the proposed district is less than the area of the supervisors' district.

The prayer of the bill is as follows:

"The premises considered, complainant prays that he be granted your most gracious writ of injunction to restrain and enjoin said sheriff and tax collector of Prentiss county, and said board of supervisors, and the said road commissioners of said district No. 1 of the Third supervisors' district of Prentiss county, from imposing or collecting said road tax on his property in said proposed road district, and that the said sheriff and tax collector, and the said board of supervisors and the said road commissioners be made parties defendant to this bill by fit and apt process, returnable to the next

term thereof, and that on final hearing said injunction shall be made perpetual, and for such other, further, and different relief as to the court may seem meet and proper, and as in duty bound will ever pray."

The grounds for relief are thus stated in the bill of complaint, viz:

"He assigns now the following special objections, as well as those appearing on the face of the proceedings, and papers against the organization and creation of said road district, the levy and assessment and proposed collection of said tax, to-wit:

"First. Said chapter 176, House Bill No. 750, attempting to authorize the creation of road district of part of supervisors' districts, is unconstitutional and void.

"Second. The said act, chapter 176, House Bill No. 750, Laws of 1914, p. 244, does not authorize the creation and organization of a road district less than one supervisors' district.

"Third. The third section of said act, chapter 176, wherein the board of supervisors are authorized to issue the bonds, only authorizes the board of supervisors to issue bonds of a supervisors' district, or districts, and does not authorize the issuance of bonds on parts of a district, or districts. The said act, chapter 176, was an act amendatory of the Laws of 1910, known as chapter 149, and whereas sections 1 and 2 of said act authorized, or attempted to authorize, the board of supervisors to create districts smaller than one supervisors' district, being in that respect amendatory of the former law, yet in carrying this forward in section 3 of said act, it directed that the levy should be made upon the supervisors' district, or districts, thus levying the tax on the whole of a district for the benefit of a part only. Said act, chapter 176, is impractical and impossible in so far as it attempts to create a smaller district than one supervisors' district, and is for that reason void.

"Fourth. If the Legislature intended to authorize the creation of a road district as small as this proposed district, the act does not clearly express the legislative intent, and is so vague and indefinite as not to be capable of enforcement.

"Fifth. Said act is impractical of enforcement and will work irremediable injury and damage, in that it proposes to create districts smaller than a supervisors' district into road districts without providing any practical means for ascertaining whether or not the residents of said proposed district shall be provided with proper voting precincts in the proposed district to express their views for or against the issuance of bonds. Said act in no part of it requiring that the said proposed road district shall conform to the already laid out precinct voting places, so the said chapter 176, Acts of 1914, is impractical of administration, and no proper method is provided for ascertaining the correct expression of the qualified voters in said proposed road district.

"Sixth. Said act, chapter 176, contravenes the general policy of our state in the creation of taxing districts, in that qualified electors, regardless of ownership of property, participate in the election, and thus there may be property owners in said district, who, under the provisions of said act, will be taxed without giving them the opportunity to express their preference for or against said bonds.

"Seventh. Said chapter 176, in its effort to amend the laws of 1912, is so clumsily worded as to fail entirely to convey the legislative intent, and throughout it fails to give complete efficacy to the amendment proposed in sections 1 and 2, where it attempts to broaden the act, so as to make it include less than one supervisors' district, and leaves the law

in such a state of doubt and uncertainty that no bond issue under it can be sold and would not be valid or binding.

"Eighth. Said act, chapter 176, in section 11 thereof, attempts to provide a means of preventing property owners in districts from paying a double tax by being put into two or more road districts, but provides no practical means for carrying out this proposed idea, and thus leaves the law in confusion and uncertainty.

"Ninth. No practical method of assessment and administration of the funds is provided for in said act, and hence there will be interminable confusion in an attempt to administer the law under this act.

"Tenth. The Legislature of the state, in passing so many road laws, especially chapter 173 of the Acts of 1914, 174, 175, 176, 177, and 178, have left the road laws of the state in such hopeless confusion and conflict as to be hopelessly irreconcilable and nobody can determine what the law is.

"Eleventh. Chapters 173 and 176 contemplate an entirely different and independent and contrary scheme for road building and maintenance, and for issuance of bonds, and are so irreconcilable in their terms and provisions and general scheme and plan as to make it impossible to determine which is effective and in operation, and which is void; the one assessing and laying a regular ad valorem tax and the other a benefit tax. There is no satisfactory provision of law preventing the enforcement of these two antagonistic schemes in the same territory, or supervisors' districts, or counties, or parts of districts or county.

"Twelfth. The attempt to create districts smaller than one supervisors' district would allow such districts to be organized and created with an irregular perimeter, and thus the sheriff and tax collector and the board of supervisors would not know how to separate the funds from other funds, and it would be impossible, or impractical, for the assessor to assess such districts, and for the collector to collect the taxes in such districts, and for the board of supervisors to administer the funds of said district.

"Thirteenth. Section 3 of the act, chapter 176, is in real and apparent conflict with sections 1 and 2 of the act.

"Fourteenth. Under chapter 176, the effort to tax the small districts and issue the bonds of small districts, violates the due process clause of the federal Constitution, in that no proper method is provided for ascertaining the will of the majority of qualified voters, or property owners, in that nonresident property owners of such districts are allowed no participation in the election or petition, although they may be large taxpayers in the district.

"Fifteenth. Said act of 1914, chapter 176, attempts to create territory not theretofore defined into something of a corporate character, but it is not clear and satisfactory what is intended, or what is created into such corporate character, whether it is a taxing district merely, or a corporation with corporate functions and taxing power.

"Sixteenth. The attempt to create a part of a supervisors' district into a taxing district, or into a district having taxing power, is not clearly and definitely expressed, and such part of a supervisors' district is not by such act created into a separate taxing district, nor into a district having separate taxing powers.

"Seventeenth. The whole subject of road legislation in Mississippi is so hopelessly entangled that it cannot be straightened out without an entire revision and re-enactment of the road laws by the Legislature."

The demurrer to this bill was sustained.

[1] Chapter 176, Laws 1914, is an amendment to chapter 145, Laws 1912, which last-

named chapter was an amendment of chapter 149, Laws of 1910.

We here copy section 1 of chapter 176, Laws of 1914 (the law under review), and the amending words appear in capital letters, viz.:

"Be it enacted by the Legislature of the state of Mississippi, that the board of supervisors of any county in this state are hereby authorized and empowered to construct, OR CONSTRUCT AND MAINTAIN, or maintain one or more highways for the convenience of the traveling public, by contracts in one or more supervisors' districts of said county, OR PART OF ONE SUPERVISORS' DISTRICT, OR TWO OR MORE OR PARTS OF TWO OR MORE SUPERVISORS' DISTRICTS IN SUCH COUNTY, AND FOR THAT PURPOSE ARE AUTHORIZED TO ISSUE AND SELL BONDS AND TO LEVY AND TO COLLECT TAXES TO PAY SUCH BONDS AND TO MAINTAIN SUCH ROADS SO CONSTRUCTED IN THE MANNER HEREIN PROVIDED."

Section 3 of this act is as follows:

"That the returns of such election shall be canvassed by the election commissioners of the county, and the result certified by the commissioners to the board of supervisors at their next regular meeting; and should the result of such election show that it has carried in favor of the issuance of bonds by a majority vote of those participating therein, or if there be no election, then it shall be the duty of the board of supervisors to issue the bonds of such supervisors' district or districts, in any amount not to exceed ten per centum of the assessed value of all the taxable property of such district, or districts, the amount within this limit to be fixed by the commissioners hereinafter provided for, subject to the approval of the board of supervisors, and such bonds to be issued and sold either all at one time or in installments from time to time as funds are needed for the construction of such highway or highways, in the discretion of such commissioners and the board of supervisors."

It will be observed that section 1 authorizes and empowers boards of supervisors of any county "to construct, or construct and maintain, or maintain one or more highways * * * by contracts in one or more supervisors' districts * * * or part of one supervisors' district."

There seems to be no doubt that the power is given to establish the district in question—to construct and maintain the road which is the subject of this controversy—and we do not understand that appellant seriously contests the grant of power, but does insist that section 3 of the act does not authorize the issuance of the bonds of a road district, embracing less than a supervisors' district.

It seems to us that the real controversy is narrowed and confined to the issuance of bonds for the proposed district and the levy of taxes on the lands embraced therein to liquidate the bonds. In other words, conceding the power to organize a road district embracing an area less than a supervisors' district, is the power to issue bonds and collect taxes to pay the bonds also given by the act of the Legislature?

However, the recent judicial history of this state shows that no money can be se-

cured to prosecute public works of the character here involved, until the approval of this court is stamped upon each bond issue, and for this reason we will undertake the onerous task of considering all the arguments advanced in this case without the faintest hope that any portion of this opinion will be hereafter accepted by would-be investors as applicable to any other bond issue than the one involved in this appeal.

The sixth, fifteenth, and sixteenth criticisms of the statute and grounds for relief are of the same character and will be so considered. They all proceed upon the idea that the Legislature has undertaken to create taxing districts or corporations with powers of taxation, or to carve out of a supervisors' district a separate and distinct taxing district with indefinite powers. The vice of this conception is made apparent by a mere reading of the law. The bill is drawn with due regard to the plenary jurisdiction over roads vested in boards of supervisors by section 170 of the state Constitution, and this thought runs through every word and phrase of the act. The exercise of the powers given by the act and the carrying out of the scheme is placed where it belongs, in the control and under the jurisdiction of boards of supervisors.

The methods for the construction and maintenance of public roads, and the means through which the funds necessary to this end may be obtained, is a proper subject of legislation, and are without objection, unless they in terms or by necessary implication take away from boards of supervisors the powers conferred by the Constitution. Nothing can be found in the act justifying the inference that the Legislature was undertaking to confer upon a separate taxing district, or corporate entity, jurisdiction over public roads, or the power to levy taxes upon persons or property. For convenience, and in order to identify the property to be assessed for the purpose of securing funds to liquidate the bonds to be issued, the act provides that boards of supervisors will issue the bonds of the district, upon which the special benefits are conferred. The district gets the benefit of the general plan for working roads, and something more, and this something more is the thing the district is required to pay. Under the plan devised by the Legislature, the resident qualified electors are permitted to express their preferences upon the subject of a road district. This was not a necessary, or important feature of the law. The Legislature was authorized to confer the discretion of organizing or not organizing the district to boards of supervisors alone.

[2] The first and second ground for relief will be considered together. It is not pointed out wherein the act is unconstitutional, unless the constitutional inhibition referred to may be found in the fourteenth ground for relief. In this ground it is said that the

act is in violation of the due process clause of the federal Constitution, "in that no proper method is provided for ascertaining the will of the qualified voters, or property owners, in that nonresident property owners * * * are allowed no participation in the election or petition." This we think has been answered. It was not necessary to the constitutionality of the act that either qualified electors or property owners, resident or nonresident, should be consulted. There is nothing in the act which discriminates between resident or nonresident property owners.

[3] The second ground is without merit, because the first section of the act clearly authorizes the organization of a road district less than one supervisors' district. There is no merit in the fourth ground.

[4] We can see nothing of merit in the fifth ground. There seems to have been no difficulty in ascertaining the will of the electors, and it is apparent that the alleged confusion and impracticability of the scheme is purely imaginary. The elector must reside in the proposed district before he can vote, and there seems to be no reason why his qualifications could not be definitely and certainly ascertained.

[5, 6] The third and seventh grounds are, in our opinion, the only grounds to be seriously considered. It is manifest that the Legislature omitted to so amend section 3 as to harmonize same with the general scheme. This was obviously an oversight. To construe this section literally would result in a miscarriage of the dominant purpose of the Legislature in passing the amendatory act. We cannot escape the conclusion that experience had demonstrated that it would be frequently desirable to organize districts in certain localities which would not embrace the entire supervisors' district. Supervisors' districts are not infrequently traversed by streams or swamps which oppose impassable barriers between the part on the one side and the part on the other side of the stream or swamp. In cases of this kind the construction of a road on one side would be of no earthly use to the people on the other side. Reasons of this kind, and no doubt many other conceivable reasons, suggested the amendment of section 1, which authorizes districts smaller than supervisors' districts. It was manifestly not the intention of the Legislature to confer a power without also providing the means for making it effectual.

It being clear that the Legislature intended to amend the act in the particular mentioned the court should not nullify the purpose, if there are any sound rules of construction by which we can enforce the evident intention of the lawmaking department. The bonds are the bonds of the board of supervisors, but the property within the road district is the security for their payment. The county authorities supervise and issue the bonds, and the security for their pay-

ment is the taxing power of the government to be exerted on the property peculiarly benefited by the special improvement. A reading of the entire chapter leads to the inevitable conclusion that it was the intention of the Legislature to provide a means by which the inhabitants of a district less than a supervisors' district would be enabled to secure for themselves a ready and convenient means of transportation which would improve the moral, financial and social condition of the community, and to accomplish this end it seems reasonably certain that the Legislature intended to give to the community the right to borrow money and to provide means by which the payment of the creditor could be insured. Any other construction would nullify the amendment.

The criticisms of the administrative features of the act are without merit or foundation. It is perfectly competent to pass any number of laws providing different plans for improving the public highways and different methods for securing funds to accomplish that purpose, and there is no confusion or conflict in the different schemes so far as we are able to see, and able counsel have not directed our attention to any law in conflict with the law under review.

The record in this case clearly identifies and defines the boundaries of the proposed district, and the procedure follows the requirements of the law and all is made a permanent record. After the issuance of the bonds the record points with certainty to the property that will bear the burden of paying the bonds when due.

Affirmed.

(108 Misa. 690)

STEVENS v. D. R. DUNLAP MERCANTILE CO. (No. 16487.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

1. EXECUTORS AND ADMINISTRATORS § 226—SETTLEMENT OF ESTATES—NOTICE TO CREDITORS—SUFFICIENCY.

A notice to creditors of a decedent's estate, which states the appointment of an administrator and declares that "notice is hereby given to all creditors having claims against said estate to present same to the clerk of said court for probate and registration according to law, within one year from this date, or they will be forever barred," and bearing a date, and signed by the administrator, complies with Code 1906, § 2103, requiring an administrator to give notice requiring creditors to have their claims probated and registered by the clerk within one year.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 806-810; Dec. Dig. § 226.]

2. EXECUTORS AND ADMINISTRATORS § 226—SETTLEMENT OF ESTATES—NOTICE TO CREDITORS—PUBLICATION—SUFFICIENCY.

A publication of a notice to creditors, dated May 26, 1910, in three weekly issues of a newspaper on June 3d, 10th, and 17th, following, is sufficient, within the statute calling for the publication for three consecutive weeks, and Code 1906, § 1607, providing that, when publication shall be required for three weeks, it shall be sufficient to publish once each week for three

weeks, though there be not three weeks between the first and last publication.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 806-810; Dec. Dig. § 226.]

3. WILLS § 672—TRUSTS FOR PAYMENT OF DEBTS.

A testator who directs that his debts shall be paid by his executor, and who empowers the executor, after the payment of debts, to sell real estate for "the purpose of division or otherwise, without any order of court," and to make deeds as executor to the purchasers, does not create an express trust for the payment of debts, and creditors must have their claims against the estate probated and registered as required by law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1579-1581; Dec. Dig. § 672.]

4. EXECUTORS AND ADMINISTRATORS § 236—SETTLEMENT OF ESTATES—ESTABLISHMENT OF CLAIMS—"PROBATE."

Under Code 1906, § 2105, providing that the administrator shall not pay any claims unless probated, allowed, and registered, and section 2106 requiring claimants to present claims to the clerk and make affidavit thereto, and thereupon, if the clerk shall approve, he shall indorse on the claim the words, "probated and allowed for \$—, * * *" and registered this — day of —, * * *" and shall sign his name officially thereto, failure of the clerk to make an indorsement showing the probate, registration, and allowance of a claim renders the claim invalid as a charge against the estate; the word "probate" meaning that the claim has, in the judgment of the clerk, been proven in the manner required by law.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 841, 842½; Dec. Dig. § 236.]

For other definitions, see Words and Phrases, First and Second Series, Probate.]

Appeal from Chancery Court, George County; H. P. Heidelberg, Special Chancellor.

Petition by John C. Stevens, administrator of J. B. Stevens, deceased, against the D. R. Dunlap Mercantile Company. From a decree of dismissal, rendered on sustaining a demurrer to the petition, petitioner appeals. Reversed and remanded.

Stevens & Cook, of Hattiesburg, and Watkins & Watkins, of Jackson, for appellant. Ford, White & Ford, of Gulfport, and Wells, May & Sanders, of Jackson, for appellee.

REED, J. Appellant, administrator with the will annexed of the estate of J. B. Stevens, filed his petition in the chancery court, averring that the claim of appellee against the estate of deceased had not been probated in the manner required by law, and that the presentation of the claim to him as administrator is not sufficient in law to authorize him to pay it out of the funds of the estate. He prayed that the claim be disallowed. The chancellor sustained a demurrer filed by appellee and dismissed the petition, and appellant thereupon prosecuted his appeal to this court.

[1] It is contended that the notice to the creditors, published by appellant, is insufficient in form. The following is the notice:

"Administrator's Notice to Creditors.

"Letters of administration having been granted on the 21st day of May, 1910, by the chancery court of George county, Miss., to the undersigned upon the estate of J. B. Stevens, deceased, of Evanston, Miss., notice is hereby given to all persons having claims against said estate to present the same to the clerk of said court for probate and registration according to law, within one year from this date, or they will be forever barred. This the 26th day of May, 1910. [Signed] J. C. Stevens, Administrator."

Appellee claims that the notice does not contain the statement that a failure to probate and register claims against the estate within one year would have the effect of barring them.

The statute (section 2103, Code of 1906) makes it the duty of an administrator to publish in a newspaper a notice requiring all persons holding claims against the estate to have the same probated and registered by the clerk within one year. Such notice should state that a failure to probate and register for one year will bar the claim. The time when the letters are granted must also be stated, and the notice should be published for three consecutive weeks; proof of publication thereof to be filed with the clerk. The notice in this administration shows the date when the letters were granted, and tells the creditors of the estate to have their claims probated and registered by the clerk within one year, and plainly conveys the information that the failure to so probate and register claims will bar them. This is the simple reading of the notice, and certainly the requirements of the statute have been met.

Appellant relies upon the decision of the court in the case of *Marshall v. John Deere Plow Co.*, 99 Miss. 284, 54 South. 948, to sustain his position. We find the notice in that case is unlike the notice in the case at bar in that it fails to state that claims must be probated and registered according to law within one year, but uses the following words to convey information relative to the requirement:

"Now all persons having claims against the estate of said decedent are hereby notified to probate the same within the time limited by law, or the same will be forever barred."

It will be noted that in the present case creditors were given notice to present their claims to be probated and registered according to law within one year, and in the *Marshall Case* they were notified to probate their claims within the time limited by law, without stating, as required by the statute, that this time was one year.

[2] It is further contended that the administrator's notice to creditors was not published for a sufficient length of time. The statute requires the notice to be published for three consecutive weeks. The proof of publication shows that the notice was published in three weekly issues of a county paper on the dates June 8, June 10, and June 17,

1910. This is sufficient publication of the notice. Section 1607 of the Code of 1906, which provides the rule governing publications in newspapers when a number of weeks is prescribed, reads as follows:

"When publication shall be required to be made in some newspaper 'for three weeks,' it shall be sufficient to publish once each week for three weeks, even though there be not three weeks between the first and last publication; but there must be three weeks between the first publication and the day for the appearance of the party or other thing for which the publication shall be made; and this rule shall furnish a guide for any similar case, whether the time required be more or less than three weeks."

[3] It is claimed that the will of John B. Stevens, deceased, created an express trust for the payment of the debts, rendering it unnecessary to have claims against his estate probated and registered as required by law. We quote the parts of the will which appellee argues create the express trust:

The first paragraph in the will reads:

"It is my will and I do hereby direct that all my funeral expenses and just debts shall be paid by executor hereinafter named, as soon after my decease as may be found convenient out of any moneys it may receive as such executor."

In the sixth paragraph the testator appointed the Central Trust Company of Mobile as executor of the will, and directed that a certain amount should be paid it as compensation, and, continuing, said:

"The said executor shall have power, and it is hereby authorized, after the payment of all debts due by my estate to divide among the beneficiaries under this will any property which may be left on hand, giving to each beneficiary as nearly as may be property of equal value, and it may in its discretion, in making divisions under this will, sell a portion of the property for the purpose of equalizing the interests of the said beneficiaries, and said executor is hereby authorized and empowered to sell any of my real estate for the purpose of division or otherwise, without any order of court, and said sale or sales may be made by public auction or privately, and may make deeds, as such executor, to the purchasers at any of such sales; and may make deeds to any of the beneficiaries under this will to any property, real or personal, which said beneficiaries may receive in a division of my said estate."

This will does not create an express trust for the payment of debts. The provisions in this will are similar to those in the case of *Packing Co. v. Miller's Estate*, 103 Miss. 435, 60 South. 574, and *Cohn v. McClintock*, 66 South. 217. In the opinions in those cases we have fully expressed our views on this subject, and we now refer thereto for the reasons for our holding here.

[4] Appellant maintains that the claim of appellee should be disallowed because there was a failure on the part of the clerk to enter an indorsement upon the claim showing that it had been probated, allowed, and registered. The statute (section 2106, Code of 1906), after providing that one who desires to probate his claim against the estate of a deceased person shall present it to the clerk and make affidavit thereto, then continues as follows:

"Thereupon, if the clerk shall approve, he shall indorse upon the claim the words following: 'Probated and allowed for \$____, and registered this ____ day of ____, A. D. ____,'—and shall sign his name officially thereto. Probate, registration, and allowance shall be sufficient presentation of the claim to the executor or administrator."

In the case at bar the clerk did not make any entry whatever upon the claim showing that it had been probated, allowed, and registered. In the book in the office of the chancery clerk, containing the record of the claims registered against the estate of deceased persons, there is an entry showing that the claim of appellee was registered.

The requirements of the statute (section 2116) was held to be mandatory in the case of *Cheairs v. Cheairs*, 81 Miss. 662, 33 South. 414. After the presentation by the creditor of his claim, supported by the necessary affidavit, it is before the clerk for his approval, and, if he approves it, he is required to indorse thereon words showing the probate, allowance, and registration and to sign his name thereto. The administrator is not permitted to pay a claim unless it has been probated, allowed, and registered. Section 2105 of the Code of 1906, after providing that the administrator shall speedily pay the debts due by the estate, etc., continues:

"But he shall not pay any claim against the deceased unless the same has been probated, allowed, and registered."

Such probate, allowance, and registration is an official act of the clerk, and it is shown by his indorsement upon the claim itself; such indorsement being the mandatory requirement of the statute. The entry of the claim in the record of registration of claims will not avail to render it unnecessary for the clerk to approve the claim and enter his indorsement thereon, as required by law.

From time to time this court has held that the probate of claims has not been sufficient, but generally upon the ground of error in the affidavit required to be made. We are considering for the first time the exact point presented in this case; that is, whether a claim, without any indorsement whatever thereon by the clerk showing that it was probated, allowed, and registered, is sufficient to constitute a valid claim against the estate and a legal voucher for the administrator in his settlement.

In the case of *Davis v. Blumenberg*, 65 South. 503, we held that an indorsement on a claim in the following words:

"I have this day examined the annexed account, and hereby allow the same, for the sum of thirteen & 00/100"

—was sufficient compliance with the statute. We quote from the opinion in that case as follows:

"The word 'probate,' in this connection, simply means that the account has, in the judgment of the clerk, been proven in the manner required by law, and the fact that he allowed and

registered it evidences the fact that he decided that it had been so proven, so that his omission to so certify is immaterial. We do not mean to depart from the strict construction heretofore given this statute; but to hold the certificate here complained of invalid would be to sacrifice substance to form, in a case wherein it is manifest that the statute had in all respects been complied with by the persons presenting the claims to be probated, and that the clerk, before allowing them, had so determined."

In the case at bar it is not manifest that the clerk approved the probate and then allowed the claim. The statute required that this should be shown by his indorsement on the claim. We hold that the failure of the clerk to make any indorsement whatever, showing the probate, registration, and allowance of the claim, will render the claim invalid as a charge against the estate of the deceased person.

The chancellor should have overruled the demurrer.

Reversed and remanded.

TILLMAN v. TOWN OF LONG BEACH.

(No. 17838.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Fred Tillman was convicted of carrying concealed weapons in the Town of Long Beach, and appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

DREYFUS v. CITY OF JACKSON.

(No. 16839.)

(Supreme Court of Mississippi. Jan. 30, 1915.)

Appeal from Chancery Court, Hinds County; P. Z. Jones, Chancellor.

Bill by Solomon Dreyfus against the City of Jackson. From a decree dismissing the bill, complainant appeals. Appeal dismissed.

Watkins & Watkins, of Jackson, for appellant. William Hemingway, City Atty., of Jackson, for appellee.

PER CURIAM. Appeal dismissed.

PRICE v. STATE. (No. 17861.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Yalobusha County; N. A. Taylor, Judge.

George Price was convicted of carrying concealed weapons, and appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.

BRYANT et al. v. STATE. (No. 17959.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Scott Bryant and another were convicted of maintaining a slaughterhouse on the banks of a running stream, and appeal. Appeal dismissed.

PER CURIAM. Appeal dismissed.

WILLIAMS v. STATE. (No. 17837.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Oliver Williams was convicted of carrying concealed weapons, and appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.**CROSSLEY et al. v. STATE. (No. 17593.)**

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Bolivar County; W. D. Cutrer, Special Judge.

Ed Crossley and another were convicted of resisting an officer in an attempt to serve a warrant, and appeal. Appeal dismissed.

A. B. Sparkman, of Cleveland, for appellants.

PER CURIAM. Appeal dismissed.**GAMMILL LUMBER CO. v. ADAMS, State Revenue Agent. (No. 17474.)**

(Supreme Court of Mississippi. Dec. 1, 1914.)

Appeal from Chancery Court, Rankin County; Sam Whitman, Chancellor.

Action between the Gammill Lumber Company and Wirt Adams, State Revenue Agent. From the judgment, the Company appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.**HUGHES v. PLANTERS' BANK.**

(No. 17877.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Judge.

Action between F. B. Hughes and the Planters' Bank. From the judgment, Hughes appeals. Appeal dismissed.

Maynard & Fitz Gerald, of Clarksdale, for appellant. Salter & Longino, of Clarksdale, for appellee.

PER CURIAM. Appeal dismissed.**FOX v. STATE. (No. 17867.)**

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Leake County; C. L. Dobbs, Judge.

Will Fox was convicted of arson, and appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.**SAUCIER v. STATE. (No. 17799.)**

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Frank Saucier was convicted of grand larceny, and appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.**YAZOO & M. V. R. CO. v. WHITE.**

(No. 16704.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Tate County; N. A. Taylor, Judge.

Action by R. P. White against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. J. F. Dean, of Senatobia, for appellee.

PER CURIAM. Affirmed.**EAST TENNESSEE NURSERY CO. v.****ROBBINS. (No. 17906.)**

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Union County; H. K. Mahon, Judge.

On motion to reinstate. Motion sustained, and case reinstated.

For former opinion sustaining motion to docket and dismiss, see 66 South. 815.

C. Lee Crum, of New Albany, for the motion. Stephens & Kenneday, of New Albany, opposed.

PER CURIAM. Motion sustained, and case reinstated.**YAZOO & M. V. R. CO. v. BARIHAM.**

(No. 17905.)

(Supreme Court of Mississippi. Feb. 1, 1915.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

On motion to reinstate. Motion sustained, and case reinstated.

For former opinion granting motion to docket and dismiss, see 66 South. 814.

Mayes & Mayes, of Jackson, for the motion. P. H. Lowrey, of Marks, opposed.

PER CURIAM. Motion sustained, and case reinstated.

(68 Fla. 248, 249)

STONE et al. v. STATE ex rel. LIPSCOMB.

(Supreme Court of Florida. Nov. 11, 1914.)

On Rehearing, Dec. 12, 1914.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR \S 784—JURISDICTION—WRIT OF ERROR—DISMISSAL.**

Where the writ of error does not appear to have been recorded as required by the statute to give the appellate court jurisdiction of the defendant in error, and there is no appearance in the appellate court for the defendant in error, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. \S 784.]

On Rehearing.

2. APPEAL AND ERROR \S 784—DISMISSAL.

Where a writ of error is entered in the Chancery Order Book, instead of being recorded in the Minute Book of the court, as expressly required by the statute, and there is no appearance in the Supreme Court by or for the

defendant in error, the writ of error will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. §§ 784.]

Error to Circuit Court, De Soto County; Frank A. Whitney, Judge.

Action by the State, on the relation of James H. Lipscomb, against George Stone and others. Judgment for relator, and defendants bring error. Writ of error dismissed, and rehearing denied.

Wallace Chadman, of Punta Gorda, for plaintiffs in error.

WHITFIELD, J. [1] Mandamus proceedings were brought November 11, 1913, to require the town authorities to place the relator's name on the ballots as a candidate for marshal at a town election held November 25, 1913, based upon a petition indorsing the relator as a candidate for marshal. The statute authorizing the municipality to elect a marshal was amended in June, 1913, so as to make the marshal appointive, and the advertisement for the election made no provision for electing a marshal. A peremptory writ of mandamus was issued November 21, 1913, on the theory that the amending act of 1913 is unconstitutional; but a stay of proceedings was ordered by the trial judge. On May 14, 1914, a writ of error was taken by the respondents. But the writ of error does not appear to have been recorded as required by law, so as to give this court jurisdiction of the defendants in error; and there being no appearance here for the defendants in error, the writ of error should be and is hereby dismissed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

On Rehearing.

PER CURIAM. The writ of error herein was dismissed because it did not appear that it had been recorded as required by the statute (section 1704, Gen. Stats. of 1906) so as to give this court jurisdiction of the defendant in error; there being no appearance here for the defendant in error. On petition for rehearing, the original writ of error is sent up, as should have been done with the transcript; but the indorsement on the writ of error shows that it "has been recorded in

C. O. Book 2, at page 776." The statute expressly requires that:

"All writs of error from the circuit courts to the Supreme Court in civil causes shall be recorded by the clerk of the circuit court to whom such writ of error is addressed in the minute book of the court within ten days after its issuance and receipt by him, and such recording by the clerk of the writ of error shall be deemed, taken and held to be sufficient notice to the defendant in error of the pendency of such writ of error proceeding in the Supreme Court, and the Supreme Court shall thereby acquire complete jurisdiction over the person of such defendant in error."

[2] In chancery causes the entry of appeal is required to "be forthwith entered in the Chancery Order Book." Section 1911, Gen. Stats. of 1906. Where an entry of appeal is recorded in the Minute Book of the court and is not "entered in the Chancery Order Book," as required by the statute, and the appellee has not appeared in the appellate court, the appeal will be dismissed. See *Ayers v. Hope*, 67 Fla. 59, 64 South. 443. Section 1831 of the General Statutes requires the clerk of the circuit court to keep "Minute Books" and also a "Chancery Order Book," and it is to these books that reference is made in sections 1704 and 1911 requiring writs of error to be recorded "in the Minute Book of the court," and requiring entries of appeal to be "entered in the Chancery Order Book." See *State ex rel. Andreu v. Canfield*, 40 Fla. 36, 23 South. 591, 42 L. R. A. 72.

The writ of error issued herein appears to have been "recorded in C. O. Book 2, at page 766," and it does not appear that the writ of error has been recorded "in the Minute Book of the court," and there has been no appearance here for the defendant in error. Assuming that the "C. O. Book" mentioned in the certificate as to the record of the writ of error has reference to the "Chancery Order Book," an entry of the writ of error therein does not give this court jurisdiction of the person of the defendant in error. The writ of error must be "recorded in the Minute Book of the court," as expressly required by the statute, to give this court jurisdiction of the defendant in error, where there is no appearance in this court of or for the defendant in error. It does not appear that this court has jurisdiction of the defendant in error in this cause; therefore a rehearing must be, and is, hereby denied. All concur.

(8 Fla. 411)

PENINSULAR CASUALTY CO. v. STATE.
(No. 1.)

(Supreme Court of Florida. Dec. 1, 1914.)

*(Syllabus by the Court.)***1. CONSTITUTIONAL LAW** \S 230 — LICENSES \S 7—LICENSE TAX—UNIFORMITY—EQUAL PROTECTION.

License taxes are not required to be equal or uniform, but they cannot lawfully be imposed so as to deny equal protection of the law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 687; Dec. Dig. \S 230; Licenses, Cent. Dig. \S 7-15, 19; Dec. Dig. \S 7.]

2. LICENSES \S 7—LICENSE TAXES—IMPOSITION — LEGISLATIVE POWER — TRIAL BY COURTS.

The state has a wide discretionary power in imposing license taxes, and, unless there can be no substantial basis for discriminations made in classifications and in fixing the amount of license taxes so that such discrimination must be regarded as purely arbitrary and unreasonable under every conceivable condition in practical affairs, the courts will not interfere with legislative regulations of such matters.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. \S 7-15, 19; Dec. Dig. \S 7.]

3. CONSTITUTIONAL LAW \S 48—EQUAL PROTECTION—BURDEN OF PROOF.

The burden is on one who complains that he has been denied the equal protection of the laws to sustain the complaint.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 46; Dec. Dig. \S 48.]

4. CONSTITUTIONAL LAW \S 70—REASONABLENESS OF STATUTE—REVIEW BY COURTS.

The reasonableness of a statute is determined in its enactment so as to preclude review by the courts, unless the act or its application is so unreasonable and arbitrary as to deny an organic right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 129-132, 137; Dec. Dig. \S 70.]

5. CONSTITUTIONAL LAW \S 230—INSURANCE \S 4—LICENSES \S 7—EQUAL PROTECTION—INSURANCE COMPANIES.

The statute requiring insurance companies to pay "two per cent. of the gross amount of receipts of premiums from policy holders in this state" is not such an arbitrary and hostile discrimination against, or excessive burden upon, insurance companies as a class as to constitute a denial to any person of the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 687; Dec. Dig. \S 230; Insurance, Cent. Dig. \S 4; Dec. Dig. \S 4; Licenses, Cent. Dig. \S 7-15, 19; Dec. Dig. \S 7.]

Error to Circuit Court, Leon County; John W. Malone, Judge.

Action by the State against the Peninsular Casualty Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

The declaration herein is as follows:

"The state of Florida, by its attorney, T. F. West, Attorney General of said state, sues the

defendant, the Peninsular Casualty Company, a corporation, for that:

"(1) The said defendant was, during the year of 1910, an industrial, sick, and funeral benefit insurance company, organized and doing business under the laws of the state of Florida, and did during said year, as such industrial, sick, and funeral benefit insurance company, conduct, engage in, and carry on the business of industrial, sick, and funeral benefit insurance within said state, and did during said year, within said state, issue, sell, deliver, and carry in force industrial, sick, and funeral benefit insurance policies for which it was paid and received pay or premium money from the purchasers and stockholders of said policies within said state during the said year of 1910 premiums in the gross amount of two hundred three thousand two hundred fifty-two and 69/100 (\$203,252.69) dollars, which said sum is the gross amount of receipts received by the said defendant from its policy holders within said state during said year; that the said defendant is required to, and should, have paid on January 1, 1911, to the state treasurer of the state of Florida, for said state, a privilege or license tax of two (2) per cent. of the gross amount of receipts received from its policy holders in said state during said year, amounting to four thousand sixty-four and 5/100 (\$4,064.05) dollars, but the said defendant has failed and refused to pay to the said state the said amount or any part thereof, although often requested so to do.

"Wherefore plaintiff sues and claims damages under this count in the sum of seven thousand and no/100 (\$7,000.00) dollars.

"(2) That the said defendant is indebted to the state of Florida in the sum of four thousand sixty-four and 5/100 (\$4,064.05) dollars as a license or privilege tax of two (2) per cent. of the gross amount of receipts or premiums received from its policy holders in the state of Florida for the year of 1910, said gross receipts being two hundred three thousand two hundred fifty-two and 69/100 (\$203,252.69) dollars, but the said defendant has failed and refused to pay the said amount or any part thereof, although often requested so to do.

"Wherefore plaintiff sues and claims damages under this count in the sum of seven thousand and no/100 (\$7,000.00) dollars.

"(3) The said defendant was, during the year of 1911, an industrial, sick, and funeral benefit insurance company, organized and doing business under the laws of the state of Florida, and did, during the said year, as such industrial, sick, and funeral benefit insurance company, conduct, engage in, and carry on the business of industrial, sick and funeral benefit insurance within said state, and did, during said year, within said state, issue, sell, deliver, and carry in force industrial, sick, and funeral benefit insurance policies, for which it was paid and received pay or premium money from the purchasers and holders of said policies within said state and during the said year of 1911 premiums in the gross amount of two hundred fifty-eight thousand five hundred thirty-six and 65/100 (\$258,536.65) dollars, which said sum is the gross amount of receipts received by the said defendant from its policy holders within said state during said year; that the said defendant is required to, and should, have paid on January 1, 1912, to the state treasurer of the state of Florida, for said state, a privilege or license tax of two (2) per cent. of the gross amount of receipts received from its policy holders in said state during said year, amounting to five thousand one hundred seventy and 73/100 (\$5,170.73) dollars, but the said defendant has failed, and refused to pay to the said state the said amount or any part thereof, although often requested so to do.

"Wherefore plaintiff sues and claims damages under this count in the sum of eight thousand and no/100 (\$8,000.00) dollars.

"(4) That the said defendant is indebted to the state of Florida in the sum of five thousand one hundred seventy and 73/100 (\$5,170.73) dollars as a license or privilege tax of two (2) per cent. of the gross amount of receipts or premiums received from its policy holders in the state of Florida for the year 1911, said gross receipts being two hundred fifty-eight thousand five hundred thirty-six and 65/100 (\$258,536.65) dollars, but the said defendant has failed and refused to pay the said amount or any part thereof, although often requested so to do.

"Wherefore plaintiff sues and claims damages under this count in the sum of eight thousand and no/100 (\$8,000.00) dollars."

A demurrer to the declaration was overruled, and the defendant filed the following pleas:

"The defendant, by John W. Dodge, its attorney, for pleas to the declaration of the plaintiff herein and each count thereof, says:

"First. That it never was indebted as alleged.

"Second. That it never promised as alleged.

"Third. That defendant is not liable for the payment of a tax of 2 per cent. of the gross amount of receipts received from its policy holders in the state of Florida, as alleged in said declaration, for that chapter 5597 of the Acts of the Legislature of the state of Florida, approved June 1, 1907, is invalid, null, and void, wherein and whereby it is provided that an insurance company such as the defendant herein shall, on the 1st day of January after the passage of said act, and on the 1st day of each succeeding January thereafter, pay to the state treasurer 2 per cent. of the gross amount of receipts of premiums from policy holders in the state of Florida, under which said act the plaintiff herein sues the defendant; and the defendant alleges that said act of the Legislature of the state of Florida, (chapter 5597) is in direct conflict with and in violation of the Constitution of the United States (section 1 of article 14 of the amendments to the Constitution of the United States), in that the said act of the Legislature of the state of Florida denies to this defendant and the stockholders of defendant the equal protection of the laws of the land, and deprives the defendant and its stockholders of its and their property without due process of law; and the defendant alleges that the said act of the Legislature of the state of Florida, under and by virtue of which the plaintiff herein bases its action, is class legislation and a discrimination as against this defendant, in that the said act of the Legislature imposes an unreasonable and arbitrary license tax against this defendant, which license tax is a discrimination as against this defendant by reason of the fact that defendant is an insurance company, and the said license tax so sought to be imposed under and by virtue of said act of the Legislature of Florida is unreasonable, arbitrarily and disproportionately imposed upon this defendant, where said license tax is considered in relation to the taxes assessed or levied or imposed, whether as license taxes or otherwise, upon the real and personal property in the state of Florida and upon occupations and businesses required to pay a license tax; that said act of the Legislature of the state of Florida imposing a license tax against insurance companies as provided therein did require the payment by insurance companies for the years 1907, 1908, 1909, 1910, 1911, and 1912, license fees amounting to between 25 and 40 per cent. of the total amount of all license

taxes required under the laws of the state of Florida; that attached hereto and made a part hereof, the same as though fully set forth herein, and marked 'Exhibit A,' is a statement showing the total amount of insurance taxes, and the total amount of other license taxes, and the total amount of direct taxes upon real and personal property in the state of Florida, and the total receipts from the general revenue fund, one-mill school fund, state board of health fund, and the pension tax fund; and the defendant alleges that one-twelfth of the entire said taxation is derived from license taxes upon insurance companies in addition to the municipal tax which insurance companies may pay and the taxes on real estate and personal property and the amount so required to be paid by insurance companies as a class, shown to be, by said statement hereto attached (Exhibit A), a discrimination against insurance companies and an unreasonable and disproportionate tax of said companies; that said tax is unnecessary, as against insurance companies, to meet any reasonable or legitimate expense for the supervision or regulation of insurance companies in the state of Florida, and the said state of Florida does not and has not expended for the purpose of supervision and regulation of insurance companies more than 10 per cent. of the total amount of license tax collected from insurance companies and in pursuance of said act of the Legislature of Florida under which plaintiff herein sues; and defendant alleges that the said license tax sought to be recovered by the plaintiff is such that the amount of fee or charge sought to be exacted is largely and unreasonably in excess of the necessary expenses of issuing a license and the additional labor of officers and other expenses imposed or resulting from the business of defendant and insurance companies or persons enumerated in said act and subjected to said license tax; that the amount of fee or charge exacted under said act of the Legislature of the state of Florida from said insurance companies is far beyond the limit of the expenses of issuing a license, the labor of officers, and other expenses imposed by the business sought to be taxed as aforesaid; and defendant further alleges that the license tax sought to be exacted of defendant is exorbitant as compared with other license taxes, and the same is an unjust and arbitrary license tax as a discrimination against insurance companies as a class, compared with other classes of which license taxes are exacted; that the equal protection of the laws of the land is denied to the class of insurance companies or persons taxed as set forth in said act of the Legislature of the state of Florida under which plaintiff seeks to maintain this action against this defendant; that the said license tax sought to be recovered is as to the amount thereof, and the fee exacted, as to the class of insurance business specified in said act, of which class this defendant is a member, a classification without any reasonable basis and purely arbitrary, and the said classification of insurance business does not rest upon any reasonable basis, but is essentially arbitrary; and the defendant alleges that the license tax imposed under said classification and sought to be recovered by the plaintiff is a license tax imposed under a classification made by said act of the Legislature of the state of Florida, which classification is, and at the time the law was enacted was, without any reasonable basis and purely arbitrary, and said classification does not, and at the time the law was enacted did not, rest upon any reasonable basis, but is, and at the time the law was enacted was, essentially arbitrary; that this defendant alleges that the license taxes, as collected by the state of Florida, show the matters and things as herein alleged, all of which the defendant stands ready to prove."

Exhibit A, referred to in the third plea, is as follows:

General Revenue Fund 1907.	
Insurance taxes.....	\$ 123,830.07
Other license taxes.....	320,792.74
Total license taxes.....	\$ 444,622.81
Direct taxes (state millage).....	\$ 215,550.74
Total receipts general revenue fund	\$ 818,940.60
1 mill school fund.....	116,085.92
State board of health fund.....	70,826.94
Pension tax fund.....	429,921.32
General Revenue Fund 1908.	
Insurance taxes.....	\$ 139,228.12
Other license taxes.....	389,818.35
Total license taxes.....	\$ 529,046.47
Direct taxes (state millage).....	\$ 302,497.93
Total receipts general revenue fund	975,696.18
Total receipts 1 mill school fund..	157,041.30
" " state board of health fund.....	76,305.81
Total receipts pension tax fund..	605,328.44
General Revenue Fund 1909.	
Insurance taxes	\$ 141,254.61
Other license taxes	304,581.87
Total license taxes.....	\$ 445,836.48
Direct taxes (state millage).....	\$ 309,288.86
General revenue fund, total receipts	910,660.03
1 mill school tax fund, total receipts	158,787.51
State board of health fund, total receipts	77,579.61
Pension tax fund, total receipts..	678,600.88
General Revenue Fund 1910.	
Insurance taxes.....	\$ 151,217.30
Other license taxes.....	327,677.08
Total license taxes.....	478,894.38
Direct taxes (state millage).....	\$ 325,279.31
Total receipts general revenue fund	\$1,911,184.18
Total receipts 1 mill school fund..	169,114.26
" " state board of health fund	82,814.28
Total receipts pension tax fund..	650,573.25
General Revenue Fund 1911.	
Insurance taxes.....	\$ 181,245.44
Other license taxes.....	398,027.76
Total license taxes.....	\$ 579,273.20
Direct taxes (state millage).....	\$ 351,522.02
Total receipts general revenue fund	\$1,188,162.06
Total receipts 1 mill school tax fund	184,548.65
Total receipts state board of health fund	88,099.03
Total receipts pension tax fund..	703,167.20

A demurrer to the third plea was sustained. The plaintiff joined issue on the first and second pleas. A trial was had by the court on an agreed statement of facts, and judgment was rendered for the plaintiff. The defendant took writ of error.

John W. Dodge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., for the State.

WHITFIELD, J. (after stating the facts as above). [1, 2] The question presented for determination is whether the third plea is a sufficient defense to the action brought by the state to recover license taxes under the statute which requires the defendant and other insurance companies to pay "two per cent. of the gross amount of receipts of premiums from policy holders in this state." Chapter 5597, Acts of 1907; Peninsular Industrial Ins. Co. v. State, 61 Fla. 376, 55 South. 398. The contention is that the statute so arbitrarily discriminates against insurance companies as a class, in imposing license taxes, that such companies and their stockholders are thereby denied the equal protection of the laws in violation of the United States Constitution. As the license is imposed for revenue, as well as police, purposes, it is not necessary to consider the averments of the third plea that said tax "is unnecessary as against insurance companies to meet any reasonable or legitimate expense for the supervision or regulation of insurance companies"; that for such supervision and regulation the state has not expended more than 10 per cent. of the total license tax collected from insurance companies; and that the license tax here sought to be exacted "is largely and unreasonably in excess of the necessary expenses of issuing a license and the additional labor of officers and other expenses imposed or resulting from the business of defendant and insurance companies." The plea avers that the quoted statute "denies to this defendant and the stockholders of defendant the equal protection of the laws of the land, and deprives the defendant and its stockholders of its and their property without due process of law," in violation of the fourteenth amendment to the federal Constitution, in that the statute "is class legislation and a discrimination as against this defendant." Averments of conclusions are not admitted by the demurrer where the act assailed or the facts stated do not sustain the asserted conclusions. The act does not on its face appear to be invalid as being in conflict with organic law, and the facts do not warrant the asserted conclusions that the license tax exacted of the defendants is "exorbitant as compared with other license taxes," or that it is arbitrary and a discrimination against insurance companies as a class, or that the classification is unreasonable and purely arbitrary. A comparison of the terms of this provision with other statutory provisions imposing license taxes does not show an unlawful discrimination. It is also averred that the license tax "is unreasonably, arbitrarily, and disproportionately imposed upon this defendant, where said license tax is considered in relation to the taxes assessed or levied or imposed, whether as license taxes or otherwise, upon real and personal property in the state of Florida and upon occupations and businesses required to pay a license

tax"; that the statute "did require the payment by insurance companies for the years 1907, 1908, 1909, 1910, 1911, and 1912 license fees amounting to between 25 and 40 per cent. of the total amount of all license taxes required under the laws of the state of Florida; * * * that one-twelfth of the entire said taxation is derived from license taxes upon insurance companies in addition to the municipal tax which insurance companies may pay and the taxes on real estate and personal property, and the amount so required to be paid by insurance companies as a class is shown by an attached statement to be a discrimination against insurance companies and an unreasonable and disproportionate tax of said companies."

No question of interstate commerce arises in this case. License taxes are not required to be equal or uniform, but they cannot lawfully be imposed so as to deny the equal protection of the law. The state has a wide discretionary power in imposing license taxes, and, unless there can be no substantial basis for discriminations made in classifications and in fixing the amount of license taxes, so that such discriminations must be regarded as purely arbitrary and unreasonable under every conceivable condition in practical affairs, the courts will not interfere with legislative regulations of such matters. *Ferguson v. McDonald*, 66 Fla. 494, 63 South. 915; *Singer Sewing Machine Co. v. Brickell*, 233 U. S. 304, 34 Sup. Ct. 493, 58 L. Ed. 974; *Ohio River & Western Railway Co. v. Dittey*, 232 U. S. 576, 34 Sup. Ct. 372, 58 L. Ed. 737; *Metropolis Theater Co. v. City of Chicago*, 228 U. S. 61, 33 Sup. Ct. 441, 57 L. Ed. 730; *Bradley v. City of Richmond*, 227 U. S. 477, 33 Sup. Ct. 318, 57 L. Ed. 603.

[3] The burden is on one who complains that he has been denied the equal protection of the laws to sustain the complaint. The averments of the plea that the license tax imposed on insurance companies is disproportionate to the taxes paid upon other occupations or businesses do not show a denial of equal protection of the laws, since others who pay license taxes are not similarly conditioned. It may well be that the insurance companies pay very little property tax and make large profits on premiums collected in the state which would be a proper basis for the license tax complained of. The plea does not negative this as a valid basis for classification or for the amounts of the taxes. The volume of the defendant's business, its profits, its tax burdens, and its corporate and business advantages, when considered separately or with other occupations and businesses, are not stated, if that would tend to show arbi-

trary and unjust discriminations and hostile exactions of taxes. The figures showing collections of license and other taxes by the state do not show arbitrary and hostile exactions of the defendant or of insurance companies as a class to which the defendant belongs. The business and governmental conditions of the state may warrant the classifications made and the license taxes imposed, and nothing stated in the plea removes the presumption in favor of the statute. Similar and additional license taxes are imposed by statute upon sleeping and parlor car companies doing business in this state, and such exactions have been sustained by the Supreme Court of the United States in the case of the *Pullman Co. v. Knott*, 235 U. S. 23, 35 Sup. Ct. 2, 59 L. Ed. —, decided November 2, 1914. See *Afro-American Industrial & Benefit Ass'n of the United States v. State*, 61 Fla. 85, 54 South. 383; *Peninsular Industrial Ins. Co. v. State*, 61 Fla. 376, 55 South. 398; *Brown v. Pittsburgh Life & Trust Co.*, 10 Ala. App. 614, 65 South. 699. Express companies are required to pay 2 per cent. upon their gross intrastate receipts. Chapter 6421, Acts 1913.

[4, 5] The reasonableness of the statute is determined in its enactment so as to preclude review by the courts unless the act or its application is so unreasonable and arbitrary as to deny an organic right. *Dutton Phosphate Co. v. Priest*, 67 Fla. 370, 65 South. 282; *Louisville & N. R. Co. v. Garrett*, 231 U. S. 298, 34 Sup. Ct. 48, 58 L. Ed. 229. The terms of the statute and the averments of the third plea that are admitted by the demurrer to be true, do not sustain the conclusions variously asserted in the plea that the statute is such an arbitrary and hostile discrimination against, or excessive burden put upon, insurance companies as a class including the defendant, as to constitute a denial of the equal protection of the laws to such class and to the defendant. *Toyota v. Territory of Hawaii*, 226 U. S. 184, 33 Sup. Ct. 47, 57 L. Ed. 180.

No lack of due process of law is made to appear.

The third plea does not show the statute to be an unconstitutional exercise of governmental power so as to be a defense to the action; therefore an issue of fact could not properly have been made thereon, and there was no error in sustaining the demurrer to the plea.

The judgment is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

PENINSULAR CASUALTY CO. v. STATE.
(No. 2.)

(Supreme Court of Florida. Dec. 1, 1914.)

Error to Circuit Court, Leon County; John W. Malone, Judge.

Action by the State against the Peninsular Casualty Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Dodge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., for the State.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be, and the same is hereby, affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

Judgment affirmed on authority of the opinion filed in No. 1 of the above-entitled cause (67 South. 165).

FLORIDA LIFE INS. CO. v. STATE.
(No. 1.)

(Supreme Court of Florida. Dec. 1, 1914.)

Error to Circuit Court, Leon County; John W. Malone, Judge.

Action by the State against the Florida Life Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John W. Dodge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., for the State.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be, and the same is hereby, affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

Judgment affirmed on authority of the opinion filed in No. 1, Peninsular Casualty Company, a Corporation, Plaintiff in Error, v. State of Florida, Defendant in Error, 67 South. 165.

FLORIDA LIFE INS. CO. v. STATE.
(No. 2.)

(Supreme Court of Florida. Dec. 1, 1914.)

Error to Circuit Court, Leon County; John W. Malone, Judge.

Action by the State against the Florida Life Insurance Company, a corporation. Judgment for plaintiff and defendant brings error. Affirmed.

John W. Dodge, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., for the State.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid, and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be, and the same is hereby, affirmed. It is further ordered by the court that the defendant in error do have and recover of and from the plaintiff in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

Judgment affirmed on authority of the opinion filed in Peninsular Casualty Company, a Corporation, Plaintiff in Error, v. State of Florida, Defendant in Error (No. 1) 67 South. 165.

TERRA CEIA ESTATES et al. v. TAYLOR
et al.

(Supreme Court of Florida. Nov. 17, 1914.)

(Syllabus by the Court.)

1. EQUITY \S 241—DEMURRER INCORPORATED IN ANSWER.

When a defendant in a suit in equity incorporates in his answer to the bill a general demurrer, whereby he attacks the equity of the bill, it is only at the final hearing of the cause that such demurrer can be insisted upon, though it should be called to the attention of the court at that time before the merits are gone into.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 515; Dec. Dig. \S 241.]

2. APPEAL AND ERROR \S 499, 939—PRESENTATION FOR REVIEW—OBJECTION AND RULING BELOW—PRESUMPTION.

Under the provisions of rule 18, Supreme Court Rules, adopted March 2, 1905 (page 11 of such rules prefixed to 51 Fla., 37 South. viii), no objection will be allowed to be taken in the appellate court to the admissibility of any evidence, oral or documentary, found in the record in a chancery cause, unless the record affirmatively shows that the objection thereto was presented to the chancellor, and expressly ruled upon by him in the court below, at or before the final hearing of the cause. Every matter, purporting to be evidence, found copied by the clerk into the record in such cause, will be presumed to have been used in evidence in the court below, unless the record affirmatively shows the contrary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298, 3804-3806; Dec. Dig. \S 499, 939.]

3. APPEAL AND ERROR \S 1009—EQUITY—FINDINGS AND CONCLUSIONS.

While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. \S 1009.]

4. JURY \hookrightarrow 14—PARTITION \hookrightarrow 17—RIGHT TO JURY TRIAL—EXTENT OF RELIEF—DETERMINATION OF TITLE.

While the statutory proceeding for partition may not be used as a substitute for the action of ejectment to try the title to lands, or used merely for the purpose of establishing rights or titles, yet where the bona fide object of a suit is the partition of lands between the common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in actual or constructive possession of the lands, then all controversies between the parties as to the legal title and right of possession may and should be settled by the court, as authorized by the statute, even though some of the joint owners claim adversely under a legal title, or dispute the title or right of the others to possession. And the statute authorizing this to be done in partition proceedings is not violative of the constitutional right to a jury trial.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 40-60, 66-83; Dec. Dig. \hookrightarrow 14; Partition, Cent. Dig. §§ 53-59; Dec. Dig. \hookrightarrow 17.]

5. APPEAL AND ERROR \hookrightarrow 184—PARTITION \hookrightarrow 17—OBJECTION BELOW—STAY OF PROCEEDINGS.

Where, in a partition suit, in order to administer full and complete justice to all the parties litigant and to settle all questions raised, it becomes necessary for the court to determine whether or not any of the land to which one of the defendants asserts the ownership and possession forms a part of the lands of which partition is sought, and it appears that such question cannot be determined in the partition suit, no error is committed by the trial court in making an order staying further proceedings in the partition suit until the interest of such defendant "may be determined in such proceedings as may be properly instituted by the parties." Where the complainant, under such order, files a bill in equity against such defendant so asserting ownership and possession as well as the other defendant to quiet the title to the lands of which partition is sought, and no objection is interposed by either defendant to the jurisdiction of the equity court, an appellate court is warranted in assuming that such defendants consented to such proceedings in the forum of equity and will not permit such question to be raised and inquired into for the first time in the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1149, 1150, 1179-1183; Dec. Dig. \hookrightarrow 184; Partition, Cent. Dig. §§ 53-59; Dec. Dig. \hookrightarrow 17.]

6. PARTITION \hookrightarrow 56—RENDITION OF DECREE—LEAVE TO FILE ANSWER.

Where a defendant has filed an answer in a partition suit wherein he relies upon adverse possession for the requisite statutory period as a defense, and at a hearing upon the pleadings and testimony taken before a special master the finding is against the defendant upon such issue, and an order is made staying further proceedings in such suit until the interest of another defendant to such suit as to the ownership of certain land might be determined in such other proceedings as might be properly instituted by the parties, and the complainant files a bill in equity against each of the defendants to quiet the title to the lands in the partition suit, and the defendant who had already had the issue of adverse possession decided adversely to him files a plea to such bill in which he again relies upon adverse possession, and testimony is taken and the cause comes on for hearing, no error is committed by the trial court in proceeding to render a final decree therein without giving such defendant leave to file an answer, especially since no

request was made by such defendant for leave to file an answer.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 160, 161; Dec. Dig. \hookrightarrow 56.]

7. ACTION \hookrightarrow 57—CONSOLIDATION—PARTITION—QUIETING TITLE.

No error is committed by the trial court in consolidating a suit for partition and a suit to quiet title, at the final hearing, and rendering a final decree, disposing of each of them, when the parties are the same and also the subject-matter.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 264; Dec. Dig. \hookrightarrow 57.]

8. APPEAL AND ERROR \hookrightarrow 1009—FINAL DECREE—EVIDENCE.

In equity, as well as at law, every presumption is in favor of the correctness of the rulings of the trial judge, and a final decree rendered by him, based largely or solely upon questions of fact, will not be reversed unless the evidence clearly shows that it was erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8970-3978; Dec. Dig. \hookrightarrow 1009.]

Appeal from Circuit Court, Manatee County; F. A. Whitney, Judge.

Suit by Nannie E. Taylor and others against Terra Cela Estates, a corporation, and others. From decree for complainants, defendants appeal. Affirmed.

C. C. Whitaker, of Tampa, and Charles T. Curry and Singeltary & Reeves, all of Bradentown, for appellants. J. L. Collier and W. B. S. Crichlow, both of Bradentown, for appellees.

SHACKLEFORD, C. J. On the 31st day of July, 1906, Nannie E. Taylor and others filed their amended bill of complaint against the Terra Cela Estates, a corporation, and Millie A. Prime, wherein, among other allegations which it is unnecessary to set forth or specify, it was alleged that the complainants and the Terra Cela Estates were seised as tenants in common of lots 2 and 4 of section 23 in township 33 south of range 17 east, containing 96.24 acres, situated in the county of Manatee and state of Florida, of which the complainants, who were seven in number, were each entitled to two parts, such lands being treated as consisting of 21 equal shares, making the complainants entitled to 14 of such parts or shares, and the Terra Cela Estates was entitled to 7 of such parts or shares, and it was prayed that such lands might be partitioned between the complainants and such defendant in accordance with the foregoing allegations. It was further alleged that the other defendant, Millie A. Prime, claimed some interest in the lands, the nature and extent of which was unknown to the complainants. The Terra Cela Estates filed an answer, in which it asserted that more than seven years prior to the filing of the bill it had entered into the possession of the lands in question, founding its claim thereto upon a written instrument as being a conveyance thereof, and had held such possession "actually and notoriously against the whole world; that said possession had

been actual, exclusive, visible, notorious, hostile and continued for a period of seven years prior to the 24th day of November, A. D. 1905." Millie A. Prime filed an answer, which contained the following averment:

"This defendant denies that she has or claims any right, title, or interest in or to said lots, numbered 2 and 4 of section 23, township 33 south, range 17 east, in Manatee county, Fla., containing 96.24 acres, or any part or portion thereof; but the defendant says that she does own, claim, and possess considerable land adjoining the said lot 4 on the east, that said lots 2 and 4 were surveyed by the United States 'according to the official plat of the survey of said lands,' and the acreage given in said patent from the United States to the heirs of James A. Taylor, deceased, is 96.24 acres; and this defendant says that, according to the official plat of the survey of said lands, the southeast corner of said lot 4 is located on the section line between sections 23 and 26, at a point 6 chains west of the southeast corner of said section 23, and that the east boundary line of said lot 4 is 6 chains west of the section line forming the eastern boundary of section 23, thereby leaving a strip of land 6 chains wide at the south end, and, on account of the slight variation of the eastern boundary of said lot 4, the said strip is slightly more than 6 chains wide at the north end, which said strip does not belong to or form any part of said lot 4, or of lot 2 according to the government survey and plat thereof, and it is this strip of land, not forming part of it, or included in the survey of said lots 2 and 4 by the government, together with certain other lands likewise not surveyed, and not included in the said lots 2 and 4, which said other lands lie east of the section line between sections 23 and 24 that this defendant owns, claims, and possesses, the lands of said defendant being more particularly described as follows, to wit: Beginning at southeast corner of section 24, run thence east 13 chains, thence north $41\frac{1}{2}$ chains, thence west 13 chains to section line dividing sections 23 and 24, township 33, range 17 east, thence south along said section line $41\frac{1}{2}$ chains to the place of beginning, containing 26.50 acres.

"Also, beginning at southeast corner of section 23, township 33 south, range 17 east running thence west 6 chains, thence north 41.50 chains variation 4 degrees and 30' east, thence east 150 chains to the section line dividing sections 23 and 24 said township and range, thence south along said section to the place of beginning containing 52.20 acres, upon which is located a bearing orange grove: the first piece above described being in section 24, and the last described piece in section 23, all in township 33 south of range 17 east according to a survey of the same. All of which this defendant is ready to aver and prove, and prays to be hence dismissed, with her reasonable costs and expenses in this behalf most wrongfully sustained."

Replications were filed to each of the answers, and a special master was appointed to take the testimony, before whom quite a volume of testimony was adduced by the respective parties litigant. On the 9th day of November, 1912, the court made the following order:

"The above cause coming on to be heard, the court having listened to the oral argument of the counsel representing both complainants and defendants and also upon an inspection of the pleadings and proofs in said cause, together with the written briefs of counsel for all the parties, and the court being satisfied in the premises makes the following findings, viz.: (1) That the Terra Ceia Estates failed to sustain its claim of adverse possession, by sufficient

proof, to the premises described in the pleadings; (2) that the complainants and Terra Ceia Estates are tenants in common of said premises; and (3) that Mrs. Prime claiming through an independent source of title her interests, if any she has, cannot be determined in this suit for partition.

"It is therefore ordered, adjudged, and decreed that the defendant Terra Ceia Estates has failed to establish its claim of adverse possession by sufficient proof, and that it, the said Terra Ceia Estates, and complainants Nannie E. Taylor et al., are tenants in common of the said premises.

"It is further ordered, adjudged, and decreed that further proceedings in this cause be stayed until the interests of Mrs. Prime may be determined in such proceedings as may be properly instituted by the parties."

On the 12th day of November, 1912, Nannie E. Taylor and the other complainants in the suit in which the foregoing order was made filed their bill against the Terra Ceia Estates and Millie A. Prime, in which they alleged that the complainants jointly with the Terra Ceia Estates were the owners of the two lots, being the same lands which were in controversy in the other suit, "that no person is in actual possession of said premises or any part thereof," and that Millie A. Prime claims some interest in and to a portion of such lands, the nature and extent of which is unknown to the complainants, which "claim is hostile and adverse to complainants and casts a cloud upon their title." The prayer of this bill is as follows:

"Now therefore, the premises considered, your complainants pray that the said defendant, Mrs. Millie A. Prime, be required to set forth the nature and extent of her said claim; that the claim of said defendant be declared null and void; and that she be enjoined from asserting any claim to the said premises whatsoever."

To this bill Millie A. Prime filed her answer, containing the same averments which were in her answer to the bill filed in the other suit and which we have copied above. Upon information and belief such defendant admitted that no person was in the actual possession of the lands described in the bill or any portion thereof. To this bill the Terra Ceia Estates filed the following plea:

"That this defendant, at the time of the filing of complainants' bill of complaint and for a long time prior to said date, was, and still is, in the adverse possession of government lots 2 and 4 of section 23, township 33 south, range 17 east, in Manatee county, Fla., holding the adverse possession thereof under color of title, openly, notoriously, and continuously, against the complainants and all other persons claiming any interest therein, all of which matters and things this defendant avers to be true and pleads the same to the whole of said bill, and demands the judgment of this honorable court whether it ought to be compelled to make any answer to said bill of complaint, and prays to be hence dismissed with its reasonable costs in this behalf most wrongfully sustained."

Replications were filed both to the answer and the plea, and a special master was appointed to take the testimony which might be offered by the respective parties. On the 26th day of December, 1913, the following final decree was rendered in the two suits:

"It appearing to the court that both of the above-styled causes are at issue, that the testimony has been taken therein, and each of said causes has been submitted to the court for final hearing, and has been extensively argued by counsel for all of the parties in interest, both complainant and defendant; and it appearing to the court that the equities in each case are with the complainants as against the Terra Ceia Estates, and that the complainants are entitled to a partition of the property involved, as prayed for in the bill; and it further appearing that the court has jurisdiction of the parties to said suits, and each of them, and also of the subject-matter involved in each of said causes, and that one decree can be entered covering and fully adjudicating all of the rights and interests of the various parties to each of said actions; that said partition proceedings were held in abeyance until the Prime interest could be adjudicated as it appeared she was claiming under an independent source of title:

"It is therefore upon consideration, ordered, adjudged, and decreed that the said causes for the purpose of this decree be, and the same are hereby, consolidated.

"It is further ordered, adjudged, and decreed that the property involved in said partition suit, namely, lots numbered 2 and 4 of section 23, in township 33 south of range 17 east, containing 96.24 acres, and lying and being in Manatee county, Fla., is owned by the complainants and the defendant the Terra Ceia Estates, and that each of said complainants and said defendant have an interest and title in said property as follows, to wit: Nannie E. Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Jep Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Jesse Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Reuben Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Eva Augusta Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Nelson Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; Irene Taylor is seised in fee simple of a $\frac{2}{21}$ undivided interest; and the Terra Ceia Estates, a corporation, is seised in fee simple of a $\frac{7}{21}$ undivided interest.

"It is further ordered, adjudged, and decreed that the complainants are entitled to a partition of said property, and it is hereby ordered and decreed that partition be made of the same, allowing and setting off to each of said complainants and to the said defendant, in severalty, a share and interest in and to said property equal to his or her undivided interest in the whole, as hereinabove set forth.

"It is further ordered, adjudged, and decreed that W. A. Halsey and John Frierson and H. S. Clark, all of Manatee county, Fla., being three suitable and competent persons, be, and they are hereby appointed to act as, commissioners in making a partition of said property in accordance with this decree. And after having made a partition of said property allotting and setting off to each of the said parties hereinabove named the share and portion of said property belonging to him or her according to the terms of this decree, it is ordered that the said commissioners shall report their actions to this court without delay.

"It is further ordered, adjudged, and decreed that the complainants and the defendant the Terra Ceia Estates shall each bear and pay their respective parts of the costs of this court in each of the foregoing causes, said cost to be taxed by the clerk of the court, and including a reasonable attorney's fee for the complainants' solicitors, to be hereafter fixed by the court according to the evidence in said partition suit and the report of the commissioners, and that the said cost shall be apportioned and paid by each of said parties in proportion to his or her interest as hereinabove set forth.

"Relative to the issues made in the above-styled suit to quiet title, the court finds that the

defendant Millie A. Prime disclaims all interest, claim, and title in lots 2 and 4, the property involved herein, but sets up and asserts claim to other property adjoining the said lots 2 and 4 on the east, which said property so claimed by the said defendant, Millie A. Prime, is described as follows, to wit: Beginning at the southeast corner of section 24, run thence east 13 chains, thence north $41\frac{1}{4}$ chains, thence west 13 chains to section line dividing sections 23 and 24, township 33, range 17 east, thence south along said section line $41\frac{1}{4}$ chains to the place of beginning, containing 26.50 acres. Also beginning at southeast corner of section 23, township 33 south, range 17 east, running thence west 6 chains, thence north 41.50 chains variation 40 degrees and 30' east, thence east 150 chains to the section line dividing sections 23 and 24, said township and range, thence south along said section to the place of beginning, containing 52.20 acres, upon which is located a bearing orange grove. The first piece above described being in section 24, and the last described piece in section 23, all in township 33 south of range 17 east, according to the survey of same.

"The court, after mature consideration and exhaustive argument by counsel for the respective parties, is of the opinion that the said lands above described as claimed by the defendant Millie A. Prime do not constitute or compose any part of the said lots 2 and 4, but that the said lands are separate and distinct and lie outside of the boundary of said lots 2 and 4.

"It is further, upon consideration, ordered, adjudged, and decreed that the said bill as to the defendant Millie A. Prime be, and the same is hereby, dismissed at the costs of the complainants, and the defendant the Terra Ceia Estates, to be borne and paid by them in proportion to their relative and respective interests in the property, as hereinabove set forth."

From this decree an appeal was entered in the names of both defendants, the Terra Ceia Estates and Millie A. Prime, and an order of severance obtained as to Millie A. Prime. Fifteen errors have been assigned, and elaborate briefs have been filed by the respective parties, including Millie A. Prime, who states that she is satisfied with the decree and asks that it be affirmed.

[1, 2] We have carefully read the transcript and the briefs of the parties litigant and have considered the errors which have been assigned, though we do not consider it necessary to discuss the assignments in detail. A demurrer was incorporated in its answer by the Terra Ceia Estates to the amended bill for partition which does not seem to have been specifically passed upon. As we held in *McRainey v. Jarrell*, 59 Fla. 587, 52 South. 304:

"When a defendant in a suit in equity incorporates in his answer to the bill a general demurrer, whereby he attacks the equity of the bill, it is only at the final hearing of the cause that such demurrer can be called up for disposition, though it should be called to the attention of the court at that time before the merits are gone into."

So far as we are informed by the transcript, this demurrer was not called to the attention of the court at the final hearing of the cause before the merits of the cause were gone into, or even subsequently thereto, and a ruling invoked thereon. This being true, in the absence of any ruling thereon, we cannot consider the grounds of the de-

murrer. Suffice it to say that no fundamental or jurisdictional defects in the bill are pointed out or made to appear. We also call attention to the fact that the special masters appointed were not empowered or authorized to make any rulings or findings, but only to take the testimony, and that they did not attempt to make any rulings upon the many objections interposed to proffered evidence or the motions to strike out; but it does not appear that any of such matters were ever brought to the attention of the circuit judge and ruled upon by him. See *Barnes & Jessup Co. v. Williams*, 64 Fla. 190, 60 South. 787, wherein, following prior decisions of this court, we held as follows:

"Under the provisions of rule 18, Supreme Court Rules, adopted March 2, 1905 (page 11 of such rules prefixed to 51 Fla., 37 South. viii), no objection will be allowed to be taken in the appellate court to the admissibility of any evidence, oral or documentary, found in the record in a chancery cause, unless the record affirmatively shows that the objection thereto was presented to the chancellor, and expressly ruled upon by him in the court below, at or before the final hearing of the cause. Every matter purporting to be evidence, found copied by the clerk into the record in such cause, will be presumed to have been used in evidence in the court below, unless the record affirmatively shows the contrary."

[3, 4] After considering all the evidence adduced which we find copied into the transcript of the record, we are of the opinion that no error has been made to appear in the findings of the circuit judge to the effect that the Terra Ceia Estates had failed to establish its claim of adverse possession of the lands in question for the statutory period by sufficient proof, as it was incumbent upon it to do, and that the complainants and such defendant were tenants in common of such lands. As we have repeatedly ruled:

"While the findings and conclusions of a chancellor, where the testimony is not taken before him, but before a master or examiner, by reason whereof he is not afforded an opportunity of seeing and hearing the witnesses, are not entitled to the same weight as the verdict of a jury, yet even in that case they should not be disturbed by an appellate court, unless they are clearly shown to be erroneous."

See *Barnes & Jessup Co. v. Williams*, supra, and *Baxter v. Liddon*, 62 Fla. 428, 56 South. 410.

We adhere to and fully approve of the following doctrine, which we have several times announced:

"While the statutory proceeding for partition may not be used as a substitute for the action of ejectment to try the title to lands, or used merely for the purpose of establishing rights or titles, yet where the bona fide object of a suit is the partition of lands between the common owners thereof, some of whom are complainants and the others are defendants, and some of the parties to the suit are in actual or constructive possession of the lands, then all controversies between the parties as to the legal title and right of possession may and should be settled by the court, as authorized by the statute, even though some of the joint owners claim adversely under a legal title, or dispute the title or right of the others to possession. And the statute authoriz-

ing this to be done in partition proceedings is not violative of the constitutional right to a jury trial."

See *Christopher v. Mungen*, 61 Fla. 513, 55 South. 273, wherein prior decisions of this court will be found cited.

We think that upon the showing made the circuit judge was warranted in holding that the bona fide object of the suit was the partition of the lands embraced therein between the common owners thereof and in retaining the same and proceeding to determine all the controversies between the parties as to the legal title and right of possession. We would refer particularly to the discussion in *Camp Phosphate Co. v. Anderson*, 48 Fla. 226, 37 South. 722, 111 Am. St. Rep. 77.

[5-7] As to that portion of the order complained of which recites that Millie A. Prime claims through an independent source of title and that her interest, if any she has, cannot be determined in the suit for partition, therefore further proceedings were ordered stayed until the interests of Millie A. Prime might be determined in such proceedings as might be properly instituted by the parties, we think that the course pursued by the circuit judge is to be commended. Having determined, and we think correctly, as we have already said, that the bona fide object of the suit was for partition and wishing to do full and complete justice between the parties, we do not well see how a more appropriate course could have been pursued. In *Sarabota Ice, Fish & Power Co. v. Lyle & Co.*, 53 Fla. 1069, text 1074, 43 South. 602, text 603, we quoted, with our full approval, the following sentence from the opinion of Mr. Justice Gray in *Hefner v. Northwestern Mutual Life Ins. Co.*, 123 U. S. 747, text 756, 8 Sup. Ct. 337, 341 (31 L. Ed. 309):

"As was said by Lord Chancellor Talbot, and repeated by Chief Justice Marshall: 'The court of equity in all cases delights to do complete justice, and not by halves.'"

See, also, our discussion in *Capital City Bank v. Hilson*, 64 Fla. 206, text 225, 60 South. 189, text 195, Ann. Cas. 1914B, 1211.

It will be observed from the answer of Millie A. Prime to the amended bill for partition which we have copied above that, although she expressly disclaimed any right, title, or interest to the two lots in controversy, yet she asserted her ownership and possession of certain described land, none of which she claimed belonged to or was embraced in either of such two lots. It had developed from the evidence which had been taken that a small orange grove was upon this land described by Millie A. Prime, which had formed a bone of contention between Millie A. Prime and the Terra Ceia Estates; the latter claiming that such grove was situated upon the two lots of which partition was sought, and that by reason of its adverse possession of such orange grove for the statutory period it based its exclusive claim to all of the land in controversy. In order

to administer full and complete justice to all the parties litigant and to settle all the questions raised, it became necessary for the court to determine whether or not any of the land described by Millie A. Prime to which she asserted ownership did form a part of the two lots of which partition was sought. The Terra Cela Estates was contending that it did.

It will be observed that the court in its order did not state or intimate what proceedings should be instituted by the parties, but left them free to take whatever course they might be advised. The complainants elected to file a bill against Millie A. Prime and the Terra Cela Estates to quiet the title to the lands of which partition was sought. We have copied above the prayer of the bill which sought relief against Millie A. Prime. No objection was interposed by either defendant to the jurisdiction of the equity court; therefore we must assume that they consented to such proceeding in the forum of equity, and such question cannot now be raised and inquired into for the first time. See *Rivas v. Summers*, 33 Fla. 539, 15 South. 319, and *Williams v. Wetmore*, 51 Fla. 614, 41 South. 545. The Terra Cela Estates filed a plea, which we have copied above, wherein it still relied upon adverse possession of the two lots of which partition was sought, as it had done in its answer filed to the bill in such partition proceedings, and Millie A. Prime filed an answer wherein she made substantially the same defense that she had made in her answer to the bill for partition. As we have already said, replications were filed to both the plea and answer, and a special master was appointed to take the testimony. The cause came on for a final hearing, which resulted in the rendering of the final decree which we have copied above. The Terra Cela Estates complains that the court erred in not allowing or ordering it to answer the bill upon the overruling of the plea. It does not appear that such defendant sought to file an answer. The sole defense set up by it in each suit was adverse possession, and as to that the court had already found against it in the partition suit, just as it did in the last suit. We think that such finding was amply sustained by the evidence. The only possession shown was that of the small orange grove, as to which a "scrambling" possession seemed to have gone on for several years between the agents and employes of the Terra Cela Estates and Millie A. Prime. We do not think that the evidence establishes adverse possession for the statutory period by the Terra Cela Estates of such grove, so, even if it had been shown that such grove formed a part of and was situated upon the two lots of which partition was sought, the defense relied upon by such defendant had failed. This being true, we do not think that the court erred in proceeding to a final de-

cree, without granting leave to or ordering the Terra Cela Estates to file an answer. We fail to see wherein any usual purpose could have been accomplished by so doing. We bear in mind our holding in *Thelsen v. Whiddon*, 60 Fla. 372, 53 South. 642; *South Florida Citrus Land Co. v. Waldin*, 61 Fla. 766, 55 South. 862; *Pinellas Packing Co. v. Clearwater Citrus Growers' Association*, 65 Fla. 340, 61 South. 625. But we do not see how that holding, under the circumstances developed in this case, can avail such defendant. It would seem to have been afforded ample opportunity to make any defense which it had.

[8] We are further of the opinion that the court was warranted in finding from the evidence adduced that the lands described by Millie A. Prime in her answers, of which she claimed the ownership, formed no part of the land described in and embraced in the partition suit. The evidence as it appears in the transcript of the record is somewhat confused; but, after a careful study thereof, we think that it sustains the conclusion reached by the circuit judge. We see no occasion to discuss the evidence or to attempt an analysis of it. As we have oftentimes held:

"In equity, as well as at law, every presumption is in favor of the correctness of the ruling of the trial judge, and a decree rendered by him based largely . . . upon questions of fact will not be reversed, unless the evidence clearly shows that it was erroneous."

See *Thelsen v. Whiddon*, *supra*, and authorities therein cited.

We see no objection to the consolidation at the final hearing of these two suits and in the disposition of each of them by one decree. We will add that the original bill in the partition suit was filed on the 24th day of November, 1905, and the final decree was not rendered until the 31st day of December, 1913; therefore it is high time that this protracted litigation should be terminated. No reversible errors having been made to appear, and believing that substantial justice has been administered to the respective parties litigant, it is ordered that the final decree be affirmed; the costs of these proceedings to be taxed against the Terra Cela Estates. Decree affirmed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(136 La. 387)

No. 20975.

STATE v. MELTON.

In re MELTON.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW §84—JUVENILE COURT LAW.

In parishes to which the provisions of the Constitution relating to juvenile courts have not been extended, as thereby authorized, the criminal jurisdiction, as conferred upon other courts,

by other articles of the Constitution, remains unaffected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. ¶¶ 84.]

2. PROHIBITION ¶ 9—GROUNDS—JEOPARDY.

Where a court has unquestionable and unquestioned jurisdiction quoad a particular offense, prohibition will not lie to prevent its exercise, upon the complaint that the defendant may thereafter be brought to trial upon another pending charge, and thus placed twice in jeopardy.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 85; Dec. Dig. ¶ 9.]

Lee Melton was charged with willfully assaulting, beating, and wounding another, and applies for a writ of prohibition to restrain the judge of the district court from trying him. Application dismissed.

Gresham & Oglesby and W. M. Wallace, all of Winnfield, for applicant. R. G. Pleasant, Atty. Gen. (J. T. Long, Dist. Atty., of Winnfield, and G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. Relator asks that the judge of the district court for the parish of Winn be prohibited from trying him upon a charge of "willfully assaulting, beating, and wounding G. C. Gaar," upon the ground that there is pending against him another and later charge of "willfully, maliciously, with a dangerous weapon and with intent to kill" said Gaar, inflicting upon him a wound less than mayhem, and that he cannot legally be forced to trial upon the one charge while the other is pending, since both charges have arisen out of the same affair, and he might thereby be twice placed in jeopardy with respect thereto. He also alleges "that he is a minor, only 14 years old, and, under the law, cannot be tried, he being exempt from trial, under the juvenile act and laws of the state," etc.

[1, 2] It appears from the return of the judge, made respondent, that there is no incorporated town of more than 7,000 inhabitants in the parish of Winn, and that the police jury has never made application to the Governor to have the operation of the juvenile court law, as (now) contained in article 118 of the Constitution of 1913, extended to that parish; and the offense first charged against relator, denounced by Act No. 107 of 1902, § 2, is therefore, under articles 109 and 116 of the Constitution, within the jurisdiction of the judge of the district court, sitting without a jury, whilst the latter and more serious charge, denounced by R. S. 794, is within the jurisdiction of the district court, sitting with a jury of five. The jurisdiction of the judge quoad the offense for which relator is about to be tried being unquestionable and unquestioned, save in the respect already considered, prohibition will not lie to prevent its exercise. If, upon being brought to trial upon the later charge, relator should consider that he is

being placed twice in jeopardy, he may so plead, and invoke the ruling of the trial court, and, if dissatisfied therewith, may find a remedy, but this court cannot now anticipate what may then happen.

The staying order herein made is therefore rescinded, and this application is dismissed at the cost of relator.

(126 La. 389)

No. 20986.

STATE v. DUPLECHAIN et al.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW ¶ 1166—SEVERAL DEFENDANTS—SEVERANCE—PREJUDICE.

The overruling of motion for a severance by several defendants, on the ground that their codefendant had made a confession implicating them in the commission of the offense charged, worked no prejudice to the movers, when on the trial no such confession was offered in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3100-3102, 3107-3113; Dec. Dig. ¶ 1166.]

2. CRIMINAL LAW ¶ 622—JOINT DEFENDANTS—SEVERANCE.

The mere fact that one defendant is seeking to escape by throwing the blame upon another is not sufficient to require a severance.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1380-1383, 1385, 1386, 1388-1390; Dec. Dig. ¶ 622.]

3. CRIMINAL LAW ¶ 508—WITNESSES—PERSONS ACCUSED OF CRIME—CODEFENDANT—DISQUALIFICATION.

A codefendant, though being jointly tried, is in no wise disqualified from testifying. Section 2, Act No. 185 of 1902, p. 355.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1099-1123; Dec. Dig. ¶ 508.]

Appeal from Fifteenth Judicial District Court, Parish of Allen; Alfred M. Barbe, Judge.

Pete Duplechain and two others were convicted of stealing a cow, and they appeal. Affirmed.

Williams & Williams, of Lake Charles, for appellants. R. G. Pleasant, Atty. Gen., and T. A. Edwards, Dist. Atty., of Lake Charles (G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. [1] The four defendants were charged on information with the offense of stealing a certain cow. Three of the defendants were found guilty as charged, and the fourth was acquitted. Duplechain and Ryder have appealed.

It appears from the record that Duplechain, Davide, and Ryder moved for a severance from Paul Bellou, on the following grounds: That they had been credibly informed that their said codefendant had made a confession of guilt, which would implicate them in the commission of the offense charged in the information; and that their defense was that the said Bellou was the thief, if the cow had been stolen as charged.

It appears from the per curiam of the court that "no confession was offered"; that Bellou testified that he had bought the meat stolen from Duplechain and Ryder, when asked where he had gotten the stolen meat; that the jury was instructed to disregard the testimony in so far as Duplechain and Ryder were concerned; that Duplechain and Ryder said they had bought the meat from Bellou; and that the evidence convinced the court they all had stolen the cow and sought to escape by blaming one another.

As no confession was offered, the appellants were not prejudiced by the overruling of their motion for a severance.

[2, 3] Bellou, though being "jointly tried," was in no wise disqualified from testifying. Section 2, Act No. 185 of 1902, p. 355. See *State v. Johnson*, 116 La. 865, 41 South. 119.

"The mere fact that one defendant is seeking to escape by throwing the blame upon the other is not sufficient to require a severance." *Id.*

Judgment affirmed.

(136 La. 391)

No. 20230.

EHRET v. POLICE JURY OF PARISH OF JEFFERSON.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

COUNTIES 67—PARISH SECRETARY—REMOVAL—POLICE JURY.

The power of removal, conferred by law upon police juries, enters as much into the employment of a secretary as does the power of appointment, and a police jury has no capacity to avoid the law or abrogate its own functions with respect to either. If it were otherwise, an incoming police jury might impose upon its successor a secretary who would be unacceptable to the new members and out of sympathy with the policy of the body.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 100-103; Dec. Dig. 67.]

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; P. E. Edrington, Judge.

Action by Casimir J. Ehret against the Police Jury of the Parish of Jefferson. From a judgment for defendant, plaintiff appeals. Affirmed.

John E. Fleury, of Gretna, for appellant. L. H. Marrero, Jr., Dist. Atty., of Gretna, for appellee.

MONROE, C. J. Plaintiff prosecutes this appeal from a judgment sustaining an exception of "no cause of action," to his demand for \$3,010, balance alleged to be due for salary as defendant's secretary for the four years beginning July 3, 1912, at \$840 per year, payable at the rate of \$70 per month, less \$350 paid him for the months of July,

August, September, October, and November, 1912; the ground upon which he rests his demand being that, having been employed for the term of four years, he was discharged, after five months' service, "without any lawful cause or without any serious ground of complaint, by a resolution of said police jury, adopted on said date [December 4, 1912], which declared his position vacant, and by a further resolution employing William R. Martin as secretary, in his stead, also adopted on said date."

Section 2743 of the Revised Statutes declares that:

"The police juries shall have power to make all such regulations as they deem expedient: * * * Eleventh. To appoint all officers necessary to carry into execution the parish regulations, and to remove them from office."

The power of removal, thus conferred, entered as much into plaintiff's employment as did the power of appointment. It has been said by this court (in a case involving the right of a police jury to remove a parish treasurer) that:

"In conferring on police juries the power of appointment and removal, the Legislature intended to enable those bodies, in cases of expediency and urgency, to act promptly, for the protection and preservation of the public interest."

Referring to an alleged conflict between the provision quoted and article 201 of the Constitution of 1879 (reproduced as article 222 of the present Constitution), providing for the removal of "all other parish, municipal and ward officers," the court said:

"The section of the Revised Statutes refers to functionaries appointed or chosen by a political corporation. The constitutional article applies exclusively to quite different classes of officers, namely, to such as are elected by the people, or appointed by the executive." *Richard v. Rousseau*, 35 La. Ann. 934.

In the later case of *State ex rel. Wilkinson, District Attorney, v. Hingle, In re Hingle, Applying, etc.*, 124 La. 655, 50 South. 616, which also involved the office of parish treasurer, it was found that by Act 121 of 1898, p. 178, the term of that office had been fixed at two years, and the court held that the term expired every two years, and was not extended by the failure of the police jury to re-elect the incumbent. In other words, it was held, in the case cited, as we hold here, that the law entered into the contract of employment and could not be avoided by the acts or omissions of the police jury. If it were otherwise, an incoming police jury might impose upon its successors in office a secretary who would be unacceptable to the new members and out of sympathy with the policy of the body. The judgment appealed from is accordingly

Affirmed.

(108 Miss. 709)

JOHNSON v. STATE. (No. 17952.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

CRIMINAL LAW ⇨589 — CONTINUANCE — RIGHT TO.

Accused should be granted a continuance upon a showing that she was so ill that she would be unable to be present at her trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1315, 1319; Dec. Dig. ⇨589.]

Appeal from Circuit Court, Alcorn County; Claude Clayton, Judge.

Celia Johnson was convicted of unlawfully selling intoxicating liquors, and she appeals. Reversed and remanded.

W. C. Sweat, of Corinth, for appellant. Ross A. Collins, Atty. Gen., for the State.

REED, J. Appellant was convicted on the charge of unlawfully selling intoxicating liquors.

When the case was called for trial her attorney applied for a continuance on the ground that she was ill, confined to her bed, and unable to attend court. He presented certificates from two physicians showing her illness, and one of the physicians testified in court that she had been suffering with a painful illness, and on the day before he examined her and found that she had a high pulse, subnormal temperature, and was in a weakened condition; that from his examination he did not think that she would be able to attend court on the next day. His certificate, made on the day of the trial, stated that she was not able to attend court on that day, and would not be so able possibly for several days.

From this showing it is clear that appellant was too ill to be present at her trial. The motion for a continuance should have been sustained. *Corbin v. State*, 99 Miss. 486, 55 South. 43; *Haggett v. State*, 99 Miss. 844, 56 South. 172; *Polk v. State*, 64 South. 215.

Reversed and remanded.

(108 Miss. 704)

CARSTARPHEN et al. v. JONES et al. (No. 18564.)

(Supreme Court of Mississippi. Jan. 18, 1915.
Suggestion of Error Overruled
Feb. 1, 1915.)

APPEAL AND ERROR ⇨695—FINDINGS—REVIEW—RECORD.

A chancellor's findings in a suit to quiet title would not be reviewed, where the testimony of several witnesses who testified orally on the merits of the case was not in the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2911-2914; Dec. Dig. ⇨695.]

Appeal from Chancery Court, Rankin County; Sam Whitman, Chancellor.

Action by W. M. Carstarphen, as administrator, and others against H. C. Jones and others. A decree was rendered dismissing

ing the complaint, and plaintiffs appeal. Affirmed.

Appellants filed a bill in chancery against appellees for the purpose of quieting title to certain lands described in the bill. The case was tried on pleadings, depositions, and proof in open court, and documentary evidence; and the chancellor rendered a decree dismissing complainants' bill, from which they appeal. The testimony of certain witnesses who testified before the chancellor is not incorporated in the record; and it is urged for that reason the finding of the chancellor below should be affirmed, since that testimony may have controlled his finding, and cannot be reviewed on appeal by the Supreme Court.

Wells & Wells, of Jackson, for appellants. Lamar F. Easterling and George Butler, both of Jackson, for appellees.

COOK, J. The record shows that several witnesses testified orally upon the merits of this case. The testimony of these witnesses is not in the record. The chancellor heard this evidence, and this evidence may have justified his finding, and, as the evidence "is not before us, we are therefore not able to judge of its effect. It may have been controlling with the chancellor." *Wilson v. Brown*, 94 Miss. 608, 47 South. 545.

Affirmed.

(108 Miss. 706)

POPE v. STATE. (No. 17914.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

1. INTOXICATING LIQUORS ⇨239—OFFENSE—INSTRUCTIONS.

Where accused offered no evidence, and the testimony for the state showed that he was given \$2 to buy whisky for another, which he did, delivering the whisky and the change, an instruction that if accused received money from another, and delivered whisky to such person, he was guilty, is not misleading in view of the evidence, though the mere delivery of the whisky itself is not ordinarily sufficient to constitute a sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 331-347; Dec. Dig. ⇨239.]

2. INTOXICATING LIQUORS ⇨169—OFFENSES—UNLAWFUL SALE.

Where accused procured the liquor, which he delivered to a third person, in a town where the sale of liquor was prohibited, he is guilty of the unlawful retailing of intoxicants, though he purchased the liquor as agent for such third person.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 187, 188; Dec. Dig. ⇨169.]

3. INTOXICATING LIQUORS ⇨198—PROSECUTION—AFFIDAVITS—SUFFICIENCY—"INTOXICANT."

An affidavit charging that accused did unlawfully sell one pint of "intoxicant liquors" will support a conviction, although the word "intoxicant" is a noun meaning that which intoxicates, and should not be used to modify the noun "liquors," for accused must have under-

stood that it was intended to charge him with the selling of intoxicating liquors.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 218; Dec. Dig. ¶198.]

4. CRIMINAL LAW ¶1178—APPEAL—WAIVER OF ERROR.

An assignment of error on a ground not mentioned in the brief is waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3011–3013; Dec. Dig. ¶1178.]

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Frank Pope was convicted of unlawfully retailing intoxicating liquor, and he appeals. Affirmed.

Shands & Montgomery, of Sardis, for appellant. Ross A. Collins, Atty. Gen., for the State.

SMITH, C. J. This is an appeal from a conviction of the crime of unlawful retailing. There was no evidence introduced on behalf of appellant. According to the evidence introduced on behalf of the state, appellant was given \$2 by Ben Chamblin with which to purchase for Ben a 50-cent bottle of whisky. This he did, delivering the whisky to Ben, together with the \$1.50 remaining of the money given him with which to make the purchase.

[1] The first assignment of error is that the court erred "in giving instruction No. 1 asked by the state," which instruction is in the following language:

"The court instructs the jury for the state that if they believe from the evidence, beyond a reasonable doubt, that in the town of Sardis, on or before the 25th day of July of 1913, defendant received 50 cents, or any other sum of money, from Ben Chamblin, for which he (defendant) delivered to said Ben Chamblin one pint of whisky, then he is guilty as charged, and the jury should so find."

The objection to this instruction is that the mere delivery of the whisky was not of itself sufficient to constitute a sale; delivery being only one of the elements necessary therefor. This is true as an abstract proposition; and had there been evidence of a delivery other than as a part of a sale, or that the 50 cents was given appellant merely for delivery of whisky, with the purchase of which he was in no way connected, it may be that this objection would not be without merit; but, when viewed in the light of the uncontradicted evidence, the instruction should not have misled the jury.

[2] Appellant is clearly guilty within the rule announced in *Wortham v. State*, 80 Miss. 205, 32 South. 50. While it is true that no witness saw him purchase the liquor, it is manifest that, if he purchased it as he agreed to do, it must have been in the town of Sardis, and therefore in a place where the sale of liquor was prohibited, for he returned with it within 15 minutes after receiving the money.

[3] The second assignment of error is that the court erred "in overruling defendant's motion in arrest of judgment." The affidavit upon which appellant was tried alleged

that he "did unlawfully and willfully sell one pint of intoxicating liquors to Ben Chamblin," etc.; and the ground of this motion in arrest of judgment is that, because of the use of the word "intoxicant" instead of the word "intoxicating," the affidavit failed to charge appellant with the commission of any crime known to the law. In the brief of counsel for appellant it is said that:

"The word 'intoxicant' is a noun, and is descriptive of nothing, when used to modify another noun, as in the affidavit in this case. Great precision should be observed in matters which vitally affect the life and liberty of a citizen. While it is not always necessary to follow the language of the statute in drawing indictments under statutory crimes, it is essential that words substantially synonymous should be used, and that an intelligent charge be described in the pleading."

It is true that "intoxicant" is a noun, and that the rules of grammar were violated by its use in this connection; but we know of no rule of law which requires an affidavit or indictment to be quashed or held to be a nullity merely because the rules of grammar were not observed in drafting it. The word "intoxicant" is defined as "that which intoxicates; an intoxicating agent, as alcohol, opium, etc." Webster's International Dictionary. Appellant could not therefore have failed to understand that by the affidavit he was charged with the selling of liquors that intoxicate; and, if there is any difference between the meaning of such an allegation and one charging him with selling "intoxicating liquors," we fail to perceive it.

[4] The assignment of errors contains two other grounds, neither of which are mentioned in the brief, and must therefore be considered as waived. Affirmed.

(108 Miss. 710)

DAVIS v. STATE. (No. 17723.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

1. EMBEZZLEMENT ¶32—INDICTMENT—SUFFICIENCY.

An indictment alleging that defendant, by virtue of his employment as a clerk and servant of a bank, had the bank's money in his possession, and feloniously embezzled the same and converted it to his own use, was not demurrable as failing to sufficiently aver that the money came into his possession by virtue of his employment as clerk and servant, or as failing to properly state the offense of embezzlement in violation of Code 1906, § 1136.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 47–50; Dec. Dig. ¶32.]

2. CRIMINAL LAW ¶567—PROOF—EXISTENCE OF CORPORATION.

In a prosecution of a bank employé for embezzlement, evidence of the de facto existence of the bank and performance of its functions as such constituted sufficient proof of its corporate existence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1276; Dec. Dig. ¶567.]

3. CRIMINAL LAW ¶278—PLEA IN ABATEMENT—JUDGE—TITLE TO OFFICE.

The title of a presiding judge to his office cannot be questioned by a plea in abatement to an indictment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 638–642; Dec. Dig. ¶278.]

4. CRIMINAL LAW § 678—MOTION TO RE-QUIRE ELECTION—EVIDENCE.

In a prosecution of a bank employé for embezzling \$1,311 by a series of embezzlements extending over a considerable period of time, a motion to compel the state to elect on which particular item it would ask a conviction was properly overruled, though there was evidence authorizing a conviction of more than one distinct embezzlement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.]

5. CRIMINAL LAW § 678 — ELECTION BY STATE — WHAT CONSTITUTES — REQUEST FOR INSTRUCTION.

In a prosecution for embezzlement of \$1,311, committed systematically at various times, the action of the district attorney in requesting and securing an instruction that defendant was guilty if he feloniously embezzled said money "to the amount of \$25" was not an election to stand on one item.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.]

6. CRIMINAL LAW § 1172—HARMLESS ERROR—INSTRUCTION.

In a prosecution of a bank employé for embezzling \$1,311 at various times, an instruction that defendant was guilty if he embezzled money to the amount of \$25, being more favorable than he had a right to demand, was not prejudicial to him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.]

7. CRIMINAL LAW § 1172—HARMLESS ERROR—INSTRUCTION.

Where, in a prosecution for embezzlement, defendant secured instructions containing a clear and forceful statement of the law as to his rights, error, if any, in instructing that the jury should try the case on the evidence, and not on the statements of attorneys, was harmless.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3123, 3154-3157, 3159-3163, 3169; Dec. Dig. § 1172.]

Appeal from Circuit Court, Adams County; R. E. Jackson, Judge.

Major Davis was convicted of embezzlement, and appeals. Affirmed.

This is an appeal from a conviction of embezzlement. The opinion states the facts.

Among other errors assigned, it is claimed that the third instruction requested by the defendant should have been given. Said instruction is as follows:

"(3) The court instructs the jury that they should try this case on the evidence produced from the witnesses, and not on the statements of attorneys."

E. E. Brown, of Natchez, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, J. Appellant was convicted upon an indictment charging him with the embezzlement of \$1,311, the money of the Bluff City Savings Bank, a corporation of which he was the assistant cashier.

[1] Before his arraignment the defendant interposed a demurrer to the indictment, upon these grounds, viz.:

"(1) Said indictment fails to aver in proper form, and at proper place, that the money al-

leged to have been embezzled 'had come into his possession and had been intrusted to his care by virtue of his employment as such clerk and servant.'

"(2) The indictment fails to properly state the offense of embezzlement.

"(3) For other causes to be shown on hearing."

Omitting the formal part, the indictment charges:

"That Major Davis, late of the county aforesaid, on the 23d day of March, 1914, in the county aforesaid, being then and there the clerk and servant of the Bluff City Savings Bank, a Mississippi corporation, did then and there, by virtue of his employment as such clerk and servant, have in and under his care and possession, of the property of the said Bluff City Savings Bank, money in the amount of thirteen hundred and eleven dollars, and of the value of thirteen hundred and eleven dollars, and did afterwards, then and there, without the consent of the said Bluff City Savings Bank, feloniously embezzle the same, and fraudulently and feloniously convert the same to his own use."

We think the indictment sufficiently charges the crime of embezzlement under section 1136, Code 1906, and that the court did not err in overruling the demurrer.

[2] Over the objection of defendant, the court permitted a witness, who, it appears, was the cashier of the bank, to testify that the Bluff City Savings Bank was a corporation, and it also unquestionably appears from the whole record that the banking business in question was conducted under the name of the Bluff City Savings Bank. Where proof of the corporate existence of a bank is required, its mere de facto existence and the performance of the functions of a bank will meet the requirement. Bishop's New Criminal Procedure, vol. 3, § 456; Wharton's Criminal Evidence, vol. 1, § 164a; Encyclopedia of Evidence, vol. 3, p. 604.

[3] The defendant pleaded in abatement of the indictment the alleged fact that the presiding judge was not a judge at all. This plea is based upon the averment that the judge was appointed November 13, 1913, during the recess of the Senate; that this appointment was, by the Governor, transmitted to the Senate at the January, 1914, session thereof; and that the Senate finally adjourned without confirming the appointment. Without discussing whether the presiding judge was a de jure judge, or merely a judge de facto, it is sufficient to say that the judge's title to his office cannot be questioned in this way. The law prescribes a way by which this question may be properly put in issue and judicially determined. The plea in abatement was properly overruled.

[4] The evidence offered by the state tended to establish that the alleged embezzlement consisted of a series of embezzlements extending over a considerable period of time. Evidence was offered which, if believed, would have authorized a conviction for more than one separate and distinct embezzlement. The defendant asked the court to compel the state to elect upon which par-

ticular item it would ask the jury to convict. It is the contention that the state must stand or fall upon some specific act of conversion. In other words, the evidence tends to show that defendant committed a series of embezzlements. The conversion of any one of the items the state claims he did feloniously embezzle, if true, would render defendant guilty of a distinct and separate crime.

The evidence is to the effect that the defendant acted as receiving teller or assistant cashier for quite a while, and evidence was offered by the state which would warrant a belief that he embezzled certain sums of money on several separate days, and, this being true, it is insisted the state should have been required to elect and stand on one of the alleged conversions. It will be noted, to make the point clear, that defendant was not indicted, in terms at least, with having embezzled "a balance of account," but was charged with the embezzlement of a specific sum of money—\$1,311.

In *Encyclopedia of Evidence*, under title "Embezzlement," it is said:

"It is competent for the court to allow evidence showing a series of acts in pursuance of a conspiracy, as all the acts may together constitute conversion."

The rule just quoted seems to be supported by the weight of authority.

"Continuous offenses generally, if the pleader chooses, may, like those not continuous, be laid as on one day and proved by acts either on one day or many." *Bishop's New Criminal Procedure* (4th Ed.) § 398.

In the same section of this authority we quote this statement with reference to the specific crime charged in this indictment, viz.:

"Embezzlement, when committed by a series of connected transactions from day to day, may be alleged as on a single day, and the real facts be shown in evidence."

The evidence in the present case tends to show that the defendant was guilty of systematically robbing the bank; that his system consisted of converting money which came into his hands and falsifying his books to cover up his tracks. This system seems to have gone along for a long time, and the evidence of some of the alleged embezzlements is stronger than of others; but in the end the jury were warranted in believing that the sum total of his peculations amounted to the sum named in the indictment.

The Supreme Court of Oregon, in *State v. Reinhart*, 26 Or. 466, 33 Pac. 882, gives a clear and logical statement of the rule and the reasons for its enforcement. We quote:

"The trust and confidence reposed in him [the accused] necessarily affords the amplest opportunity to misappropriate the funds intrusted to his care, and makes it almost, if not quite, impossible to prove just when and how it was done, but the ultimate fact of embezzlement is susceptible of direct proof, and that is the act against which the statute is directed. The crime may, as in the case at bar, consist of many acts done in a series of years, and the fact

at last be discovered that the employer's funds have been embezzled, and yet it be impossible for the prosecution to prove the exact time or manner of each or any separate act of conversion. In such case, if it should be compelled to elect and rely for conviction upon any one single act, the accused, although he might be admittedly guilty of embezzling large sums of money in the aggregate, would probably escape conviction. The law does not afford exemption from just and merited punishment on mere technical grounds, which do not in any way affect the guilt or innocence of the defendant or the merits of the case."

It seems to us that in the practical enforcement of the criminal laws and the punishment of criminals, and especially that class of criminals who usually resort to embezzlement of trust funds, would be made well-nigh impossible, if the state were compelled to rely for conviction upon the proof beyond all reasonable doubt of one of the many acts of a shrewd malefactor. The state might be able to show beyond all peradventure of a doubt that the defendant had for years systematically robbed his employer of many thousands of dollars, but it might be difficult, if not impossible, to pick out one item and prove that to the satisfaction of the jury. In the instant case the state relied for conviction on evidence supporting the theory that defendant had for a long time systematically converted the money of the bank. The result of the evidence is that defendant had embezzled the funds intrusted to his care. Of that there seems to be no room for doubt.

We decline to hold that there was any error in refusing to require the state to pick out one particular item of the series of embezzlements and to stand on that for conviction.

[5, 6] It is further claimed that the court erred in giving this instruction for the state:

"The court instructs the jury for the state that, if you believe from the evidence in this case beyond a reasonable doubt that Major Davis was employed as clerk or servant by the Bluff City Savings Bank, and that by virtue of his employment of such clerk or servant he received into his possession or custody money, and that he feloniously, willfully, and unlawfully embezzled said money to the amount of \$25, then the defendant is guilty as charged, and the jury should so find."

The contention seems to be that the representative for the state, in asking this instruction, elected to stand on one item. We do not so understand. We assume that the district attorney intended to inform the jury that they could not convict the defendant unless they believed he had embezzled as much as \$25. In other words, defendant was indicted for a felony, and the district attorney did not ask a conviction for less than a felony. However that may be, we cannot see that defendant was in any way prejudiced by the instruction, as it gave him more than he was entitled to receive.

[7] There was no error of which defendant can complain in refusing instruction No. 3. There is considerable doubt as to the pro-

priety of giving this instruction in any case, but surely the defendant here cannot complain of any failure on the part of counsel to secure for him a clear and forceful statement of the law as to his rights in the premises.

We have given careful consideration to the argument of counsel and to the points presented in his brief, and we believe that appellant had a fair and impartial trial, and there is nothing in the record which will justify a reversal.

Affirmed.

(108 Miss. 726)

HOLLIDAY v. STATE. (No. 17678.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

1. CRIMINAL LAW §1170—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In a prosecution for the unlawful sale of intoxicating liquors, any error in excluding evidence that, on the trial of another for the same offense, defendant allowed himself to be used in an effort to entrap the state's witnesses into pointing out the wrong person as the guilty party, and was himself mistakenly identified as such person, was harmless, where the jury got the benefit of the excluded evidence in spite of the court's rulings.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. § 1170.]

2. CRIMINAL LAW §829—INSTRUCTIONS—ALIBI—REASONABLE DOUBT.

Where the court clearly instructed on reasonable doubt, it was not error to refuse an instruction that defendant was entitled to an acquittal, where the evidence to sustain an alibi raises a reasonable doubt as to guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

3. CRIMINAL LAW §785—CAUTIONARY INSTRUCTIONS.

The fact that a detective testifies in a criminal case does not authorize an instruction to cautiously scrutinize his testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. § 785.]

Appeal from Circuit Court, Coahoma County; T. B. Watkins, Judge.

Dan Holliday was convicted of the unlawful sale of intoxicating liquors, and appeals. **Affirmed.**

Salter & Longino, of Clarksdale, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, J. Appellant was convicted for the unlawful sale of intoxicating liquors, and, being not altogether satisfied, appeals to this court for relief.

[1] We gather from the record that an affidavit had been made against Walter Sellers for selling intoxicating liquors. When this cause came on for trial before the justice of the peace, the witnesses for the state were asked to point out the man who sold them the liquor, and they pointed to the defendant in this case—Dan Holliday. Whereupon Walter Sellers was discharged, and the of-

ficer of the law made an affidavit against Dan Holliday.

We also gather from the record that, on the trial of appellant in the circuit court, his counsel offered to prove what occurred on the trial of Sellers in the justice court. It seems that Sellers, or his counsel, endeavored to set the stage so as to entrap the state's witness into pointing out some other person for Sellers than Sellers himself.

To pull off this little comedy, appellant was induced to sit behind counsel in such manner as to indicate that he was the party on trial. When the state's witnesses were asked to point out the man who sold them the liquor, they promptly identified Holliday as the man. So it was that instead of staging a comedy, so far as appellant is concerned, they had staged a tragedy. In other words, they had baited the hook to catch suckers, but they caught a tiger instead.

When appellant undertook to have a witness rehearse the harrowing details of this serio-comic performance in the justice court, the district attorney interposed an objection, which was sustained. It is a bit difficult to see how a rehearsal of the occurrence in the justice court could be of any value to appellant. True, it might have furnished amusement to the jury and kept them guessing as to the pertinence of the diversion to the matter in hand. There seems to be no doubt that the state's witnesses were unacquainted with the man who sold them the liquor. They did not know his name; but they did know the man.

The state's witnesses are called detectives, which means that they were used by the officers to catch "blind tigers" and to break up the sale of intoxicants. They say they bought liquor from this defendant and were informed that his name was Sellers; that he told them his name was Sellers when they got the liquor. The jury believed the detectives, and it thus appears that, when appellant attempted to play the clown in the free show pulled off in the justice court, he succeeded in putting his own neck in the halter.

The record, we think, shows that the jury got the benefit of what defendant was seeking to prove in spite of the rulings of the court upon the details and the manner of getting the alleged evidence before the jury.

[2] This defendant undertook to show his innocence by proving that he was not at the alleged scene of the crime at the time fixed by state's witnesses, but was at another place. He did not succeed very well, but we will assume that he did for the purpose of the next assignment of error.

The court refused to instruct the jury as follows:

"The court instructs the jury for defendant that where the defense is an alibi, and the evidence in support of it, viewed in connection with all the testimony, is in this particular case suffi-

cient to raise a reasonable doubt as to guilt, the accused is entitled to an acquittal."

We do not think there was any error in refusing this instruction. Of course the court should, when requested, define alibi and inform the jury that it is a legal defense. The instruction, as requested, merely tells the jury that they should acquit the defendant, if they had a reasonable doubt of his guilt. The given instruction told the jury the same thing in different language.

[3] The court refused to instruct the jury that it was their duty to "cautiously scrutinize" the testimony of a detective. The jury should cautiously and carefully weigh the evidence of all witnesses, but we know no statute or rule of evidence which requires the jury to regard detectives as liars, until the contrary is proven. There is no law authorizing the court to say that detectives' evidence should be looked upon with suspicion. The jury are the sole judges of the credibility of witnesses and the weight of evidence, and they are just as able to discriminate between witnesses as is the judge.

Affirmed.

(108 Miss. 732)

KING v. MILES et al. (No. 16572.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

1. BANKRUPTCY \Leftrightarrow 143—PROPERTY VESTING IN TRUSTEE—INSURANCE POLICIES.

Under Bankr. Act (Act July 1, 1898, 30 Stat. 565, c. 541 [U. S. Comp. St. 1913, § 9654]) § 70a, providing that, when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may pay or secure to the trustee such surrender value and continue to hold the policy free from the claims of creditors, and that otherwise the policy shall pass to the trustee as assets, a trustee can claim only the cash surrender value, though the entire proceeds of the policy become available before adjudication, and the trustee has no right whatsoever to a policy having no cash surrender value.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. \Leftrightarrow 143.]

2. BANKRUPTCY \Leftrightarrow 143—RIGHT OF TRUSTEE—INSURANCE POLICY.

Where insurance policies on the life of a bankrupt had been assigned as security for an indebtedness greater than their cash surrender value, and moreover were exempt under Laws 1908, c. 175, providing that the proceeds of a life insurance policy not exceeding \$5,000, payable to the executor or administrator of the insured, shall inure to the heirs or legatees, freed from all liability for debts with certain exceptions, the court, in a suit by the trustee in bankruptcy against the assignee to recover premiums paid to the assignee by the bankrupt while insolvent, had no power to adjudicate the title to the policies as between the trustee and the assignee, as the trustee had no right or claim thereto which could be adjudicated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 194, 201, 202, 213-217, 223, 224; Dec. Dig. \Leftrightarrow 143.]

3. BANKRUPTCY \Leftrightarrow 399 — EXEMPTIONS — WAIVER OF EXEMPTIONS.

A bankrupt by listing insurance policies in his schedule of property and reciting that

they were held by a creditor by assignment for a debt, without claiming them as exempt or making any claim whatever regarding them, or any statement that they were property belonging to the estate, did not waive the exemption.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 657-669; Dec. Dig. \Leftrightarrow 399.]

4. ESTOPPEL \Leftrightarrow 98—TESTIMONY AS WITNESS—ASSIGNMENTS—RIGHTS OF ASSIGNEE.

In a suit by the administratrix of the holder of insurance policies against an assignee thereof to recover the amount of the policies on the theory that they were assigned as collateral security for an indebtedness which had been paid, no estoppel could be predicated on the fact that insured testified in a prior action between his trustee in bankruptcy and the assignee to recover premiums paid to the assignee by insured while insolvent, in which suit the title to the policies was not in issue.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 290; Dec. Dig. \Leftrightarrow 98.]

5. JUDGMENT \Leftrightarrow 688 — CONCLUSIVENESS — MATTERS CONCLUDED.

An action by the administratrix of a bankrupt against an assignee of policies on the bankrupt's life, claimed to have been assigned as collateral security for an indebtedness which had been paid, to recover the amount of the policies, was not barred by the judgment in an action by the trustee in bankruptcy against the assignee to recover premiums paid to the assignee by the bankrupt while insolvent, in which it was alleged by the trustee and admitted by the assignee that the policies had been assigned to her absolutely and unconditionally and not as security, as neither the parties nor the cause of action was the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1211; Dec. Dig. \Leftrightarrow 688.]

Appeal from Chancery Court, Yazoo County; P. Z. Jones, Chancellor.

Bill by Miss Letitia King, administratrix of Charles L. King, deceased, against Mrs. Mary R. Miles and others. From a decree for defendants, plaintiff appeals. Reversed and remanded.

E. L. Brown and Williams & George, all of Yazoo City, and Mayes & Mayes, of Jackson, for appellant. Noel, Boothe & Pepper, of Lexington, for appellees.

REED, J. This is an appeal from the decree of the chancellor sustaining the plea of res adjudicata, and dismissing appellant's bill of complaint.

Appellant, Miss Letitia King, administratrix of the estate of Charles L. King, deceased, filed her bill in chancery against the appellee, Mrs. Mary R. Miles, then a resident of the state of Louisiana, and certain other parties who were indebted to Mrs. Miles, and who were made parties in order to subject the amounts that they severally owed to the payment and satisfaction of such decree as might be rendered in favor of appellant against Mrs. Miles.

Appellant, as administratrix, sought to recover from Mrs. Mary R. Miles the amount of \$10,000 and interest, being the proceeds of two insurance policies of \$5,000 each in the New York Life Insurance Company on

the life of Charles L. King, who died October 11, 1911.

Photographs of the two policies are with the record in this case, and are now before us. Both policies originally were made payable to the executors, administrators, or assigns of the insured. Later there was a change in the beneficiary, so that the policies were made payable to Miss Letitia King, sister of the insured. Subsequent to this a change was made again in the beneficiary, whereby the policy was made payable, as at first, to the executors, administrators, and assigns. The policies were then assigned and transferred to Mrs. Mary R. Miles by the insured.

Appellant averred in her bill that, though the assignments to Mrs. Miles are absolute in terms, they were nevertheless made for the purpose of securing to her certain indebtedness owing by Charles L. King, the insured, for advances; that the policies were, by understanding between Mrs. Miles and Mr. King, held as a continuing security for like advances made by her to him during subsequent years; that Mrs. Miles never acquired any right, title, or interest in the policies, other than that of security for such advances; and that she continued to hold them only as such security.

It appears from the averments in the bill that the entire indebtedness secured by the policies of insurance was paid to Mrs. Miles; that, when she was fully paid, the policies were released from the pledge as security; and that she was then indebted to appellant, as administratrix of the estate of Charles L. King, for the proceeds of the policies, which proceeds she collected by virtue of the assignment to her, and was holding as trustee for the benefit of the estate.

Charles L. King was adjudicated a bankrupt on March 9, 1909. In the schedule of property filed by him, and under the subdivision "policies of insurance," he made the following mention of the two policies of insurance on his life:

"Policies for \$10,000 in New York Life payable to sister, Miss M. L. King, but now held by Mrs. M. R. Miles by assignment for debt of \$3,094.70, worth about \$1,800."

The bankrupt made no other reference to the policies, did not claim them in the schedule as exempt, and they were not set aside to him by the bankrupt court as exempt. It is patent that Mr. King was in error in describing the property in his schedule as payable to his sister. It appears that he only showed in the schedule that the policies were, at the time of their surrender, worth about \$1,800, and were assigned as security for an indebtedness of \$3,094.70 to Mrs. M. R. Miles. He did not make any claim whatever regarding the policies, nor any statement that they were property belonging to his bankrupt estate. It is not apparent, from the terms of the policies, that they had any cash surrender value, and no custom of the

company treating them as having such is alleged or proven. However, we will in this consideration treat them as having a value when listed by the bankrupt.

Appellee Mrs. Miles, in defense to the bill of complaint in the case at bar, claimed that appellant was barred from recovery of the proceeds of the insurance policies in this case, by reason of the adjudication of the court in a former case brought against her by E. L. Trenholm, trustee of the estate of Charles L. King, bankrupt, which cause is numbered 3631 on the general docket of the chancery court of Yazoo county. In that suit the trustee sought to recover: (1) Certain usurious interest paid by the bankrupt to Mrs. Miles; (2) certain overcharges in rent; and (3) certain sums paid by the bankrupt to Mrs. Miles for premiums paid by her on the two insurance policies. It was charged in the bill in that case that the insurance policies had been previously assigned, transferred, and delivered by the bankrupt to Mrs. Miles absolutely and unconditionally, and not as security for advances by her to him; and that the amounts paid by the bankrupt to her to refund the payments by her of the premiums were so paid by him while he was wholly insolvent and unable to pay his debts, which insolvency was then known to Mrs. Miles, and that such payments were in fraud of the bankrupt's creditors, who might, at the time of the filing of the petition by the bankrupt, had bankruptcy not intervened, have maintained their suits against her to recover the same, and which rights the trustee, under the Bankrupt Act, is subrogated to and invested therewith, for the benefit of the bankrupt's creditors.

In her answer to the bill of complaint in that case (cause 3631), Mrs. Miles denied collecting usurious interest and her liability for any overcharge in rent. She admitted that the policies were transferred and delivered to her absolutely and unconditionally by Mr. King, and that she thereafter had the full ownership thereof. She denied that Mr. King was wholly insolvent and unable to pay his debts when he refunded the premiums she had paid, and denied her liability to the trustee for amounts of such premiums.

Evidence was heard in that cause (No. 3631); both Mrs. Miles and Mr. King giving depositions. The following decree was then rendered by the chancellor:

"This cause coming on this day for final hearing on the pleadings, proofs, and all the papers in the cause, and the court, having fully considered the same, is of the opinion that the complainant is entitled to recover on the three demands made by his amended bill and now before the court, viz., usury, demand for overcharges in rent, and premiums paid on insurance policies, together with interest thereon, the sum of \$6,500, and on no other demand. It is therefore ordered, adjudged, and decreed that the complainant, E. L. Trenholm, trustee of the estate of C. L. King, bankrupt, do have and recover of the defendant Mrs. Mary R. Miles the sum of \$6,500, and all costs of court; and it is further ordered, adjudged, and decreed

that the said Mrs. Mary R. Miles do have and retain as her absolute property the insurance policies mentioned in said bill of complaint and the proceeds thereof, free from any and all claims thereto made or to be made by said complainant."

In the case at bar much testimony was heard, and extensive accounting between Mrs. Miles and Mr. King, involving large amounts and going over a number of years, was presented. The chancellor decided the case in favor of Mrs. Miles on the defense of res adjudicata alone, and he did not pass upon the case in any other respect. This is shown by his decree sustaining the plea and dismissing the bill, which is as follows:

"This cause coming on this day to be heard on the pleadings, proofs, and all the papers in the cause, and the court, being of opinion that the facts in support of the plea of res adjudicata, and the plea thereof, are a complete defense to the entire bill of complaint, does not pass upon any other question involved by the pleadings and proofs, but, deciding the cause on that plea alone, doth order, adjudge, and decree that the bill of complaint of Letitia King, administratrix of the estate of C. L. King, deceased, against the defendant Mary R. Miles et al., be and the same hereby is dismissed at the cost of the complainant."

It will be seen that there was no issue in the first case (cause 3631) between the trustee and Mrs. Miles relative to the property in the two policies. The controversy between them, which related to the insurance in any way, was the right of the trustee to recover from Mrs. Miles the amounts paid by the bankrupt, while insolvent, to her for premiums on policies which she claimed to own absolutely and unconditionally. This was the only matter between the parties to that suit touching the insurance policies for the adjudication by the court.

[1] The trustee, by virtue of the surrender in bankruptcy by Charles L. King, could only have received and have been vested with the cash surrender value of the policies. Section 70a of the Bankrupt Act of 1898; *Holden v. Stratton*, 198 U. S. 202, 25 Sup. Ct. 656, 49 L. Ed. 1018; *Hiscock v. Mertens*, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771; *Burlingham v. Crouse*, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148; *Everett v. Judson*, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; *Andrews v. Partridge*, 228 U. S. 479, 33 Sup. Ct. 570, 57 L. Ed. 929.

In *Burlingham v. Crouse*, supra, it was decided that the trustee could not claim as an asset a policy upon the bankrupt's life payable to his executors, administrators, or assigns, where the insurance company previously advanced to the bankrupt the full surrender value stipulated in the policy. In *Andrews v. Partridge*, supra, it was held that the cash surrender value is to be ascertained as of the date of the filing of the petition, and that the right of the bankrupt to pay to the trustee such value, and to continue to hold the policy, is not extin-

guished by the death of the bankrupt after the filing of the petition, and that such right may be exercised by his executors. In *Everett v. Judson*, supra, it was decided that the time when the petition in bankruptcy is filed fixes the cash surrender value of insurance policies on the bankrupt's life; and that the death of the bankrupt between the filing of the petition and the adjudication does not make the proceeds of the policy, over and above the cash surrender value, assets in the hands of the trustees.

It will be seen from the decisions of these cases that the trustee cannot claim any more than the cash surrender value of a policy at the time of the filing of the petition, even though the entire proceeds become available before adjudication; and further that the trustee has no right whatsoever to a policy in which there is no cash surrender value.

It was held in the case of *Dreyfus v. Barton*, 98 Miss. 758, 54 South. 254, that the cash surrender value, at the time of adjudication, of a policy on the life of the bankrupt is exempt under the statute (chapter 175, Laws 1908), providing that policies of insurance, payable to the executors or administrators of the insured, shall inure to the heirs or legatees free from all liability for the debts of the decedent, except premiums paid on the policy, etc.; and in the opinion in this case *Holden v. Stratton*, supra, was cited and relied on.

[2] In the case at bar the bankrupt mentioned the policies in his schedule, and gave their surrender value, and showed that such policies had been assigned as security for an amount greater than such value. If this was true, then there was no property therein whatever to be received and disposed of by the trustee. In addition to this, under the holding in *Dreyfus v. Barton*, supra, the cash surrender value of the policies was exempt. Therefore it could not have been adjudicated by the court that the trustee had any right or claim to the policies.

It is claimed that the policies were adjudged to belong to Mrs. Miles in the final decree in the cause of *Trenholm, Trustee, v. Miles*, No. 3631, by reason of the statement in the decree that she should "have and retain as her absolute property the insurance policies mentioned in said bill of complaint, and the proceeds thereof, free from any and all claims thereto made or to be made by said complainant." We do not see that this statement by the chancellor in his decree can have the effect claimed. It follows, from what we have already said relative to the vesting of an interest in the policies in the trustee, that the trustee had no claim or right to the policies for adjudication, and that therefore the chancery court had no power to make a decree adjudicating the title as between the trustee and Mrs. Miles.

[3] We see nothing in the listing of the policies by the bankrupt in his schedule to constitute a waiver of exemption. We note the argument by counsel for appellee that, as the policy was made payable to Mrs. Miles by the assignment, they were not exempt because the statute relied on is applicable only to policies payable to the executor or administrator of the insured; but Mrs. Miles' absolute ownership of the property is contested in the present case, and is a question for decision, and cannot avail now to sustain counsel's contention.

[4] There is no force in the contention of appellees that there is an estoppel in this case because Mr. King testified in the first case. None of his actions in that case will preclude appellant from maintaining her suit by proper proof.

[5] There is not an identity of parties complainant and their quality in bringing suit in the first case and the present one. In the first, the complainant was a trustee in bankruptcy suing for the benefit of creditors. In this case the suit is by another person, who is an administratrix, for the benefit of an estate of a decedent.

The identity of the cause of action is not the same. The first case was to recover the amount paid by a bankrupt, while insolvent, for premiums. The present case is to recover the full proceeds of a policy which accrued to the rightful beneficiary upon the death of the insured. There is a difference in identity in the things sued for. The first case involved the wrongful payment of premiums by a bankrupt, as well as illegal charges of interest and rent. The second involved the full amount of insurance paid upon the death of the insured.

We cannot see that the identical matter in issue in this case was determined by the former adjudication. The decree in that former action is not so in point as to control the issue in the pending one. We therefore conclude that the chancellor erred in sustaining the plea of *res adjudicata*.

Appellees desire us to go into the full consideration of all of the issues in this case, in addition to that of *res adjudicata*. The record shows that there are a large number of matters for account. The transactions and dealings between Mrs. Miles and Mr. King extend over a number of years. Errors claimed in the accounts would have to be carefully examined. Considerable examination and investigation is necessary. The lower court is better adapted for all this; it can make the necessary auditing and stating of accounts by its master or special commissioner. The very machinery and organization of the court renders it better suited for the work.

We will not enter into a consideration of any of the other issues of the case; and it is therefore reversed and remanded.

(108 Miss. 742)

H. LUPKIN & SONS v. RUSSELL. (No. 16562.)

(Supreme Court of Mississippi. Feb. 8, 1915.)

1. APPEAL AND ERROR \S 818—PROCEEDINGS—CONTINUANCE.

Where the Supreme Court passes the call of the docket of a district, cases therefrom stand continued until the call of the docket for that district at the next term of court; and hence a party desiring to correct the record may do so during the interim, and a continuance is unnecessary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 3199; Dec. Dig. \S 818.]

2. PROCESS \S 164 — RETURN — AMENDMENT AFTER JUDGMENT.

Where process was in fact legally served, and the court thereby acquired jurisdiction, the return, if defective, may be amended after judgment.

[Ed. Note.—For other cases, see Process, Cent. Dig. \S 176, 239-248; Dec. Dig. \S 164.]

3. APPEAL AND ERROR \S 440 — EFFECT OF TRANSFER—CORRECTION OF SHERIFF'S RETURN.

Even after an appeal has been taken from the judgment, the lower court may correct the return of service, so as to show that there was a valid service of process, and such amendment will be considered by the appellate tribunal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2198-2201; Dec. Dig. \S 440.]

4. APPEAL AND ERROR \S 95—QUESTIONS REVIEWABLE—REFUSAL TO AMEND SHERIFF'S RETURN.

The Supreme Court may review a refusal to permit an amendment of a sheriff's return of process, to show that service was not made on Sunday, the refusal being on the ground that the court was without jurisdiction because an appeal from the judgment was pending, whether or not a decision on the merits of the question would have been reviewable under Code 1906, \S 775.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 649-654; Dec. Dig. \S 95.]

Appeal from Circuit Court, Coahoma County; W. A. Alcorn, Jr., Judge.

Action by Percy B. Russell against H. Lupkin & Sons. Judgment for plaintiff, and defendants appeal. Thereafter, plaintiff's motion for leave to amend the sheriff's return of service of process having been overruled, plaintiff applied for a writ of certiorari. Order reversed, and the cause with respect to the motion remanded.

Mayes & Mayes, of Jackson, and Maynard & Fitzgerald, of Clarksdale, for appellants. Outrer & Johnston, of Clarksdale, and Jas. R. McDowell, of Jackson, for appellee.

SMITH, C. J. This is an appeal from a judgment by default, and one of the assignments of error is that:

"It appears from the returns of the sheriff on the summons issued in said cause that the same was served on August 25, 1912, which was on Sunday and was an illegal day for the service of the summons, and the judgment rendered thereon was void."

After the filing of this assignment of error, appellee filed a motion alleging that the re-

turn of the sheriff on this summons was erroneous, for the reason that it was in fact served on a day other than Sunday, and praying that the cause be postponed to a later day, so that this error could be corrected in the court below.

[1] It will not now be necessary for us to postpone the hearing of this cause, for the reason that we have passed the call of the docket of the district from which it comes, and therefore the cause stands continued until the call of the docket for that district is again reached at the next term of this court.

Since the filing of the motion to postpone above referred to, a motion for permission to the sheriff to amend the return on the summons to accord with the alleged facts of the service thereof has been disposed of in the court below adversely to appellee. After this motion to amend was overruled in the court below, appellee filed another motion in this court, requesting the issuance of a writ of certiorari directing the clerk of the court below to send up the record of the proceedings on the motion to amend. A certified copy of this record, however, has now been filed with the clerk of this court, so that the issuance of such a writ is now unnecessary.

[2, 3] It appears from this record that the motion to amend was overruled on the ground that the court below was without jurisdiction to grant the relief prayed for, the recital in the order overruling it being as follows:

"The court having heard the evidence adduced by the plaintiff in support of said motion, and being thereof sufficiently advised, but being in doubt as to the jurisdiction of this court to order an amendment of the said return, because there is an appeal pending from the judgment rendered herein in the Supreme Court, it is therefore ordered that the said motion be and the same is hereby overruled."

An examination of the authorities herein-after cited will disclose that the rule governing the matter here in question is this: That where the process was in fact legally served, and the court thereby acquired jurisdiction of the defendant, "but the return of the officer or other proof of service fails to show that fact, or is otherwise irregular or defective, it may be amended after judgment," provided the amendment will not have the effect of invalidating an otherwise valid judgment. 23 Cyc. 872, and authorities cited in note 48; 1 Freeman on Judgments (4th Ed.) § 89b; note to Malone v. Samuel, 13 Am. Dec. 172. The cases of Dorsey v. Peirce, 5 How. 173, and Hughes v. Lapice, 5 Smedes & M. 451, are in harmony with the rule as here announced, for the reason that each of them comes within the exception or proviso thereto. In Planters' Bank v. Walker, 3 Smedes & M. 409, the amendment under consideration was sought to be made before judgment,

and the court in the course of its opinion, after referring to the fact that it had been held in Dorsey v. Peirce, supra, that an amendment of this character cannot be made after judgment, stated that the reason this cannot be done is "that it would cause a reversal and seriously affect rights acquired under it." Such an amendment can be made even after an appeal has been taken from the judgment rendered, and when certified to the appellate court will be considered by it in disposing of the cause. 1 Freeman on Judgments (4th Ed.) § 89b; Hefflin v. McMinn, 2 Stew. (Ala.) 492, 20 Am. Dec. 58; Talcott v. Rosenberg, 8 Abb. Prac. N. Y. (N. S.) 287; Borrego v. Territory, 8 N. M. 446, 46 Pac. 361; Gonzales v. Cunningham, 164 U. S. 613, 17 Sup. Ct. 182, 41 L. Ed. 572.

The cases of Meyer Bros. v. Whitehead, 62 Miss. 387, and Kelly v. Harrison, 69 Miss. 856, 12 South. 261, are not here in point, for the question in those cases was not whether a sheriff should be permitted to amend his return on the process, but whether or not judgments by default should be vacated because rendered upon returns of service of process shown to be false.

It follows from the foregoing views that the court below was in error in holding that it was without jurisdiction to grant the relief prayed for.

[4] Whether or not the rule of the common law that the refusal of the lower court to permit an amendment of this character to be made is not subject to review on appeal has been modified by section 775 of the Code, is not now before us, and we express no opinion relative thereto, for the reason that the court below did not decide the controversy on its merits, but overruled the motion on the ground that it was without jurisdiction to grant the relief prayed for. Avery v. Bowman, 39 N. H. 393; note to Malone v. Samuel, 13 Am. Dec. 175.

The order overruling the motion for leave to amend is reversed, and the cause, in so far as the proceedings therein under this motion are concerned, will be remanded to the court below.

(108 Miss. 746)

WILLIAMS et al. v. BOARD OF SUP'RS
OF RANKIN COUNTY. (No. 17998.)

(Supreme Court of Mississippi
Feb. 8, 1915.)

1. APPEAL AND ERROR ⇨811—ADVANCEMENT OF CAUSES—STATUTE.

Under Code 1906, § 4907, providing for the advancement of causes, a separate class of cases to be advanced is not created by the words "in actions of mandamus, in cases where the public interest is concerned, and in cases at law or in chancery, involving," etc., so as to permit the advancement of an appeal from or

ders of a board of tax supervisors levying assessments for road construction, etc., for the cases where the public interest is involved are only actions of mandamus.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3191-3194; Dec. Dig. § 811.]

2. APPEAL AND ERROR § 811—CALENDARS—ADVANCEMENT OF CAUSES—STATUTE.

Under Code 1906, § 4907, providing for the advancement of causes "in cases at law or in chancery, involving taxes claimed by the state, county, or municipality," an appeal from orders of a board of tax supervisors that place a district under the operation of Laws 1912, c. 257, providing additional methods of working the public roads, levy an ad valorem tax and a commutation tax to raise funds for road building, and that employ a commissioner, will be advanced.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3191-3194; Dec. Dig. § 811.]

Appeal from Circuit Court, Rankin County; J. D. Carr, Judge.

Appeal by John F. Williams and others from a judgment of the circuit court affirming orders of the Board of Supervisors of Rankin County. Motion by appellee to advance the case. Sustained.

Stingly & McIntyre, of Brandon, for the motion. Watkins & Watkins, of Jackson, opposed.

REED, J. This hearing is upon a motion by appellee to advance this case and hear it out of its regular time under the authority of section 4907 of the Code of 1906.

The board of supervisors of Rankin county made an order bringing district No. 1, in that county, under the operation of chapter 257 of the Laws of 1912, which provides additional methods for working the public roads. Three orders were made by the board, all on the same day. The first placed the district under the provisions of the act; the second levied an ad valorem tax and a commutation tax to raise funds; and the third elected and employed a commissioner. An appeal was taken to the circuit court from the action of the board in passing these orders. The appeal to this court is from the judgments of the circuit court in affirming the orders of the board of supervisors.

Counsel for appellee in their brief maintain that the case should be advanced (1) because the public interest is concerned, and (2) because it involves a tax matter.

[1] It is settled in this state, by the holding of the court in the case of Jackson Loan & Trust Co. v. State, 96 Miss. 347, 54 South. 157, that cases like that at bar cannot be advanced on the ground that they are cases where the public interest is concerned. In that case the court decided that the clause in the statute (section 4907), which reads, "in cases where the public interest is concerned," does not make a separate class of

cases to be advanced, but that the clause related to actions of mandamus only; and that the meaning of the provision in the statute is that causes may be made preference, quoting from the opinion, "in actions of mandamus where the public interest is concerned."

We also refer to the recently rendered decision in the cases of J. M. Magee v. Lincoln County and J. M. Magee v. C. M. Brister et al., 67 South. 145, considered together on a motion to advance, and in which decision we approved the case of Jackson Loan & Trust Co. v. State, supra.

[2] We will advance this case, however, on the ground that it involves a tax matter. Under the provision of the statute whereby preference is given "in cases at law or in chancery involving taxes claimed by the state, county, or municipality," we are authorized to do so. It will be seen that one of the three orders passed by the board of supervisors on the same day, and to bring the district under the provision of the act, was an order levying taxes to provide funds to work the roads. This order was reviewed by the circuit court, and is now before us in this appeal.

The motion is sustained, and the case advanced and set for the second Monday in March.

WALTON v. WALL. (No. 17052.)

(Supreme Court of Mississippi.
Feb. 8, 1915.)

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action between J. H. Walton and E. C. Wall. From the judgment, Walton appeals. Motion to revive sustained, and cause revived.

L. F. Rainwater, of Sardis, for appellant. Shands & Montgomery, of Sardis, for appellee.

PER CURIAM. Motion sustained, and cause revived.

BELZONI DRAINAGE DIST. v. CRANE. (No. 17629.)

(Supreme Court of Mississippi.
Feb. 6, 1915.)

Appeal from Circuit Court, Washington County; F. B. Everett, Judge.

Action between the Belzoni Drainage District and Mary P. Crane. From the judgment, the Drainage District appeals. Appeal dismissed.

W. S. Knotts, of Belzoni, and Wynn, Watson & Wynn, of Greenville, for appellant.

PER CURIAM. Appeal dismissed.

BAGWELL v. SHIELDS. (No. 16707.)
(Supreme Court of Mississippi. Feb. 8, 1915.)
Appeal from Chancery Court, Calhoun County; D. M. Kimbrough, Chancellor.
Action between J. W. Bagwell and Mrs. Ada Shields. From the judgment, Bagwell appeals. Affirmed.

Flowers & Brown, of Jackson, for appellant.
Mayes & Mayes, of Jackson, for appellee.

PER CURIAM. Affirmed.

BURNSIDE v. BURNSIDE. (No. 17536.)
(Supreme Court of Mississippi. Feb. 8, 1915.)
Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.
Action between Mrs. Stella Burnside and J. T. M. Burnside. From the judgment, Mrs. Stella Burnside appeals. Motion to dismiss sustained, and cause dismissed.

Bowers & Griffith, of Gulfport, for appellant.

PER CURIAM. Motion sustained, and cause dismissed.

RUSSELL v. STATE. (No. 17637.)
(Supreme Court of Mississippi. Feb. 8, 1915.)
Appeal from Circuit Court, Franklin County; R. E. Jackson, Judge.
W. B. Russell was convicted of grand larceny, and appeals. Affirmed.
Whittington & McGehee, of Meadville, for appellant. J. M. Vardaman, of Jackson, for the State.

PER CURIAM. Affirmed.

EVANS v. SIMMONS. (No. 16283.)
(Supreme Court of Mississippi. Feb. 8, 1915.)
Appeal from Circuit Court, Jasper County; W. H. Hughes, Judge.
Action between S. Evans and J. W. Simmons. From the judgment, Evans appeals. Affirmed.
R. D. Cooper, of Meridian, for appellant.

PER CURIAM. Affirmed.

STEWART v. STATE. (No. 17858.)
(Supreme Court of Mississippi. Feb. 8, 1915.)
Appeal from Circuit Court, Yalobusha County; N. A. Taylor, Judge.
Luke Stewart was convicted of selling intoxicating liquors, and appeals. Affirmed.
Creekmore & Stone, of Water Valley, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

(68 Fla. 324)
ROESS LUMBER CO v. STATE EXCH. BANK.
(Supreme Court of Florida. Nov. 24, 1914.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** \S 140 — **DEFENSES — WAIVER—RENEWAL NOTE.**

One who gives a note in renewal of another note, with knowledge at the time of a partial failure of the consideration for the original note, or false representations by the payee, etc., waives such defense, and cannot set it up to defeat a recovery on the renewal note. And where one giving such renewal note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered them and ascertained his rights, it became his duty to make such inquiry and investigation before executing the renewal note, and, if he fails so to do, he is as much bound as if he had actual knowledge thereof.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. $\S\S$ 355-359; Dec. Dig. \S 140.]

2. **CORPORATIONS** \S 428 — **KNOWLEDGE OF AGENTS—EFFECT TO CHARGE CORPORATION.**

The established rule is that knowledge acquired by the officers or agents of a corporation, while not acting for the corporation, but while acting for themselves, is not imputable to the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. $\S\S$ 1748-1761; Dec. Dig. \S 428.]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by the State Exchange Bank, a corporation, against the Roess Lumber Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

H. M. Hampton, of Ocala, for plaintiff in error. R. T. Boozer, of Lake City, for defendant in error.

SHACKLEFORD, C. J. The State Exchange Bank, a corporation brought an action at law against the Roess Lumber Company, a corporation, upon a promissory note, alleged to have been executed by the defendant to the order of Bardin & Brown, a firm composed of F. F. Bardin and D. W. Brown, which note, before maturity, for value, was indorsed and transferred by Bardin & Brown to the plaintiff. Six pleas were filed to the declaration. The plaintiff joined issue upon two of the pleas and filed replications to the other pleas, to which replications the defendant interposed a demurrer, which was overruled, whereupon the defendant filed a rejoinder, and a trial was had before a jury, which resulted in a verdict and judgment in favor of the plaintiff. Ten errors are assigned, but the plaintiff in error, who was the defendant in the court below concedes in its brief that only two points are presented to this court for determination; therefore we shall confine ourselves to those points.

In its pleas the defendant admits that it executed and delivered to Bardin & Brown

the promissory note described in the declaration, and upon which the action is based, but denies that such note was indorsed and transferred to the plaintiff by the payee for value before maturity. The defendant further by its pleas avers that such note was executed by it to Bardin & Brown in part payment for cypress shingles purchased by the defendant from Bardin & Brown, in pursuance of a certain contract made and entered into by the parties, which contract Bardin & Brown had failed and neglected to carry out and perform, specifications of which are set forth, of which facts the plaintiff had notice and knowledge prior to the time the note was indorsed and delivered to it. In its replications to the pleas the plaintiff alleges that the note, which forms the subject-matter of the action, was a renewal note, executed by the defendant to take up the original note which it had executed, and that, at the time of the indorsement and transfer of the note, the plaintiff "had no knowledge of the alleged agreement and conditions under which it is claimed by the defendant that said note was executed and delivered." The foregoing is a very condensed statement of somewhat lengthy pleadings, but we think that we have stated sufficient to make this opinion intelligible.

In *Padgett v. Lewis*, 54 Fla. 177, 45 South. 29, we held as follows:

"One who gives a note in renewal of another note, with knowledge at the time of a partial failure of consideration for the original note, or false representations by the payee, etc., waives such defense, and cannot set it up to defeat a recovery on the renewal note. And where one giving such renewal note either had knowledge of such facts and circumstances, or by the exercise of ordinary diligence could have discovered them and ascertained his rights, it became his duty to make such inquiry and investigation before executing the renewal note, and, if he fails so to do, he is as much bound as if he had actual knowledge thereof."

See, also, to the same effect, *Hyer v. York Manufacturing Co.*, 58 Fla. 283, 50 South. 485, and *Franklin Phosphate Co. v. International Harvester Co.*, 62 Fla. 185, 57 South. 206, Ann. Cas. 1913C, 1247.

The plaintiff in error concedes that is a correct statement of the law, but contends that it is not applicable to the instant case, for the reason that the defendant, "although aware, at the time of the execution of the renewal note, that there had been a failure on the part of Bardin & Brown to carry out their contract, yet executed said note in reliance upon the representations and assurances of Bardin & Brown that they would make good any shortage between the number of shingles furnished and the number required to be furnished by their contract with" the defendant. There are conflicts in the evidence upon this point; therefore it was a matter for the jury to pass upon and determine. Even if this contention of the defendant had been established by the evidence, it may well be doubted whether or not the facts and

circumstances testified to were sufficient to bring the instant case within the exceptions to the general rule laid down by us in the cited cases, such as was recognized in *McDaniel v. Mallary Bros. Machinery Co.*, 6 Ga. App. 848, 66 S. E. 146. Even in that case we find the following statement of the law:

"The defendants, with notice of the defects, renewed one of the notes. Ordinarily this would have closed their mouths from defending further on account of the breaches of warranty then existing."

See, also, the discussion of the rule in *Atlanta Consolidated Bottling Co. v. Hutchinson*, 109 Ga. 550, 35 S. E. 124; *Stewart v. Simon* (Ark.) 163 S. W. 1135; *McCormick Harvesting Mach. Co. v. Yoeman*, 26 Ind. App. 415, 59 N. E. 1069; *Smith v. Smith*, 4 Idaho, 1, 35 Pac. 697.

It will be observed that this action was not brought by Bardin & Brown, the payees in the note, but by the State Exchange Bank, their assignee, which plaintiff claims to have purchased the note before maturity for value, without any notice or knowledge of the facts and circumstances by which the defendant claims it was induced to execute such renewal note. This being the case, it was incumbent upon the defendant to establish by the evidence that the plaintiff did have such notice or knowledge, otherwise the plaintiff must be held to be a holder in due course, in accordance with the provisions of section 2985 of the General Statutes of Florida, which we had occasion to discuss somewhat in *Taylor v. American National Bank of Pensacola*, 63 Fla. 631, 57 South. 678, Ann. Cas. 1914A, 809; *Jones v. Manitowoc Shipbuilding & Dry Dock Co.*, 65 Fla. 467, 62 South. 590; *Dicks v. Johnson*, 66 Fla. 306, 63 South. 700; *Berryhill-Cromartie Co. v. Manitowoc Shipbuilding & Dry Dock Co.*, 66 Fla. 170, 63 South. 720. The defendant contends that, as the evidence showed F. F. Bardin, a member of the firm of Bardin & Brown, the payees in the note, was president of the State Exchange Bank, the plaintiff in this action, whatever notice or knowledge Bardin had of the transactions between his firm and the defendant in connection with the execution of the note must be imputed to the bank of which Bardin was president. We had occasion to consider this question in *Aycock Bros. Lumber Co. v. First National Bank of Dothan*, 54 Fla. 604, 45 South. 501, wherein we held adversely to the contention of the defendant, stating that:

"The knowledge acquired by the officers or agents of a corporation, while not acting for the corporation, but * * * for themselves, is not imputable to the corporation."

See the authorities there cited.

No reversible errors having been made to appear to us, the judgment must be affirmed.

TAYLOR, COCKRELL, HOCKER, and
WHITFIELD, JJ., concur.

(68 Fla. 350, 352)

EVANS et al. v. JOHNSON et al.

(Supreme Court of Florida. Nov. 24, 1914.

On Rehearing, Jan. 21, 1915.)

*(Syllabus by the Court.)*1. TRUSTS \S 89—RESULTING TRUST—ESTABLISHMENT—EVIDENCE.

A chancellor will not be held in error for decreeing partition of lands among the heirs of a common ancestor who, it is conceded, had title, the adverse claim of one of the heirs being that she furnished the consideration for the title that was made to her mother, when the ancestor has been dead many years, and the evidence adduced to establish a resulting trust is not convincing beyond a reasonable doubt.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. \S 89.]

On Rehearing.

2. PARTITION \S 17—DECREE—DESCRIPTION IN DEED—POSSESSION.

Where a conveyance is of the west half of a lot actually containing 10 acres, but the description and area specifically given in the conveyance covers only $2\frac{1}{2}$ acres, and the possession given and the occupancy had under the conveyance for many years is only of one-half of the west half of the lot embracing $2\frac{1}{2}$ acres, and the other parties during the entire time claimed and had possession of the other $2\frac{1}{2}$ acres contained in the west half of the lot, the claimants under the first-mentioned conveyance will be confined in partition proceedings to the $2\frac{1}{2}$ acres occupied under such conveyance.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 53-59; Dec. Dig. \S 17.]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Partition by Margaret Evans and others against Florence Johnson and others. From decree for defendants, complainants appeal. Modified and affirmed on rehearing.

Sparks & Jennings, of Jacksonville, for appellants. C. B. Peeler, of Jacksonville, for appellees.

WHITFIELD, J. [1] This appeal is from a decree for the partition of land among the heirs of a common ancestor. It is conceded that the common ancestor received a deed of conveyance of the land and lived on a portion of it till she died, more than 20 years ago. But it is contended that a daughter who lived on a portion of the land furnished the consideration for the conveyance made to the mother, and that a trust results in favor of the daughter as against the other heirs.

In *Geter v. Simmons*, 57 Fla. 426, 49 South, 131, it was held that a resulting trust will not be decreed in favor of those who claim to have furnished the consideration for a conveyance of land made to another, when the person who had title had been dead many years, and the evidence adduced to destroy such title is not so convincing as to establish the essential facts beyond a reasonable doubt. See *Rogero v. Rogero*, 66 Fla. 6, 62 South, 899.

There is evidence that the daughter furnished the consideration, and that she intended the mother to have only a life interest in the land, but this contradicts the conceded terms of the deed of conveyance to the mother, and it cannot be said on the entire evidence that the chancellor erred in decreeing partition and, in effect, rejecting the claim of a resulting trust in favor of the daughter, who sought to prove that she furnished the consideration for the conveyance to the mother. Criticisms are here made of the nature and condition of the deed of conveyance to the mother admitted in evidence, but the deed does not appear in the record and is not sent here for inspection under the rule on that subject. Apparently the decree is correct, and the appellants have not performed their burden of showing reversible error in the decree. It is therefore affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

On Rehearing.

PER CURIAM. [2] The attention of the court having been called to the fact that the application for an oral argument filed herein had been overlooked when the case was considered on the briefs filed, an oral argument was allowed. The record has been again carefully considered in the light of the oral argument; and the original deed on which complainants base their right to partition, which was not here when the case was decided, has been sent here by an order made under the rule.

The deed was executed April 23, 1870, and conveys land in fee simple to Sarah Cooper, the common ancestor. The deed is considerably mutilated by careless use, but it is clearly ascertained that the land is described as follows:

"The west half of a lot of land numbered and designated as lot number three (lot No. 3) upon the map of a tract of land in the eastern portion of the western Isaac Hendricks grant of Haddock's Estate tract, north of the railroad, said map being recorded in the clerk's office among the public records, Duval county, the north and south line of the lot hereby conveyed measuring three chains ninety links and the east and west lines measuring six chains and forty links, and containing two and one-half acres more or less."

The testimony shows that under this deed Sarah Cooper occupied till her death in 1875 a portion, containing $2\frac{1}{2}$ acres, of the west half of lot 3, possession of which was given her by the surveyor who witnessed the deed delivered to her, and that her daughter, Margaret Evans, occupied the other portion of the west half of lot 3, containing $2\frac{1}{2}$ acres, under a deed executed the same day conveying to her the east half of lot 3, the possession of which was given to her by the surveyor at the same time.

The court decreed a partition of the entire west half of lot 3, except a small portion not in controversy, presumably upon the theory that, as Margaret Evans' deed was to the east half of lot 3, while under such deed she occupied with her mother only the west half of lot 3, and the occupancy of the common ancestor and her children of the entire west half of lot 3 was pursuant to the conveyance to the ancestor of the west half of lot 3, though the conveyance purported to cover only $2\frac{1}{2}$ acres, while the west half of lot 3, in fact, contains 5 acres. But the terms of the deed of conveyance to Sarah Cooper, the common ancestor, which original deed is now before this court, and the possession and occupancy of Sarah Cooper thereunder, are confined to $2\frac{1}{2}$ acres; and to this $2\frac{1}{2}$ acres only do the complainants show an interest in a title derived from Sarah Cooper, the common ancestor. A resulting trust in favor of Margaret Evans as to this $2\frac{1}{2}$ acres is not clearly established, and the ruling of the chancellor thereon is not shown to be erroneous.

When the former opinion herein was rendered the deed to Sarah Cooper was not before the court, and the transcript of the record brought here on appeal did not show error in the decree.

The affirmance of the decree herein is modified so as to direct a partition only of the $2\frac{1}{2}$ acres of land covered by the deed of conveyance to Sarah Cooper, and by the possession and occupancy of Sarah Cooper and her heirs under such deed of conveyance.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

(136 La. 393)

No. 20,838.

DROUIN et al. v. BOARD OF DIRECTORS OF PUBLIC SCHOOLS OF PARISH OF AVOYELLES.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

1. TAXATION §44 — UNIFORMITY — SCHOOL TAXES.

The Constitution having recognized school districts, and having provided for the giving of additional support to public schools, and for erecting and constructing schoolhouses in the school districts, and having authorized the levy of special taxes therefor by the parish school boards in the school districts, in excess of the limitation of taxation fixed by the Constitution for state purposes, it is not necessary that the taxes levied by such school boards for the several districts of a parish should be equal and uniform throughout the parish.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. §44.]

2. SCHOOLS AND SCHOOL DISTRICTS §24—ESTABLISHMENT OF SCHOOL DISTRICTS—DIRECTORS—DISCRETION—REVIEW BY COURTS.

The board of directors of the public schools of the several parishes of the state of Louisiana

are given full discretion in establishing school districts in their respective parishes, and their action in establishing the boundaries of a school district will not be reviewed by the courts, where it is not shown that the discretion vested in the board has been abused.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 42, 45, 47-49; Dec. Dig. §24.]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; A. J. Lafargue, Judge.

Action by George L. Drouin and others against the Board of Directors of the Public Schools of the Parish of Avoyelles. From judgment for defendant, plaintiffs appeal. Affirmed.

J. W. Joffrion, of Marksville, for appellants. S. Allen Bordelon, of Marksville, for appellee.

SOMMERVILLE, J. Plaintiffs, property owners and taxpayers of school district No. 50 in the parish of Avoyelles, attack the action of the board of directors of the public schools of that parish whereby said school district No. 50 was created. They also attack the validity of the election ordered by said board as held in said district, by which the rate of taxation on the property in that district was increased for school purposes.

There was judgment in favor of defendant, and plaintiffs have appealed.

[1] The Constitution (article 250) directs that:

"The General Assembly shall provide for the creation of a state board, and parish boards of public education."

It also recognizes school districts (article 281); and in article 232 it fixes the rate of the state tax at six mills on the dollar. It limits parish, municipal, or public board taxes for all purposes whatever to ten mills on the dollar—

"provided, that for giving additional support to public schools, and for the purpose of erecting and constructing public buildings, public school houses, * * * the title to which shall be in the public, any parish, municipal corporation, ward or school district may levy a special tax in excess of said limitation; whenever the rate of such increase and the number of years it is to be levied and the purposes for which the tax is intended, shall have been submitted to a vote of the property tax payers of such parish, municipality, ward or school district entitled to vote under the election laws of the state, and a majority of the same in numbers, and in value voting at such election shall have voted therefor."

While article 225 provides that "taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax," the several parish boards of directors of the public schools throughout the state are authorized to impose additional taxes for the support of the public schools in the school districts of the parishes. The property tax payers in any one school district of a parish may authorize additional taxation within their dis-

trict for additional support of the public schools, and for the purpose of erecting schoolhouses in such district, although taxpayers in other school districts, in the same parish, may not impose upon themselves the same or an equal amount of taxation. The objection of plaintiff, therefore, that the tax in district No. 50 is not equal and uniform with the tax imposed in school district No. 37, or other districts in Avoyelles parish, is not well founded.

The next objection of plaintiffs, that the order calling for the election does not specify the years by number during which the tax is to be collected, is without merit; for article 232, and the statutes thereunder, only provide that "the rate of such increase and the number of years it is to be levied and the purpose for which the tax is intended" are to be mentioned in the call to be submitted to the property tax payers of the district. The law does not require that the years should be indicated by their numerical numbers. That is to be done when the tax is levied.

In 1904 the board of directors of the public schools of the parish of Avoyelles, by legal authority, imposed a tax for school purposes on the property in the ward in which districts 37 and 50 are located, for ten years. That term has now expired.

In 1911 school district No. 37 was created, and a tax of five mills was voted for ten years, in addition to the tax then being collected in the ward.

In 1913 another election was held for the purpose of further increasing the school tax by ten mills, but the election failed.

[2] The board of directors of the public schools of the parish of Avoyelles then formed district No. 50, by carving it out of school district No. 37; an election was held in the new district; the tax was carried; and the plaintiffs, property tax payers in district No. 50, are here attacking the action of the school board in creating said school district. Plaintiffs charge that school district No. 50 is a district within a district (No. 37); and they argue that the school board was without authority to form a new district, after it had once formed the district, and that it had exhausted its power under the act of the Legislature. They further object to one of the boundary lines of school district No. 50 as being indefinite, tortuous, and unfair.

Under the direction and authority of the Constitution, the General Assembly has established parish boards of public education throughout the state. In the last act on the subject (No. 214 of 1912, p. 464) it is provided, in section 5, that the board shall be elected by the qualified voters of "each police jury ward of the several parishes of the state, a member of the board of directors of the public schools of such parish for each police juror member in said ward." Such board has jurisdiction over the entire parish.

Among other things, the act provides that:

"The members of the board of directors shall visit and examine the schools in the several school districts of the parish from time to time, and they shall meet and advise with the trustees when occasion requires.

"The board shall determine the number of schools to be opened, the location of the schoolhouses, the number of teachers to be employed, etc. * * * Each board of directors shall exercise proper vigilance in securing for the schools of the parish all funds destined for the support of the schools, including the state funds apportioned thereto, the poll tax collectible, and all other funds. * * * They may * * * change the location of the schoolhouse, sell or dispose of the old site, and use the proceeds thereof toward procuring a new one.

"The board of directors * * * shall have authority to establish graded schools, and to adopt such a system in that connection as may be necessary to secure their success. Central or high schools may be established when necessary. * * * The board of directors shall have the authority to assess and collect fifty cents per annum from the parent or guardian of each child enrolled in the public schools of the parish or district, to be collected in such manner as the said board shall determine. * * *

"It shall be the duty of the parish board with the parish superintendent to divide the parish into school districts of such proper and convenient area and shape as will best accommodate the children of the parish. The parish board of directors shall as soon as practicable proceed to the work imposed upon them and upon the completion of the work they shall make a report to the parish superintendent, which report shall contain the boundary and description of said district, designated by number. * * * Parish boards, if they deem it to be to the best interest of the schools, may divide the parish into districts without reference to the wards in the parish. * * *

"Where two school districts adjoin, it shall be lawful for the children in either of said districts to be taught in and at such schoolhouse as shall be most convenient to them; provided, that the tuition fee shall be paid to the district in which they are taught, and that no charge be made without the consent of the school boards of the respective parishes. * * *

"There shall be selected by the patrons of each local school district in the manner to be provided by the board of directors of the parish in which the school district is located, * * * three auxiliary visiting trustees who shall have the same qualification as members of the parish of the board or directors. The said trustees shall visit the schools of their respective districts and shall make quarterly reports to the parish board of directors of the actual condition of the schools and shall make needful suggestions in all matters relating to the schools of which they are trustees."

The act further makes the superintendent of the public schools in the parishes the treasurer of all school funds appropriated by the state to such parish, or raised, collected, or donated therein, for the support of the free public schools. It is made the duty of the board to adopt a budget of revenues for the ensuing year, and a budget of expenditures for the same time.

School boards are generally considered as public quasi corporations. They are subordinate agents of the sovereign, exercising extremely limited and restricted powers, having for their purpose the accomplishment of a single governmental end, namely, that of the education of the people. The local control of

school districts is vested primarily in the legally designated and qualified voters of the school district, who, at the time designated in the law, elect a board of school directors, which in this state are equal in number to the police jurors in each parish.

The statute under consideration gives to the parish board, in conjunction with the parish superintendent, the right to divide the parish into school districts of such proper and convenient area and shape as will best accommodate the children of the parish. Section 13. And this power to create districts includes the power to create new districts out of old ones or to consolidate two or more districts already formed, and to repeal the ordinance creating any one or more districts. The discretion vested in the parish board in forming school districts cannot be controlled by the courts, where it is not shown that this discretion has been grossly abused. *Burnham v. Police Jury of Claiborne Parish*, 107 La. 513, 32 South. 87.

In the case of *Moore v. Board*, 131 La. 757, 60 South. 234, we reviewed the action of the parish board of school directors in consolidating three school districts previously formed, and the creation of a high school district. The board subsequently rescinded its action creating the high school district, and the action of the board was approved.

Plaintiffs' complaint that one of the boundaries of school district No. 50 is tortuous and unfair is only proved to the extent that it is tortuous. The witnesses had no difficulty in locating it. And as it is made the duty of the school board "to divide the parish into school districts of such proper and convenient area and shape as will best accommodate the children of the parish," their action will not be disturbed. The court is without authority to annul the action of the board in establishing the "area and shape" of school district No. 50. The crooked boundary complained of is not shown to be unfair to the educable children of district No. 50; on the contrary, it is shown that the majority of property owners in that district were desirous of establishing a high school for the children of the district, which high school is shown to have great advantages over the ordinary graded school; and the board, to accommodate the children of the parish residing in district No. 50, in providing a high school for them, ran the boundary line complained of in such way as to embrace within the district the property of those who were desirous of taxing themselves for the improved school conditions. The citizens of the state have a right to tax themselves for such purpose, and it is the duty of the school board to establish and create school districts and schoolhouses which will best accommodate the children of the parish.

The action of the school board in dividing school district No. 37 into two districts, in

which district No. 50 has been formed, has the effect of depriving district No. 37 of a schoolhouse; but under the management of the parish board the children of district No. 37 will be received and taught in the high school established in district No. 50 for the time during each year that the said school, when it was a graded school, was open for the education of the same children, and, under the law which has been quoted before, the children of this adjoining district, No. 37, may attend the full term of the high school in the adjoining district No. 50 by the payment of a small fee fixed by statute.

But no parent or property owner residing in district No. 37 is before the court making complaint of the action of the parish school board. No additional tax has been placed upon property in district No. 37; and the children of that district are not deprived of any right which they enjoyed before the division of district No. 37. It will be time enough to consider a complaint of residents of school district No. 37 when one is made.

Plaintiffs complain that there may be some confusion in having three visiting trustees for each of the districts, Nos. 37 and 50, or of one set of trustees for both districts. The law provides that the board of directors of the parish shall provide for three auxiliary visiting trustees in each district, to be selected by the patrons of the district, in the manner provided by the board of directors. This will doubtless be done for district No. 50 in due time, and the patrons of said school district will select the auxiliary visiting trustees. The duties of said trustees are very simple:

"They shall visit the schools of their respective district and shall make quarterly reports to the board of directors of the actual condition of the schools, and shall make needful suggestions in all matters relating to the schools of which they are trustees."

Judgment affirmed.

(136 La. 400)

No. 20128.

WORKS v. HEILPERN et al.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by Editorial Staff.)

DEEDS \Leftrightarrow 211 — WIFE'S LAND — VALIDITY — EVIDENCE.

Evidence held insufficient to sustain a finding that a wife had been coerced by her husband to convey her plantation to pay his debts, but required a finding that a conveyance was made in settlement of a mortgage duly authorized and given for advances to operate the plantation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 637-647; Dec. Dig. \Leftrightarrow 211.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by Carrie Works against H. L. Heilpern and others to set aside a conveyance of real property. Decree for defendants, and complainant appeals. Affirmed.

Murff & Thurber, of Shreveport, for appellant. Thigpen & Herold, of Shreveport, for appellees.

PROVOSTY, J. This case does not call for any very elaborate discussion, as it involves no disputed point of law, but only facts, and the evidence may be said to be all on one side. Plaintiff sold her plantation to Mark Bluestein, the father-in-law of the defendant Heilpern, on March 6, 1908, and brought this suit on February 14, 1913, to annul the sale on the grounds that she signed the act of sale through the influence and coercion of her husband and thinking that it was only a security for his debts. She alleges that she did not become acquainted with the real facts until long afterwards, and then only from hearsay, and that she then learned that said act evidenced a sale for a price said to have been paid, \$1,300 cash, \$2,000 by means of four notes of the purchaser secured by mortgage on said property, and \$2,500 by the purchaser assuming to pay a mortgage for said amount which some time previously she had given to the defendant Heilpern for a debt of her husband.

The sale is also asked to be annulled on the ground of lesion beyond moiety; but that ground was abandoned in the course of the trial in the lower court.

The facts are that plaintiff gave the \$2,500 mortgage with the authorization of the judge, to obtain advances for her plantation, and that practically all of these advances were made directly to her, she coming to the store of defendant in person for them or having them addressed to her when shipped; that, as the result of overflows followed by the advent of the boll weevil, no crops were being made, and all lands in that neighborhood had become so depreciated that there was practically no sale for them, and that the defendant brought suit to foreclose his mortgage; that a Mr. Pickett, owner of a plantation in the neighborhood of that of plaintiff, took an interest in plaintiff's behalf, and induced the defendant to consent very reluctantly to buy the place at private sale; that plaintiff's husband had abandoned plaintiff months before, and gone to Oklahoma, from whence he had to be asked to return in order to authorize his wife to make the sale; that the transaction was fully explained to plaintiff before she signed the act of sale; that a draft of \$1,300 for the cash part of the price was handed her, and was afterwards presented for payment and paid; that the four notes were handed her, and that some five months afterwards she, in person, sold them for \$1,800, without her husband taking any part whatever in the transaction, so far as the person who bought them from her knew; that while the sale was made to Mark Bluestein, the real purchaser was the

defendant, the purpose of the substitution being to avoid in that way the giving of a mortgage which the defendant would otherwise have had to give to Bluestein.

Judgment affirmed.

(136 La. 402)

No. 20494.

FLANAGAN v. GEHRKE.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

EXECUTORS AND ADMINISTRATORS ~~§~~425—
PUBLIC ADMINISTRATOR—RIGHT TO SUE.

Act No. 68 of 1910 authorizes the public administrator of the parish of Orleans "to appear in court for, and on behalf of, the state of Louisiana, to assert her claim, as heir, to any estate in which the state may be interested," but there is no law which authorizes that officer to prosecute a petitory action on behalf of the state for the recovery of property alleged to have been acquired and to be owned by the state solely, in virtue of her sovereignty; hence, where such suit is brought, and the plaintiff, administrator, disclaims the intention of asserting any claim on behalf of the state, as heir, an exception to his right to prosecute the same and to stand in judgment therein should be sustained.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1663, 1665-1672; Dec. Dig. ~~§~~425.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Peter J. Flanagan, as administrator of the succession of Isaac Warbeck, against Laura Gehrke. From an order denying defendant's objections to plaintiff's capacity to sue, she appeals. Reversed.

Benjamin Ory, of New Orleans, for appellant. M. D. Dimitry, of New Orleans (Ernest T. Florance, of New Orleans, of counsel), for appellee. Wm. Winans Wall, of New Orleans, amicus curiæ.

Statement of the Case.

MONROE, C. J. Plaintiff alleges that he is the public administrator of the parish of Orleans, and, as such, has qualified as administrator of the succession of Isaac Warbeck, and in that capacity he brings this suit to recover, in behalf of the state of Louisiana, certain lots of grounds, situated in New Orleans, and concerning which the following admissions are made, to wit:

That they were purchased by Isaac Warbeck from the New Orleans Canal & Banking Company and others in 1833; that Warbeck died, and that his succession was opened in 1836, upon the application of Gottschalk, a creditor, who was appointed curator of the vacant estate, in which said lots were inventoried; that, in December, 1912, James P. Cordill, public administrator, was appointed administrator and curator of said estate; and that in May, 1913, Peter J. Flanagan succeeded Cordill in those positions. It

is admitted that Joseph P. Bres purchased the lots at tax sale made on June 25, 1894, for state taxes of 1876, 1877, and 1878, assessed in the name of Isaac Warbeck, and received a deed, of date July 2, 1894; that on December 27, 1900, defendant purchased said lots at sheriff's sale made under a judgment and fi. fa. against Bres, received a sheriff's deed, January 15, 1901, and has been in physical possession of, and has paid the taxes upon, said lots since that date.

It is further admitted that "it is mentioned" in the probate proceedings thus referred to that Warbeck died unmarried, and that it does not appear that any one has claimed his succession in the quality of heir.

Beyond the facts thus admitted, the evidence shows that the lots in question were adjudicated to the state at different times in 1884 and 1885, for the state taxes of 1880, 1881, 1882, and 1883, respectively, and that defendant's possession since January 15, 1901, has been open, peaceable and uninterrupted.

Opinion.

The petition alleges:

"That the state of Louisiana is, by reason of his [Warbeck's] said death, and the absence of lawful heirs, the sole owner of his succession, and became, by operation of law, the owner of all the property left by said decedent."

Defendant excepted to the capacity of Flanagan, administrator, to bring suit and stand in judgment, and excepted to the demand made by him, on the ground of vagueness of allegation, no cause of action disclosed, prescription and estoppel; and, reserving her rights with respect to her exceptions, further set up in her answer that the property of a vacant succession does not devolve upon the state by escheat, but that the proceeds of such property after administration are to be paid into the state treasury, and there held in trust, and that the state has no right to demand recognition as owner of the property here in controversy, save as the heir of Isaac Warbeck, which claim is barred by the prescription of 30 years.

The office of public administrator was created and its functions prescribed by Act No. 87 of 1870, p. 120, and the office was abolished as to every parish in the state save the parish of Orleans by Act No. 74 of 1877 (Extra Session, p. 111) which act also made certain other changes in the original statute. By Act No. 222 of 1902, p. 452, section 1 of the act of 1870 was amended and re-enacted so as to read:

"That the Governor * * * shall appoint a suitable person to be known as public administrator for the parish of Orleans. The public administrator for the parish of Orleans shall be appointed administrator of all intestate successions, and curator of the estates of all absentees, when there is no surviving husband or wife or heir, present, or represented in the state, who is qualified * * * and who claims the right to assume the duties of the said office."

By Act No. 68 of 1910, p. 112, the section thus amended and re-enacted was again amended and re-enacted so as to read:

"That the Governor * * * shall appoint * * * The public administrator of the parish of Orleans shall be appointed curator or administrator of all vacant estates. He shall also be appointed administrator of all intestate successions, where there is no surviving husband or wife or heir present or represented in the state, who is qualified to assume and who claims the right to assume the duties of said office. He shall also be authorized to appear in court for and on behalf of the state of Louisiana to assert her claim as heir, to any estate in which the state may be interested." (Italics by the court.)

As we have seen from the excerpt from the petition hereinabove quoted, the plaintiff, administrator, is asserting no claim on behalf of the state as the heir of Isaac Warbeck, but alleges that the state is the "owner" of the property here in controversy, and her counsel interprets their petition to mean that the state disclaims the intention of asserting title by inheritance, and insists that she became the owner of the property solely by virtue of her sovereignty. Their main argument is to that effect, as may be inferred from the following excerpts from their "additional" and latest brief herein filed, to wit:

"Now, in the present case the right of the theoretical heir to accept this succession, which was opened in the courts in 1836, when Warbeck died, remained in suspense until 1866. In 1866, by the lapse of 30 years, his right to accept was barred by prescription. There was no such thing at that time possible as an heir with the right to take possession. The suspense ended and the original title of the state became effective. The property, then, belonged to the state, as part of its public domain, not by forfeiture, not by inheritance, because there was no one from whom it was to be forfeited, and no inheritance was possible. The state took because *there was no heir and because there could be no heir.*" (Italics by the writer of the brief.)

If, then, "there was no heir, and * * * could be no heir," it is plain that the language of Act No. 68 of 1910 (which is the latest act conferring authority on the public administrator), "He shall be authorized to appear in court for, and in behalf of, the state of Louisiana, to assert her claims, as heir," is without application in the present situation, since it confers upon the public administrator no authority with respect to the claim which he is, here, asserting. It is true that in paragraphs of the petition other than that already quoted it is alleged and prayed:

"That long prior to the assessment of any taxes upon which any tax deed may have based the said property had, as aforesaid, become the property of the State of Louisiana; that there can be no such thing as assessment by the state of Louisiana of taxes on property owned by the state of Louisiana; that there can be no forfeiture or sale for said taxes on said property, and the tax collector was without authority to sell, in any manner, property belonging to the state of Louisiana; that it is the duty of the public administrator of the parish of Orleans, now the administrator of

the estate of Isaac Warbeck, to bring into said succession, administer thereon, and turn over to the state of Louisiana, such property as belongs to the state. * * * Wherefore petitioner prays that the said Mrs. Laura Gehrke * * * may be cited to appear and answer this petition, and, after due proceedings had, that judgment be rendered decreeing said Mrs. Laura Gehrke * * * not to be the owner of the property described in the petition, and decreeing the said property to the succession of Isaac Warbeck and which belongs to the state of Louisiana."

The suit is therefore clearly a petitory action, brought on behalf of the state of Louisiana for the recovery of property of which, it is asserted and insisted, the state is owner, by virtue of her sovereignty, and not by inheritance, and the prayer, that "the property be decreed to the succession of Isaac Warbeck, and which belongs to the state of Louisiana," sufficiently indicates that the decreeing of the property "to the succession" is regarded as merely a means to the end, and that the end to be accomplished is the recovery of the property by the state. There may, however, for aught we know, be vast tracks of land, within her borders which belong to the state of Louisiana, by virtue of her sovereignty, which are occupied by individuals or corporations under color of title, and the recovery of which would require the institution of petitory actions, but we find nothing in the legislation concerning the public administrator of the parish of Orleans which confers upon that officer the authority to institute such actions.

If, upon the other hand, it could be argued (though no such argument is made) that this is primarily a suit on behalf of a vacant succession, for the return "to the succession" of property belonging to it, and that the court is not called upon to consider at this time the ultimate destination of the property, the answer would be that the claim of the succession is barred by the prescription of ten years in favor of the defendant, by reason of her actual, open, peaceable and uninterrupted possession for more than ten years, in good faith, under a title transmissive of property emanating from the state of Louisiana, and by the prescription of three years, in favor of tax titles established by article 233 of the Constitution. Plaintiff can hardly deny that there is still such an entity as the vacant succession of Isaac Warbeck, since he comes before the court in the capacity of its administrator, and prays for a judgment "decreeing said property to the succession of Isaac Warbeck," and our law (C. C. 3526) declares, in express terms that prescription "runs against a vacant suc-

cession, though no curator has been appointed to such succession." Without, however, entering upon the question of the construction of those provisions of the Civil Code, which, upon the one hand, declare that (article 485) "the succession of persons who die without heirs, or which are not claimed by those having a right to them, belong to the state," and that (article 929) "in defect (sic) of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the state," and, upon the other hand, of article 917 (found under the subtitle, "Of Irregular Successions") which declares that when the deceased has left neither lawful descendants, nor lawful ascendants, nor collateral relations, *the law calls to his inheritance*, either the surviving husband, or wife, or his or "her, natural children, or the state in the manner and order hereafter directed" (italics by the court) and of article 949, and other provisions, to the effect that irregular heirs do not succeed directly to the estate of the *de cuius*, but have only a right of action to be put into possession, and of the various provisions concerning vacant successions and their administration, to be found in chapter 8 of Book 3, we find it sufficient, for the purposes of this case to hold, that, though Act No. 68 of 1910, p. 113, authorizes the public administrator of the parish of Orleans to "appear in court for, and on behalf of, the state of Louisiana, to assert her claim as heir, to any estate in which the state may be interested," there is no law which authorizes that official to bring a petitory action on behalf of the state for the recovery of property alleged to have been acquired, and to be owned by the state, solely in virtue of her sovereignty; and hence that the exception to plaintiff's capacity to prosecute this suit and to stand in judgment should have been sustained. The point thus passed on, it may be remarked, was not presented or considered in the case of Cordill, Administrator, v. Quaker Realty Co., 130 La. 933, 58 South. 819, upon which plaintiff relies.

For the reasons assigned, it is ordered and decreed that the judgment appealed from be annulled and avoided, and that there now be judgment in favor of defendant, sustaining her exception to the right and capacity of the plaintiff, administrator of the vacant succession of Isaac Warbeck, to prosecute this suit and stand in judgment herein; and it is accordingly further decreed that plaintiff's demands be rejected, and this suit dismissed at the cost of said plaintiff.

(136 La. 409)

No. 20907.

HOPKINS v. CROW et al.

In re CROW.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by Editorial Staff.)

1. COURTS \S 121—JURISDICTION—AMOUNT IN CONTROVERSY.

In a revocatory action the court's jurisdiction is tested by the amount of plaintiff's claim, while in an action en declaration de simulation it is tested by the value of the property whereof the transfer is sought to be set aside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 410, 413-426, 428, 437, 450, 452, 458, 459, 466; Dec. Dig. \S 121.]

2. COURTS \S 122—JURISDICTION—CAUSES OF ACTION.

Where plaintiff's petition alleged conjunctively a revocatory cause of action, and also facts sufficient to sustain an action en declaration de simulation, but the court had no jurisdiction of the revocatory action, because the amount in controversy was insufficient, an exception thereto would be sustained and the declaration upheld only in so far as it stated a cause of action de simulation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413, 427; Dec. Dig. \S 122.]

Action by J. L. Hopkins against Perry Crow and others. Application by M. E. Crow for writs of certiorari and prohibition to the Judge of the Fourth Judicial District Court of the Parish of Union. Exceptions to jurisdiction, so far as applicable to the revocatory action, sustained, and, so far as applicable to the action en declaration de simulation, affirmed.

J. B. Crow, of Farmersville, for applicant. John B. Holstead, Judge, of Ruston, in proper. Harvey G. Fields, of Farmersville, for respondent.

PROVOSTY, J. The plaintiff's petition contains the allegations and prayer for a revocatory action, and also the following additional allegations and prayer, to wit:

"That the said transfer of land was without any real consideration; that the consideration therein expressed is erroneous; and that the said act does not evidence a real and genuine sale."

"Prays that said transfer be entirely revoked."

This allegation and prayer are sufficient to sustain the action en declaration de simulation; so that this action and the revocatory action are included in the same petition. Usually when both of these actions are urged in one petition it is done in the alternative, but this precaution was not taken in the present case. No exception was based on that circumstance however; the only exception filed, which is the one we are now called upon to consider, was to the jurisdiction of the court *ratione materiae*.

[1] The lower limit of the jurisdiction of the district court in which the suit is filed is \$50; whereas the amount of plaintiff's claim is only \$38. The law is that in the revoca-

tory action the jurisdiction of the court is tested by the amount of plaintiff's claim, and that in the action en declaration de simulation it is tested by the value of the property whereof the transfer is sought to be set aside. The contention of relator is that the suit is purely revocatory, and that therefore the court is without jurisdiction.

[2] True, the court has no jurisdiction of the revocatory action. *Loeb v. Arent*, 33 La. Ann. 1086; *Zuberbier and Behan v. Morse*, 36 La. Ann. 970; *Schwartz v. Schmidt*, 37 La. Ann. 42; *Flower v. Prejean*, 42 La. Ann. 897, 8 South. 596; *Moore v. Ringuet*, 45 La. Ann. 1118, 13 South. 670; *Newman v. Blackman*, 50 La. Ann. 128, 23 South. 205; *Courtney v. Rigmaiden*, 112 La. 806, 36 South. 704. But it has jurisdiction of the action en declaration de simulation.

It is therefore ordered, adjudged, and decreed that, in so far as the exception to the jurisdiction is applicable to the revocatory action, the judgment overruling same is set aside, and that said exception is now sustained, but that, in so far as the said exception is applicable to the action en declaration de simulation, the judgment overruling same is affirmed; the costs of the present application to be paid in equal parts by plaintiff and defendant.

(136 La. 411)

No. 19806.

HARVEY et al. v. GARTNER et al.

(Supreme Court of Louisiana. April 27, 1914.

On Rehearing, Jan. 25, 1915.)

(Syllabus by the Court.)

On Rehearing.

1. MALICIOUS PROSECUTION \S 25—RIGHT OF ACTION—FILING PETITION IN BANKRUPTCY.

A petition in bankruptcy filed by bona fide creditors, without malice, without libelous and slanderous charges, with reasonable grounds for believing the allegations contained in the petition, with probable cause, and upon legal advice, although not successfully prosecuted, will not sustain an action for damages in the courts of the state.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 56-58; Dec. Dig. \S 25.]

2. BANKRUPTCY \S 114—CONSERVATORY PROCEEDING—APPOINTMENT OF RECEIVER.

The appointment of a receiver without bond from the petitioners, to take possession of the property of a person charged with bankruptcy, is a conservatory proceeding, instituted for the benefit of the debtor and his creditors, and cannot be likened to the issuance of a writ of attachment by the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 164-166; Dec. Dig. \S 114.]

3. BANKRUPTCY \S 99—RECEIVER—CONSERVATORY WRIT—DISSOLUTION.

Damages will not be allowed on the dissolution of ordinary conservatory writs, in the absence of statutory authority therefor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 136, 146; Dec. Dig. \S 99.]

(Additional Syllabus by Editorial Staff.)

4. RECEIVERS \Leftrightarrow 81—NATURE OF OFFICE.

A receiver is an arm of the court representing the debtor and creditors as well as the court.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 150; Dec. Dig. \Leftrightarrow 81.

For other definitions, see Words and Phrases, First and Second Series, Receiver.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Martin W. Harvey and others against Oscar Gartner and others. From the judgment, plaintiffs appeal. Reversed and rendered.

James J. McLoughlin and Hall, Monroe & Lemann, all of New Orleans, for appellants.

Edgar M. Cahn, of New Orleans, for appellees Wilmot Machinery Co. and Gartner. Gustave Lemle, of New Orleans, for appellee A. Baldwin Co., Limited. J. Zach Spearling, of New Orleans, for appellee Palfrey-Rodd-Purcell Co., Limited.

The following is an extract from appellees' brief:

In *Ellis, Milbank & Co. v. Fisher, Burgess & Co.*, 10 La. Ann. 479, it was held:

"Where two parties have judgments against each other, they are bound to compensate, and the execution in either case may be enjoined."

To the extent that plaintiff's judgment was compensated by each judgment rendered in favor of each defendant, it ceased to be. Having no existence, of course no execution could issue thereon against any one.

Plaintiffs' judgment being compensated to the extent of the respective judgments obtained by defendants, execution can only issue for the balance, and this is what the judge a quo decreed should be done.

Article 2091 of the Revised Civil Code reads as follows:

"There is an obligation in *solido*, on the part of the debtors, when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them, exonerates the others toward the creditor."

The judgment being in *solido*, under article 2091 of the Revised Civil Code, above quoted, any payment made by any of the debtors in *solido* exonerates the others toward the plaintiff to the extent of the amount paid.

Pothier on Obligations, p. 152, lays down the following:

"The payment which is made by one of the debtors (in *solido*) liberates all the others; this is a consequence of the principle, that a debtor, in *solido*, is only one debtor of the same thing, of which there are several debtors."

"Not only a real payment, but every other kind of payment, ought to have this effect; therefore, if one of the debtors in *solido*, being sued by the creditor, opposes, in compensation of the debt demanded, a like sum owing to him from the creditor, the other debtors are liberated by this compensation, as well as by a real payment."

"Peter and Paul are my debtors, in *solido*, of the sum of one thousand pounds. Afterwards I become the debtor of Peter of the like sum. If I sue Peter for the payment of the thousand pounds due me, and he opposes the compensation of the debt due to him, this compensation, as we have seen, being equivalent to a payment, the

debt due to me from Peter and Paul becomes extinct, as against them both."

Fuzier-Harman, *Répertoire Général Alphabétique du Droit Français* (Edition of 1894) vol. 12, under the word "Compensation," No. 126:

"It has been decided that if the codebtor, who can of his own personal right plead compensation, is sued, or if he intervenes in the suit directed against his codebtors to plead compensation, the discharge is acquired by all."

Pandectes Françaises, Nouveau Répertoire de Doctrine de Législation et de Jurisprudence, Rivière, Weiss & Frennelet (Edition of 1893), Obligations, No. 459:

"The character of the exception based on compensation, as exception of release of debt, cannot be determined 'a priori.' It would appear that compensation, likened theoretically to double imaginary payment, ought to produce in the matter of solidarity the same effect as payment. It is just that which happens when the creditor of the debt in *solido* at the outset (at first) demands payment from that one of the codebtors to whom he himself is a debtor, and he is met with the plea of compensation. If the creditor then attempts to claim payment of the debt from the other codebtor, he has the right to apply to the creditor that the debt extinguished by the compensation pleaded by his consort (codebtor) has been at the same time extinguished in regard to him. Compensation, as we are going to see, which furnishes only a personal exception, becomes here a common exception."

Paillet, *Manuel de Droit Français, commenting on C. N. 1294* (our C. C. 2211), 7th Ed., p. 525, says:

"Whenever one of the solidary codebtors, to whom is due something by the creditor, has himself used the means of compensation to have the debt, for which he is held as a solidary obligor, declared extinguished, all the other solidary codebtors may take advantage of that fact to prove that the debt can no longer be claimed from them. The effect of the compensation is necessarily to terminate the action of the one who was originally the creditor, otherwise there would be a contradiction in recognizing in him again to recover it," etc.

Pothier on Obligations, p. 152, has the following:

"While article 1294, C. N. (R. C. C. 2211), does not permit a solidary obligor to oppose as compensation the sums which the creditor owes to his codebtor, it does not follow that the solidary obligor is not able to take advantage of a judgment in favor of his codebtor which has already pronounced the compensation."

PROVOSTY, J. This suit is in damages for loss of property and injury to credit and reputation, alleged to have been suffered by plaintiffs as the result of proceedings in involuntary bankruptcy instituted against them by the defendants, in the course of which a receiver was appointed to take possession of the property. The plaintiffs are the firm of Martin W. Harvey & Co., and Martin W. Harvey individually; said firm being alleged to be composed of Martin W. Harvey and Howard Segrave.

An exception of want of proper parties was interposed, based upon the fact that the partner, Segrave, is not individually a party to the suit. This exception was properly overruled. The suit is by the partnership and by Martin W. Harvey; both of them perfectly competent persons to stand in judg-

ment without the assistance of Segrave. Individually, Segrave has no cause of action; he having consented to the proceedings in bankruptcy.

Pleas of *res judicata* and estoppel also were filed. They are founded upon the following facts: After the termination of the proceedings in bankruptcy by the rejection of the petition in bankruptcy, the plaintiff firm took a rule on the receiver to show cause why he should not return its property of which he had taken possession; and, when the receiver applied for his discharge and the cancellation of his bond, the plaintiff firm filed an opposition, alleging that he had not accounted for said property. There was judgment overruling this opposition, and discharging the receiver. It is that judgment which is said to be *res judicata* of the present suit.

That judgment passed merely upon the liability of the receiver, and in no wise upon the liability of the present defendants. The rule upon the receiver, as well as the opposition to his discharge, was a mere calling upon that officer to give an account of his stewardship. In making his defense to them, the receiver was representing exclusively himself, and in no wise the present defendants. The suit in the instant case is a calling upon the defendants themselves, and it is to respond in damages for having instituted the proceedings in bankruptcy and caused a receiver to be appointed. Hence neither the cause of action, nor the parties, nor the thing demanded, can be said to be the same in the present suit as in these former proceedings; and, as a consequence, the judgment in these former proceedings is not *res judicata* of the present suit.

The estoppel is said to result from the fact that plaintiffs demanded of the receiver the return of the property. This plea is so devoid of legal foundation that one hardly knows how to get about arguing it. In the exercise of their right to recover back their property or its value, the primary recourse of the plaintiffs was against the receiver who had taken possession of it, and, in legal contemplation, still had it in possession. So long as the receiver had the property in possession, these plaintiffs certainly could not have a cause of action in damages against the present defendants for the loss of it. How, then, can the legal efforts of these plaintiffs to recover this property from the receiver operate as an estoppel to the present suit. Instead of a bar it was rather in the nature of a prerequisite.

In support of this plea of estoppel the defendants cite *High on Receivers* (4th Ed.) p. 319, § 270, to the effect that the litigant, at whose instance a receiver has been appointed, is not liable for property lost through the fault of the receiver. Grant that this is good law, the plaintiffs are not suing for any losses suffered through the fault of the

receiver, but for losses suffered without the fault of the receiver—losses which he could not avoid, but for which the defendants are alleged to be liable by reason of the same having been the direct consequence of their act in wrongfully instituting bankruptcy proceedings and causing a receiver to be appointed. If, by reason of having to be sold at forced sale for whatever was bid, at a time of great financial depression, when there was no market for that kind of property, the movables of the plaintiff firm, of which the receiver took charge, had to be sold for a mere song, and, if, by reason of its being in the hands of a receiver, the sawmill of the plaintiff firm could not be insured, these were matters for which the receiver was in no way at fault, and for which he was in no wise responsible, but which came about as the direct consequence of the bankruptcy proceedings instituted by these defendants, and of the appointment of a receiver made at their instance, and for which they may well be responsible, notwithstanding the blamelessness of the receiver.

On the merits, the facts are as follows: The firm of Martin W. Harvey & Co. was originally composed of Martin W. Harvey, L. C. Heintz, and James L. Reid. It was formed in February, 1907. It was a sawmill concern, and owned a sawmill plant, timber lands, oxen, and wagons. After it had been in existence some six months, and had accumulated a considerable amount of lumber on its yard, and contracted debts, Harvey, in August, 1907, bought out the interest of Heintz and Reid, and took Segrave as a partner. The purchase price was \$2,500—\$625 cash, and \$1,875 credit, for which Harvey gave his note. On October 10, 1907, the partnership, by way of security for the payment of this note, made a redeemable sale to Heintz and Reid of all its timber lands, oxen, and wagons, reserving, however, the possession and use of this property, and agreeing that payment should be made on the \$1,875 note at the rate of \$2.50 for every thousand feet of lumber sold. At that time the financial crisis of that year was on, and owing to the business depression resulting therefrom, the firm found itself unable to dispose readily of the lumber it was accumulating on its yard or to collect its accounts, and in consequence found itself financially embarrassed. Its largest creditor was the defendant, Oscar Gartner, who had been furnishing it money to run with. It then entered into a written agreement with Gartner, by which the latter undertook to act as trustee and take possession of all the property of the firm, and operate the mill and dispose of the lumber, in the interest of the creditors; and, under this agreement, he actually took possession. Certain of the creditors, however, would not join in this arrangement, and brought suit; and this led to an application for a respite.

This application was filed on February 28, 1908. The defendant Gartner furnished \$50 towards the expenses of it. On March 8, 1908, he filed the petition in involuntary bankruptcy, having induced the other defendants to join him in it, and given them, in order to induce them to do so, a written guaranty to hold them harmless against all claims for damages; they having no knowledge of the facts of the matter, and relying entirely upon his representations. The respite proceedings were still pending. They culminated in the respite being granted on April 8, 1908. On March 9th, the day after the filing of the petition in bankruptcy, the defendants filed a petition alleging that the appointment of a receiver was necessary, and asking that one be appointed. This prayer was granted, and a receiver was appointed; and he took charge of all the property which the plaintiff firm had turned over to the defendant Gartner, as trustee, except the part included in the redemption sale. The fire insurance companies canceled their policies on the sawmill, for the reason that it had passed into the hands of a receiver, and the receiver was unable to obtain insurance. On March 24, 1909, judgment was rendered dismissing the bankruptcy proceedings. In the meantime, the sawmill had burnt down without insurance, and the receiver had had to sell all the movables at auction sale for whatever they would bring for cash. Plaintiffs first exhausted their remedy against the receiver, and then brought this suit.

The receiver, by authority of the court, took possession of the property of the plaintiff firm against its will in precisely the same way that a sheriff does under a writ of attachment or sequestration. From that moment, the plaintiff firm was as powerless to protect or preserve the property or interfere with it as if an injunction had issued against its doing so. "The appointment of a receiver," says 34 Cyc. 17, "is an equitable remedy which bears a similar relation to courts of equity that proceedings in attachment bear to courts of law. Hence the appointment of a receiver has been stated to be an equitable injunction or attachment, although it is also said to be in the nature, not of an attachment, but a sequestration." Inasmuch as the defendants caused the receiver to be appointed, the plaintiff firm contends that they should stand in responsibility for the loss of said property precisely as does a plaintiff in writ when an attachment or sequestration is dissolved.

Defendants, on the other hand, contend that this would be the case only if the appointment of the receiver had been made under section 8e of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1913, § 9587]); that is to say, upon bond being furnished, and not under the general equitable powers of the court, without bond being furnished.

We do not see what the nonfurnishing of the bond has to do with it. Damages for the wrongful issuance of an attachment or sequestration would be due none the less if an attachment or sequestration bond had not been furnished. The nonfurnishing of bond for obtaining the writ would appear to us to be in the nature of an aggravation of the situation. What would have been the legal situation if the court had made the appointment of its own motion, we will not undertake to say, but it made it upon the allegations, affidavit, and express prayer of these defendants.

The trial court allowed the plaintiff firm \$8,000 for the sawmill burnt down without insurance, and nothing for the lumber which was taken charge of by the receiver and sold at a sacrifice price. This lumber was appraised at \$1,000, and we think the plaintiff firm is entitled to at least that much for it. Defendants contend that the allowance of \$8,000 for the mill is excessive. We do not so find from the evidence. The plaintiff firm, then, should have judgment for \$9,000, less \$770.14 accounted for by the receiver.

The plaintiff firm would seek to hold defendants liable, not only for the property taken possession of by the receiver, but also for the property turned over to Gartner as trustee. But this cannot be, as the present suit is not one for an accounting, but for damages resulting from the bankruptcy proceedings.

As actual damages, in addition to the property losses, the plaintiff firm claims \$2,000 attorney's fees. Attorney's fees could not be allowed for defending the bankruptcy suit, nor for prosecuting the present suit, since attorney's fees are not allowed for prosecuting or defending ordinary suits. They are allowed for obtaining the release of property from seizure, but only where the services in that connection are rendered separately from those rendered in the main suit. In other words, only where the release of the property is obtained by means of a separate proceeding, and not as the result of the termination of the main suit, to which the seizure was ancillary. All this is so abundantly settled in our jurisprudence that citation of the decisions to that effect cannot be necessary.

The trial court properly rejected also the claim of damages for injury to reputation and credit. The bankruptcy proceedings were instituted on the advice of counsel, which is in itself a good defense if Gartner in good faith laid the facts before the counsel; and we have no sufficient reason to think that he did not do so. It is said that the plaintiff firm was in fact solvent, and that defendant Gartner knew this, since he was familiar with its affairs. But the solvency of the firm was not so very clear; there were large debts; and, while there were assets, there was no market for them; and they were not so large but that opinions might differ on the point of whether their

actual, present value exceeded the debts. It is said that Gartner's knowledge of this solvency is conclusively shown by the fact that the respite proceedings were predicated on the assumed solvency of the plaintiff firm, and that he co-operated with the plaintiff firm in said proceedings. We see nothing conclusive in this. A business man may be hopeful of a certain business situation one day and not be so confident a week or ten days later. Especially if he makes new discoveries, as, we suspect strongly, Gartner did in this case. Except the statement of Harvey, that Segrave represented Gartner, and kept the books of the firm, we find absolutely nothing in the record to show that Gartner, at the time the application for a respite was made, had any knowledge, or even suspicion, of this redemption sale having been made. The schedule of assets filed with the petition for a respite, and duly sworn to by both Harvey and Segrave, makes no mention of this redemption sale, but carries the property thus sold as still belonging to the firm. There is no reason to suppose that Segrave was more communicative to Gartner, with regard to this redemption sale, than he was to the court. In the absence of all suggestion of ill will or express malice, the fact that Gartner was so confident of his case in the bankruptcy proceedings that he was willing to undertake to hold his creditors harmless against afterclaps affords a strong inference of his good faith.

In their several answers to plaintiffs' petition, the defendants prayed for judgment against the plaintiff firm for the amounts due them respectively by it; and the trial judge, in the same judgment in which he condemned the defendants, in solido to pay the plaintiff firm \$10,000, condemned the plaintiff firm to pay to them the amounts due them respectively; and he went on and decreed that the sum, or aggregate amount, of those several judgments in favor of defendants should extinguish in an equal amount by compensation the judgment of the plaintiff firm.

The plaintiff firm complains of this lumping of the judgments; but we do not see that it has any ground for doing so. What difference can it make whether the extinguishment of its judgment by compensation, which results by operation of law, is effected by these judgments separately or together. The extinguishment is just as effective and complete and final in the one case as in the other.

Counsel say that "as a practical proposition this result does injustice to the general creditors of Harvey & Co. by making it impossible to collect the solidary judgment in their favor from the responsible defendants."

But surely counsel would not want to collect an extinguished judgment, or the extinguished part of a judgment. When, in the same judgment, Harvey & Co. is condemned to pay to Oscar Gartner \$6,696.23, and Oscar Gartner is condemned to pay to Harvey &

Co. \$10,000, compensation takes place by operation of law and the \$10,000 judgment is extinguished completely and finally up to \$6,696.23, and continues to exist only for the balance of \$3,303.77, and execution can issue only for this balance. And, as with the judgment in favor of Gartner, so with the judgments in favor of the other defendants; each extinguished by compensation, to an amount equal to itself, the judgment of the plaintiff firm. "Compensation," says article 2208, C. C., "takes place of course by the mere operation of law, even unknown to the debtors; the two debts are reciprocally extinguished, as soon as they exist simultaneously, to the amount of their respective sums."

Counsel quote article 2211, C. C., to the effect that one debtor in solido cannot oppose in compensation what the creditor owes to his codebtor. But nothing of the kind is being done in the present case. In the present case each debtor is opposing in compensation the debt due to himself. This article 2211 can have application only where a debtor in solido is being sued separately. It can have none where all the debtors in solido are being sued together, and the debts to be compensated are all embraced in the same judgment. See extract from defendants' brief given in margin.

The judgment appealed from is affirmed, except that, in so far as it is in favor of plaintiffs, it is reduced from \$10,000 to \$8,230. The costs of appeal to be paid by plaintiffs.

O'NIELL, J., takes no part.

On Rehearing.

SOMMERVILLE, J. The firm of Martin W. Harvey & Co. was organized February 1, 1907, to engage in owning and operating a sawmill in St. Tammany parish, La.; and it went into operation April 1st of the same year. The partners were Martin W. Harvey, who had a one-half interest, Dr. Louis Heintz and James L. Reid, with a one-fourth interest each. Harvey contributed a secondhanded boiler and some machinery, together with a small amount of lumber, valued at about \$2,000, to the partnership; and the other two partners contributed \$1,000 each. Oscar Gartner, the principal defendant in this suit, made loans and advances to the firm in the sum of about \$6,696.23, under a written contract, of date February 21, 1907, wherein the firm pledged to him, as security, "all lumber and logs on hand at the said mill, or adjacent thereto, or to be manufactured thereat, and also the mill buildings, mill machinery, dry kilns, teams, etc., used in conjunction with said sawmill."

In August, 1907, Heintz and Reid withdrew from the firm, after they received from the firm a check for \$625 and a note for \$1,875, making \$2,500, for their interests. Howard A. Segrave became a partner in the firm, to the extent of a one-eighth interest,

in August, 1907; M. W. Harvey being the owner of the other seven-eighths. James L. Reid testified that he sold his interest to Segrave for \$1,250, although, according to his testimony, he, together with Dr. Heintz, had received \$2,500 for their joint interest in said partnership from that partnership. The new firm retained the name of the old firm.

October 10, 1907, the new firm sold to James L. Reid and Dr. Louis G. Heintz all of the standing timber around the mill, all the contracts and leases that it held from the Greenlaw Lumber Company, the ox teams and wagons, all of which were used in connection with the sawmill, for \$1,875, the amount of the promissory note which was formerly issued to these gentlemen by said firm, in part payment of what they had invested in the firm as partners; and they acknowledged due delivery of the property sold to them. This act of sale contained a right of redemption within six months by paying to the purchasers the purchase price, with interest at the rate of 8 per cent., and all costs of transfer. The act provided:

"If said property is not redeemed within six months the said purchasers are to be the absolute owners of said property."

The property was not redeemed within the specified time. October 18, 1907, Heintz and Reid sold this same property to Jos. Rauch for \$1,875, subject to the right of redemption reserved to M. W. Harvey & Co. October 19, 1907, the firm entered into a contract with some of its creditors, wherein it was stated that the firm is "financially embarrassed and is temporarily unable to pay its debts and comply with its obligations." And it was agreed that a trustee should be appointed to take charge of the business of said firm and administer its affairs. This agreement was not to be binding or effective until all creditors of the firm had signed it. All the creditors did not sign, although Mr. Gartner, the largest creditor, went into possession of the property temporarily as trustee for all concerned. He was required to take an inventory of all the assets of the business; he was to operate the mill and sell the output of lumber to the best advantage; but the creditors of the firm were not informed that the firm had already parted with most of its assets by transferring to the two retiring partners, Heintz and Reid, all of the assets, except the sawmill and about \$500 worth of lumber. The mill was not operated by Mr. Gartner, the trustee. An offer was made to him, while acting as trustee, which he thought advantageous to the creditors of the concern, whereby a lease might be effected, with an option to purchase for \$7,500 the entire property, including the standing timber, etc., which had been sold to Reid and Heintz, which, in turn, had been sold to Rauch. But Reid and Heintz refused to return the property transferred to them without payment of

the \$1,875; and the offer could not be accepted.

February 22, 1908, M. W. Harvey & Co., alleging their "inability to collect accounts due them promptly, and by reason of the unusual depression and stagnation in business (the panic of 1907 was on), and their inability to dispose of their stock in trade and other assets rapidly enough in due course of business to meet maturing obligations, and by reason of losses sustained by them in the course of said business, petitioners are not at present able to meet their obligations;" and they asked for a respite of one year. To their petition they attached a schedule of assets amounting to \$14,200, and of liabilities amounting to \$12,767.04. In the list of assets were placed the standing timber, valued by them at \$3,000, and the oxen and wagons at \$1,200, which had been sold to Heintz and Reid nearly a year before; and the time for redeeming them had expired. And among the liabilities were placed Reid and Heintz for \$1,875, although they had been settled with. Harvey advanced the costs of the respite proceeding.

Before the order for respite was granted, March 9, 1908, five of the creditors of the firm of M. W. Harvey & Co., among whom was Oscar Gartner, petitioned the United States District Court to adjudge the firm, and the members thereof, bankrupts. All of the members of the old firm of M. W. Harvey & Co., as well as the members of the new firm, were made parties defendant. There was a trial, with the verdict that:

"We, the jury, find that the firm of M. W. Harvey & Co., composed of Martin W. Harvey and Howard A. Segrave, was solvent, within the intent and meaning of the bankruptcy law, on the 9th day of March, 1908, and had not committed an act of bankruptcy within the intent and meaning of the bankruptcy law."

There was judgment holding that the original firm of M. W. Harvey & Co. had been dissolved August 10, 1907, and that the new firm of Martin W. Harvey & Co. was formed subsequently, consisting of Martin W. Harvey and Howard A. Segrave, of which neither Reid nor Heintz were members; and it was decreed that the petition of the plaintiffs be dismissed, with costs, reserving to respondents their rights to sue for damages, if any they had.

In their petition to have the firm of M. W. Harvey & Co. and the individual members thereof declared bankrupts, the petitioners set forth the different acts of the firm hereinbefore mentioned, and introduced documentary evidence in support thereof. And, in addition thereto, there was filed an answer by Howard A. Segrave, one of the members of said firm, in which he admitted the inability of said firm, and the individual members thereof, including himself, to pay their debts; and he expressed a willingness that he and the partnership should

be adjudged bankrupts; and he joined in the prayer of the petitioners.

This written admission on the part of Segrave for himself and his firm was an act of bankruptcy; but the jury and the court neglected to adjudge him a bankrupt.

Martin W. Harvey, individually, and Martin W. Harvey & Co., composed of Martin W. Harvey and Howard Segrave, bring this suit sounding in damages against Oscar Gartner and four others, all of whom were creditors and petitioners in the bankruptcy proceeding before referred to. They allege that these defendants petitioned the United States District Court to have them declared bankrupts, and asked for the appointment of a receiver, who took possession of their property; and that they opposed the bankruptcy proceedings. And they further allege that defendants filed said proceedings "wantonly and with malice"; and that the petition therein filed "constitutes a libel and slander upon the reputation of your petitioners as well as upon the business reputation, credit, and character of your petitioners, and your petitioners show that the allegations of the said petition and affidavit are untrue and unfounded," and they claim damages in the sum of \$24,000, divided as follows: For loss of property, \$12,000; loss of profits, \$5,000; fees of counsel in the bankruptcy court, \$2,000; and for damages to petitioners' credit, character, reputation, and business standing, \$5,000. A supplemental petition was filed by the same parties reciting that a verdict and judgment had been rendered in the bankruptcy proceeding dismissing same.

The record shows that the partnership of M. W. Harvey & Co. has been dissolved. The object of the partnership was the running of a sawmill, and that sawmill has been destroyed by fire; all the assets of the firm have been disposed of; and one of the partners, Howard Segrave, is a bankrupt, as declared by him in the bankruptcy proceeding in his answer to the petition filed in that cause. The only real party plaintiff is M. W. Harvey.

Petitioners do not set forth any averment of the petition in bankruptcy filed by these defendants which was libelous and slanderous. And it does not contain such. The language therein used is decorous and proper; the allegations thereof are material; and the lines of the statute were followed very closely. But plaintiffs allege that the filing of said petition was done "wantonly and with malice, and constitutes a libel and slander against the reputation of your petitioners," etc. And it is argued by them that it is unnecessary to show malice on the part of defendants to sustain their suit for damages.

They are not proceeding under section 3e of the bankruptcy law, which provides in part that:

"If such petition be dismissed by the court or withdrawn by the petitioner, the respondent or respondents shall be allowed all costs, counsel

fees, expenses, and damages occasioned by such seizure, taking, or detention of such property. Counsel fees, costs, expenses and damages shall be fixed and allowed by the court, and paid by the obligors in such bond."

The section further provides that, where the petition asks that the property of defendant be taken charge of and held pending a hearing of the petition, the petitioner must give bond with good and sufficient surety.

The petitioners in the bankruptcy court did not ask, in their petition to have the now plaintiffs declared bankrupts, that the property should be taken charge of by the marshal; and no bond was given by them for such an order. The petitioners there pursued the usual course of filing a separate petition, on the same day that the original petition was filed, in which they asked that a receiver might be appointed. This receiver was appointed by the court, and he took possession of the property of the defendants, without the plaintiffs in the suit being required to give any bond.

Petitioners are proceeding under the state law which provides that whatever act of man that causes damage to another obliges him by whose fault it happened to repair it; and they are asking for alleged actual damages and attorneys' fees for defending them in the bankruptcy court.

The bankruptcy court is authorized in the bankruptcy law of July 1, 1898, to "appoint receivers or the marshals, upon application of parties in interest, in case the courts shall find it absolutely necessary, for the preservation of estates, to take charge of the property of bankrupts after the filing of the petition and until it is dismissed or the trustee is qualified." Section 2 (3) (U. S. Comp. St. 1913, § 9586). The statute does not require, although the court may order, that petitioners shall give bond when a receiver is applied for and appointed; but a bond is required of the petitioners when they ask that the marshal be put in possession of the property of the alleged bankrupt. Section 3e and section 69a (sections 9587, 9653).

If this suit for damages and counsel fees were in the bankruptcy court, and on a bond given by the petitioners there in accordance with the bankruptcy law and an order of court, the cause of plaintiffs would be controlled by the terms of that statute. It has been held by the Supreme Court of Illinois in *Hill v. U. S. Fidelity & Guaranty Co.*, 250 Ill. 242, 95 N. E. 150, that damages were recoverable on a bond given by a creditor on the appointment of a receiver in bankruptcy, who had been appointed on an order wrongfully obtained. The court held that the law applied alike to the bonds given by petitioners for receivers and for marshals in bankruptcy proceedings.

A decision to the contrary was rendered in *Re Moehs & Rechnitzer* (D. C.) 174 Fed. 165, in a suit on a bond given for the ap-

pointment of a receiver, where the petitioners acted without malice and with probable cause.

This present suit is not on a contract or bond given in a bankruptcy proceeding. The provisions of the bankruptcy law are not invoked by plaintiffs. Congress has authorized the courts of bankruptcy to allow to respondents in bankruptcy suits, where the petition is dismissed or withdrawn, "all costs [counsel fees], expenses, and damages occasioned by such seizure, taking and detention of such property," where bonds have been required and given for such seizure.

And the action of Congress in allowing damages in the case referred to is persuasive with the court, but the statutes and jurisprudence of this state must govern in disposing of this cause.

We do not think that plaintiffs can recover under the state statutes. And it has been held, with direct reference to the bankruptcy act, by the District Court, S. D. New York, in *Re Ghiglione*, 93 Fed. 186, that counsel fees could not be recovered in the case where application was made for a receiver and was denied.

[1] Plaintiff alleged that the defendant acted wantonly and with malice. The allegation is necessary to sustain the action. Malice, express or implied, and the want of probable cause, must both concur in actions of this kind. The suit is in the nature of a suit for damages for a malicious prosecution; and an action for instituting a civil suit of that nature requires not less for its maintenance than an action for a malicious prosecution of a criminal proceeding. The trial judge ignored totally the question whether the conduct of the now defendants had been attended by malice, though the now plaintiffs charge malice in their petition; and he denied all importance to the necessary inquiry, whether the now defendants had probable cause for their action or not.

The plaintiffs in the bankruptcy court proceeded with firm and reasonable belief that they had a just claim, a lawful right to resort to that court; and their failure in that court cannot render them responsible in damages for the consequences of their acts. Their conduct must be weighed in view of what appeared to them when they filed their petition in the bankruptcy court, not in the light of subsequently appearing facts. If they had reasonable cause for their action they cannot be held in damages because of their failure. That they had reasonable cause to believe that acts of bankruptcy had been committed must be conceded in view of the statements in the answer of Howard Seagrave, a partner in the partnership of Martin W. Harvey & Co., before narrated. It was proved that the partnership was actually dissolved by the withdrawal of two partners, and by their taking assets of the firm,

amounting to \$3,000 or over, in return for what they had put into the firm, the sum of \$2,000. That property was the pledge of the firm's creditors, and they should not have taken it from the firm of which they were members. That act, although concealed from the creditors of the firm, may not have been a technical act of bankruptcy, inasmuch as it occurred October 10, 1907, more than four months before the date of the bankruptcy proceeding, March 9, 1908. Such action would have been an act of insolvency under the state law, for it was passed within less than a year of the date of the bankruptcy proceeding.

The act of sale, with the redemption provision, just referred to, is called by the parties an act of security. If it was intended to act as an act of security, and the property did not actually become the property of Reid and Heintz until the period of redemption had expired, April 10, 1908, then plaintiff "transferred, while insolvent, any (a) portion of his property to one or more creditors with intent to prefer such creditors over his other creditors," and such was an act of bankruptcy, under the provisions of the bankruptcy law.

Again, it was shown that the plaintiff firm entered into a contract with a trustee, to whom it assigned all of its property and assets for the benefit of its creditors, some five months before the date of bankruptcy; and this transfer was made to said trustee, who is the main defendant in this cause, and the principal creditor of the firm, without informing him and the other creditors that the standing timber, contracts, etc., upon which the sawmill depended for its existence, and much of which had been pledged to him for money advanced, had been transferred to the two retiring members of the firm. But this was not within four months of the bankruptcy proceeding.

The evidence shows that a petition of respite was filed in the state court of St. Tammany parish within one month before the bankruptcy proceedings were filed. In that petition, as well as in the agreement to appoint a trustee, it was recited:

"That owing to the inability to collect accounts due them promptly, and by reason of the unusual depression and stagnation in business, and their inability to dispose of their stock in trade and other assets rapidly enough in due course of business to meet maturing obligations, and by reason of losses sustained by them in the course of said business petitioners are not at present able to meet their obligations, but that they have ample means to do so, and their liabilities (assets) largely exceed in value the amount of their liabilities."

The stringency of the money market in 1907; the fact that M. W. Harvey & Co., a new firm, depended upon Oscar Gartner, defendant here, to advance it more than \$6,000, where he had contracted to advance \$3,000; the transfer of the property pledged to Gartner for money advanced by him; the withdrawal of two partners from the firm and taking by them of \$3,000 worth of property,

when their interest in that firm was only \$2,000, and the creditors were not paid; the declaration of the firm that they were unable to meet their obligations; the listing of certain property in respite proceedings as assets after the said property had been sold to the two retiring partners; the absolute knowledge on the part of Gartner that the firm was insolvent; the written admission by one of the partners that he and the firm were insolvent; that under section 1804, R. S., these acts constituted presumptive evidence of fraud, on the part of the firm, taken together with the testimony of Edgar M. Cahn and Gustave Lemle, two reputable members of the state bar, to the effect that they, after consideration and consultation, advised these defendants that plaintiffs had been guilty of acts of bankruptcy—are, taken together, convincing that defendants here proceeded in the court of bankruptcy against plaintiffs here without malice, believing their allegations to be true, and with reasonable and probable cause.

In a somewhat similar suit for damages because of an involuntary proceeding in bankruptcy which was dismissed, the Supreme Court held, prior to the adoption of the bankruptcy law of 1898, that, the defendants having acted bona fide upon legal advice, their defense was perfect. *Stewart v. Sonneborn*, 98 U. S. 187, 197, 25 L. Ed. 116.

Plaintiffs here were really insolvent at the date of the bankruptcy proceeding under the definition of insolvency in the bankruptcy law. It says in section 1 (15) (U. S. Comp. St. 1913, § 9585):

"A person shall be deemed insolvent within the provisions of this act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed or removed, with intent to defraud, hinder, or delay his creditors, shall not, at a fair valuation, be sufficient in amount to pay his debts."

Petitioners filed a schedule of their assets and liabilities February 22, 1908, which showed their liabilities to be \$12,767.04 and their assets \$14,200. But they had conveyed timber and ox teams appearing in the list of assets at a valuation of \$4,200, which had been conveyed to Reid and Heintz. The saw-mill was valued at \$8,000, which did not apparently cost quite \$4,000, and which was worth much less after the sale of the standing timber around it; and the ox teams. The mill was not being operated at the time of the filing of the bankruptcy proceeding; and its value was very small. Plaintiffs did not have property sufficient to pay their debts, at a fair valuation. They were insolvent.

[2] Plaintiffs argue that a bankruptcy proceeding, amended by an application for the appointment of a receiver, carries with it the same responsibility as where an attachment was wrongfully issued on an application to the courts of this state.

In this state, the law with reference to the issuance of attachments is not the same as that with reference to the appointment of receivers. The writ of attachment is usually taken against absconding, concealed, or fraudulent debtors, and the sheriff is directed to take possession of the property and hold it for the plaintiff in the cause.

The law with reference to receivers is different. A receiver may be appointed on the request of the majority of the stockholders of a corporation, or for mismanaging the business, for committing acts ultra vires, for wasting, misusing, or misapplying the property of a corporation, or where the property of the corporation is abandoned, or for insolvency, or where the property has been seized, or is under judicial process by fraud or collusion, or where the corporation has been adjudged not organized according to law, and for other reasons.

[4] It is not necessary for the appointment of a receiver that a creditor shall have absconded, or concealed his property, or committed fraud. The receiver is the arm of the court. He represents the debtor and all of his creditors, as well as the court. Such appointment does not necessarily carry disgrace with it, or disaster, or even damage to business.

The appointment of receivers may be likened to the judicial sequestration ordered ex officio by the judge, under article 274, C. P. Receivers are appointed in the interest of all parties to the litigation; and the right to appoint is vested in the court for the purpose of preserving the property in dispute.

The receiver in this case was appointed without requiring a bond to be given by the petitioners; and the property of the defendants in the cause was given into the possession of said receiver. All was done by the judge of the bankruptcy court in the exercise of the discretion vested in him. And, as the defendants were insolvent, no bond would have been required for the issuance of a writ of sequestration in the state court. C. P. 278.

It is observed that the jury in the bankruptcy court found that M. W. Harvey & Co. were solvent. But the evidence in the record before us is quite conclusive of their insolvency at the time that the bankruptcy proceeding was filed. The remedy sought by plaintiff in the bankruptcy court was invoked in good faith, without malice, with probable cause, and upon legal advice; and no injury resulted for which the petitioners are responsible, though the jury there found that plaintiffs did not present sufficient cause, and that suit failed.

[3] Parties are not permitted to recover damages for setting aside conservatory writs, which may have been acquired in good faith, upon reasonable grounds, and for probable cause. *Nuzum v. Gore*, 24 La. Ann. 208; *Duncan v. Wise*, 39 La. Ann. 74, 6 South. 13.

It is therefore ordered, adjudged, and decreed that the judgment appealed from in favor of plaintiff be reversed; that there be judgment in favor of defendants and against plaintiffs, dismissing their suit; and that there be judgment in favor of defendants on their reconventional demands as prayed for by them—costs to be paid by plaintiff.

(136 La. 435)

No. 20953.

STATE v. QUINN.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

1. INTOXICATING LIQUORS §143 — "BLIND TIGER"—ELEMENTS OF OFFENSE.

The purpose of Act No. 146 of 1914 is to penalize the keeping of a "blind tiger," and a "blind tiger" is defined by the act "to be any place in those subdivisions of the state where the sale of spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giving away as a beverage in connection with any business conducted at such place," and the keeping of the "place" in the subdivisions mentioned, and of the liquors, "for sale, barter," etc. "in connection with any [other] business conducted at such place," are essential ingredients of the offense of "keeping a blind tiger," and should be set forth in a bill of information purporting to charge that offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 152; Dec. Dig. §143.

For other definitions, see Words and Phrases, First and Second Series, Blind Tiger.]

2. INTOXICATING LIQUORS §132 — WRONGFUL SALE—STATUTES—APPLICATION.

Neither Act No. 107 of 1902, which grades the offense of selling intoxicating liquors, without the previous obtention of a license, with reference to the amounts required to be paid for such licenses, nor Act No. 176 of 1908 (known as the "Gay-Shattuck Law"), has any application in communities where the issuance of liquor licenses is prohibited. On the other hand, section 910 of the Revised Statutes (as amended and re-enacted), penalizing the offense of keeping a grog or tipping shop or retailing spirituous liquor without the previous obtention of a license, and Act No. 4 of 1910 (Ex. Sess.), defining "grog or tipping shops," are applicable where no liquor licenses can be issued, but are inapplicable where such licenses can be issued, and where, as a consequence, the offense of selling liquor without a license must be, and is, graded with reference to the amounts paid for the licenses.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 141; Dec. Dig. §132.]

Land, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; John R. Land, Judge.

F. P. Quinn was convicted of unlawfully keeping a blind tiger, and he appeals. Reversed, and defendant discharged.

Lewell C. Butler, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen. (Wm. A. Mabry, Dist. Atty., of Shreveport, and G. A. Gondran of New Orleans, of counsel), for the State.

Statement of the Case.

MONROE, C. J. Defendant was convicted upon the charge that he "unlawfully did keep a 'blind tiger,' by keeping intoxicating liquors for sale, barter, exchange, or giving away as a beverage, at the Kansas City Southern Hotel, Shreveport, Caddo Parish, La., where the sale of intoxicating liquor is prohibited, contrary to the form of the statute," etc. He was sentenced "to pay a fine of \$500, and costs, and to serve six months in the parish prison, and, in default of payment of said fine to serve six months additional in said parish prison," etc.

From which conviction and sentence he has appealed, and presents his case to this court upon a single bill of exceptions, reading (so far as it need be quoted) as follows:

"Be it remembered that prior to the pleading herein (the defendant afterwards refused to plead, and a plea of not guilty was entered) the defendant demurred, and moved to quash the information herein filed; defendant setting up that the information disclosed no crime or misdemeanor known to the laws of Louisiana, especially attacking the constitutionality of Act No. 146 of 1914, as being violative of the state and federal Constitutions. And further demurred and said that the information disclosed no crime, because it was not charged that the intoxicating liquors were so kept 'in connection with any business conducted at said place'; that defendant demanded to be informed what business was being operated in connection with the keeping of said intoxicating liquors, which information was not set up in said charge, nor furnished the defendant. Which said demurrers were overruled, and to which overruling defendant excepted and reserved the bill," etc.

The judge a quo, citing City of Shreveport v. Maroun, 134 La. 490, 64 South. 388, and other cases decided by this court prior to the passage of Act No. 146 of 1914, held, in effect, that a "blind tiger" is a device by which a liquor dealer seeks to ply his vocation, and, at the same time, to conceal his criminal agency in the selling; that they are public nuisances per se, and may be abated; and that the act of 1914 should be construed to mean that the offense of keeping a blind tiger, thereby defined and denounced, may be completed by the sale, barter, exchange, or giving away as a beverage, in prohibition territory, of intoxicating liquors, whether in connection with other business or apart therefrom.

Opinion.

[1, 2] Of the various statutes concerning the sale of intoxicating liquors which were enacted prior to the passage of Act No. 146 of 1914, sections 1211 and 2778 of the Revised Statutes, and Acts Nos. 76 of 1884 and 221 of 1902, amendatory of those sections, deal with the question of the power of the police juries and municipal authorities to grant or withhold licenses as may be determined by the legal voters of their respective parishes, wards, and municipalities; sections 910 and 1215 of the Revised Statutes, and Acts Nos. 83 of 1886 and 66 of 1902,

amendatory of section 910, declares it to be a misdemeanor, the minimum penalty for which is a fine of \$100, to keep a grog or tipping shop or to retail spirituous or intoxicating liquors without previously obtaining a license; Act No. 40 of 1908 makes the certificate of the collector, to the effect that an internal revenue license has issued therefor, prima facie evidence that the holder is keeping a grog or tipping shop; Act No. 46 of 1906 declares it to be an offense to solicit or receive orders for the purchase of spirituous or intoxicating liquors in any community where the retailing of such liquors is prohibited; Act No. 4 of 1910 (Ex. Sess.) defines the term "grog or tipping shop," as used in the other statutes, when applied in communities where the sale of intoxicating liquors is prohibited; Act No. 107 of 1902 (section 8, p. 163) grades the offense of retailing liquor without a license, with reference to the amount required to be paid for the license; and Act No. 176 of 1908 ("Gay-Shattuck Law") purports to regulate and license the business of conducting barrooms, cabarets, etc., where intoxicants are sold, in communities where the licensing of such establishments is permitted. Construing the provisions of Act No. 107 of 1902, grading the penalty for selling liquor without a license with reference to the amount required to be paid for the license, and dealing with the argument that, in communities where no licenses are permitted, there can be no penalty, it had been held by this court (prior to the passage of the act of 1914) that Act No. 107 of 1902 and Act No. 176 of 1908 (by its terms) find applications only in those communities in which licenses may be issued, whilst the other legislation applies in prohibition territory. *State v. Hageman*, 123 La. 810, 49 South. 530; *State v. Bailey*, 124 La. 152, 49 South. 1011; *State v. Donato*, 127 La. 398, 53 South. 662. It had also been held that the term "blind tiger" had a known and definite signification, and that "blind tigers" may be abated as public nuisances, by parochial and municipal authorities in the exercise of the general or special powers conferred on them. *Town of Ruston v. Fountain*, 118 La. 53, 42 South. 644; *City of Shreveport v. Maroun*, 134 La. 490, 64 South. 388, and authorities there cited. It had further been held that the laws prohibiting and regulating the sale, barter, etc., of intoxicants had no application to the business of selling nonintoxicating beverages, such as "near-beer," "hiawatha," etc. *State v. Maroun*, 128 La. 829, 55 South. 472; *City of Shreveport v. Smith*, 130 La. 132, 57 South. 655. In the cases last above cited the argument was strongly pressed upon the court that the business of selling the beverages mentioned, and others of similar character, was being used as a screen, behind which intoxicants were sold, but the court could find no authority for declaring one lawful business more than another to be unlawful, be-

cause an unlawful business might be conducted by the same person and at the same place. Such, in general, was the state of the law and the jurisprudence upon the subject of the sale of intoxicants when the General Assembly passed the Act No. 146, of 1914, which is entitled and in part reads as follows:

"An act to define and prohibit the keeping of a 'blind tiger'; to provide for the search of the same and for the seizure and destruction of any spirituous, malt or intoxicating liquor found therein; to provide for the punishment of any violations of this act.

"Section 1. * * * That a 'blind tiger' is hereby defined to be any place in those subdivisions of the state where the sale of spirituous, malt or intoxicant liquors is prohibited, where such spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giving away as a beverage in connection with any business conducted at such place.

"Sec. 2. * * * That the keeping of a 'blind tiger' is hereby prohibited, and whoever shall be guilty of violating this act shall be guilty of a misdemeanor.

"Sec. 3. Provides that any place suspected of being a 'blind tiger' shall be searched, by an officer designated in a search warrant, and that any prohibited liquor found by such officer shall be seized and brought into court; that any court, having the power of a committing magistrate, may issue the warrant, upon an affidavit to the effect that the affiant believes a designated place to be a 'blind tiger,' together with such other evidence as the court may require in order to make out a prima facie case; that the officer shall make his return within 24 hours and shall bring into court all of the prohibited liquors, and all the persons that he may find on the premises, and that the court shall proceed, 'without delay,' to examine the facts, as a committing magistrate.

"Sec. 4. * * * That whoever shall be found guilty of keeping a 'blind tiger,' in violation of this act, shall be fined not less than \$200 nor more than \$500 and be imprisoned for not less than 30 days nor more than 6 months and on default of the payment of the fine and costs he shall be imprisoned for not more than 6 months additional.

"Sec. 5. * * * That all laws and parts of laws in conflict herewith be and the same are hereby repealed."

It appears, therefore, that although there were already upon the books statutes (Act Nos. 107 of 1902 and 176 of 1908) penalizing the retailing, without a license, of intoxicating liquors, or the keeping of a barroom, cabaret, etc., in communities where licenses may be issued, and other statutes (R. S. 910 and 1215, and amendments to section 910) penalizing such sales, or the keeping of a grog or tipping shop, in communities where licenses therefor are not permitted, and still another statute defining the term "grog or tipping shop," as applied to such establishments in the communities last above mentioned, and although the court had recognized the term "blind tiger" as having a well-known meaning, and as descriptive of, and applicable to, a public nuisance, the General Assembly nevertheless deemed it advisable to pass the act of 1914 specifically defining that term and denouncing and penalizing, as a misdemeanor, the keeping, in communities where the sale of intoxicants is prohibited

(meaning where the licensing of such sales is not permitted), of the place described in the definition. Thus (again quoting from the act):

"Section 1. * * * That a 'blind tiger' is hereby defined to be any place in those subdivisions of the state where the sale of spirituous, malt or intoxicant liquors is prohibited, where such * * * liquors are kept for sale, barter, exchange or * * * giving away as a beverage in connection with any business conducted at such place.

"Sec. 2. * * * That the keeping of a 'blind tiger' is hereby prohibited, and whoever shall be guilty of violating this act shall be guilty of a misdemeanor."

Then follow provisions authorizing the issuance of search warrants, the seizure of goods, the arrest of persons, the mandatory requirement that the court shall proceed "without delay" to examine the facts as a committing magistrate, and the penalty, the minimum being a fine of \$200. Construing the statute thus enacted with those which had already been enacted and construed, and considering that it applies exclusively to prohibition territory, and that the existing laws applicable in such territory already covered sales of liquor, whether made in one place or another, the keeping of grog or tipping shops, as such, and without reference to their connection with any other business conducted at the same place, and the keeping of "blind tigers" (interpreted by this court to mean places, whether in prohibition or nonprohibition territory where intoxicating liquors are sold, on the sly, contrary to law), and further considering the unusual and drastic provisions for the enforcement of the statute in question, and the fact that the minimum penalty which may be imposed thereunder is double that which may be imposed under any other statute relating to the sale of intoxicating liquors, and our conclusion is that the purpose of the act was to define and denounce, as a distinct offense, the keeping of a "place" in prohibition territory "where spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giving away," not as in a place devoted to such business as a grog or tipping shop, but "in connection with any [other] business conducted at such place"; and we therefore

further conclude that the keeping of the "place" in a subdivision of the state where the sale of such liquor is prohibited (or not permitted), and the keeping of the liquors at such place, in connection with some other business, conducted at such place, are essential ingredients of the offense so denounced; and hence that they should have been set out in the bill of information.

"An indictment under a statute ought with certainty and precision to charge the defendant to have committed or omitted acts under the circumstances, and with the intent mentioned in the statute; and if any one of these ingredients be omitted the indictment is not good." *State v. Stiles*, 5 La. Ann. 326; *State v. Hood*, 6 La. Ann. 179; *State v. Read*, 6 La. Ann. 227.

"The general rule is (and this, whether the indictment be under the common law, or for an offense created by statute) that the special manner of the whole fact ought to be set forth, with such certainty and so specifically that it may judicially appear to the court that the indictors have gone on sufficient premises, to enable the court to know what judgment is to be pronounced on conviction; that the defendant may clearly understand the charge he is called upon to answer; and that posterity may know what law is to be derived from the record." *State v. McClanahan*, 9 La. Ann. 211.

See, also, *State v. Durbin*, 20 La. Ann. 408; *State v. Breaux*, 122 La. 521, 47 South. 876; *State v. Noel*, 125 La. 309, 51 South. 215.

"In an indictment upon a statute, it is necessary that the defendant should be brought within all the material words of the statute, and nothing can be taken by intendment." *Wharton's Crim. Law*, 133; *1 Chit. Crim. Law*, 283.

"The offense should be charged either in the language of the statute or in language of equivalent import; and a verdict not responsive to the charge will not authorize a judgment." *State v. Pratt*, 10 La. Ann. 191; *State v. Casson*, 20 La. Ann. 49.

The foregoing is but little more than an elaboration of the views expressed in the case of *State v. Frankie Mackie* (20941) 67 South. 25, recently decided, and the application for rehearing in which is this day refused.

It is therefore ordered that the conviction and sentence appealed from be set aside, the demurrer and the motions to quash sustained, and the defendant discharged.

LAND, J., dissents.

(108 Miss. 749)

TERRY v. UNKNOWN HEIRS OF GIBSON.
(No. 16549.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

QUIETING TITLE \S 49 — PARTIES — IMPROVEMENTS.

Plaintiff sued to quiet title to certain land, alleging title in fee, and certain heirs of a common source served by a publication only filed an answer alleging that they were co-owners, whereupon plaintiff filed an amended bill claiming title by adverse possession, and in this averred the making of improvements, and prayed that in case the court found that the title was in all the heirs of the common source it should allow plaintiff for improvements and taxes less rents, profits, and the use of the land. *Held*, that all necessary parties were before the court for the purpose of an adjudication of plaintiff's title, but all of the heirs of the common source, not having appeared nor been personally served, were not before the court so as to authorize an adjudication of plaintiff's right to improvements, etc., and hence the court, having determined that plaintiff was a co-owner only, properly dismissed the cause without prejudice to his right to assert his claim for improvements, less rents and profits, and refused to continue the cause until all necessary parties were brought in.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 98, 99; Dec. Dig. \S 49.]

Appeal from Chancery Court, George County; J. M. Stevens, Chancellor.

Action by R. T. Terry against the unknown heirs of John D. Gibson. Judgment for defendants, and plaintiff appeals. Affirmed.

Geo. W. Ellis, of Atmore, Ala., and Wells, May & Sanders, of Jackson, for appellant. H. B. Everitt, of Pascagoula, and Watkins & Watkins, of Jackson, for appellees.

REED, J. Appellant filed his bill in chancery to quiet the title to 40 acres of land, being a quarter of a quarter section situated in George county. The land was a part of a tract of 80 acres which was entered under the United States land laws by John D. Gibson in 1836. John D. Gibson occupied the land he so entered until his death in 1853. He died intestate, leaving as his heirs at law his widow and eight children. His widow continued to reside on the land, which was the homestead of the family, until her death in 1892. A son, David Gibson, resided with his mother and continued the occupancy of the land after her death. Appellant acquired the title which he claimed to the land by conveyances from David Gibson; the deeds to him being from grantees under conveyance from David Gibson.

In the original bill filed by appellant he alleged that the other heirs at law of John D. Gibson had made a parol gift to David Gibson of their undivided shares and interests in the land upon the consideration and agreement that he should remain on the place and support and care for his mother, and that he took possession of the land under such gift and continued to occupy, use, and im-

prove it, claiming the same adversely to all others.

Certain of the heirs of John D. Gibson, who had been made parties to the suit under the citation published to unknown heirs, appeared and filed an answer to the bill, denying the material allegations thereof. Thereupon appellant filed an amended bill, in which he claimed title alone through the adverse possession and occupancy of the land by David Gibson. In his amended bill he averred that certain improvements had been made on the land, and prayed that, if the court should find that the title to the land was in all the heirs of John D. Gibson, and not in him alone, he should be allowed to recover for improvements and taxes, less reasonable rents and profits for the use of the land.

Upon the final hearing the court decreed that appellant owned an undivided interest in the tract of 40 acres which he acquired through conveyances from David Gibson, and that such land was a part of the common estate owned by the heirs of John D. Gibson in common. The relief—that is, the quieting of title—prayed for was denied, and appellant's bill of complaint dismissed.

The court, after stating in the final decree that some of the heirs of John D. Gibson, who had been brought into court by publication to nonresident heirs on the original bill, had not appeared and were not represented by counsel in the case, and that possession or partition of the land was not sought for in the present case, denied also the alternate relief prayed by appellant in his amended bill, for adjustment of the claim for improvements and taxes, less rents and profits, and dismissed the cause as to such claim without prejudice to the right of appellant to assert the same in another appropriate proceeding for recovery.

It is contended by appellant that when the chancellor found that certain parties were necessary for an adjudication of appellant's claim for improvements, and declined to proceed as to same, that then the chancellor should not have made an adjudication of the question of title, but should have deferred all action in the cause until all parties were brought in and were before the court. This is appellant's assignment of error in this appeal.

The suit was brought by appellant in accordance with the provisions of the statute for the adjudication of the question of appellant's right to have the title which he asserted in the land quieted. In the original bill, upon which the summons to the unknown heirs was based, the prayer was solely for this relief. All necessary parties for the purpose of the adjudication of appellant's title had been brought in, and the court was authorized to act relative thereto.

By the decision of the court appellant was not the owner of the whole title to the 40

acres of land, but only held an undivided interest therein. This he owned in common with the heirs of John D. Gibson, except David Gibson, who had conveyed the tract. This 40-acre tract was a part of the whole tract originally the homestead of John D. Gibson and which descended to his heirs. In any settlement of appellant's claim for improvements and taxes which should be reduced by reasonable rents and profits of the land his cotenants should all be brought in as necessary parties to the proceeding. The court would not be in position to settle the rights of appellant and the other tenants in common in the ownership of the land until all were before the court as parties. We learn from the chancellor's decree that all of such parties were not in court. The chancellor was therefore correct in declining to consider and adjudge appellant's claim for improvements and the matter of general accounting between the parties relative thereto on the ground that all necessary parties were not before him, and he was right in dismissing appellant's claim without prejudice, and in reserving to appellant the right to assert the same in appropriate proceeding to be later instituted.

Affirmed.

(108 Miss. 752)

GRAND COURT OF CALANTHE v. BASKIN. (No. 18003.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

1. APPEAL AND ERROR § 612—FILING OF TRANSCRIPT ON APPEAL—STATUTES—CONSTRUCTION.

Under Code 1906, § 69, requiring the clerk of the trial court to make and certify a transcript of the record of the case and transmit it and the appeal bond taken to the clerk of the Supreme Court, when considered, as it must be, in connection with Laws 1910, c. 111, relating to stenographers' notes of testimony and bills of exception on appeal, the clerk must make and certify to the Supreme Court a transcript of the record in the case, and, where the stenographer's transcript of the evidence has not been filed, the record as it exists without it must be certified, and, where the stenographer's transcript is afterwards filed and certified, the question of whether it is a part of the record will arise only in the event a motion is made by appellee to strike it from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.]

2. APPEAL AND ERROR § 659—RECORD—CERTIORARI.

Where the failure of the clerk below to file the record on the return day has not materially prejudiced the rights of appellee, certiorari will issue to the clerk directing him to send up forthwith the record in the case on file in his office.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659.]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action between the Grand Court of Calanthe and Henry B. Baskin. From a judg-

ment for the latter, the former appeals. Motion to docket and dismiss overruled, and certiorari awarded.

Tally & Mayson, of Hattiesburg, for the motion. D. M. Watkins, of Hattiesburg, opposed.

SMITH, C. J. This is a motion to docket and dismiss for the reason that the record in the cause has not been filed in this court. The judgment appealed from was rendered on the 28th day of May, 1914, and the appeal was perfected by the filing of an appeal bond on the 4th day of July, following. The record therefore was returnable to this court, under sections 4902 and 4906 of the Code, on the third Monday of January, 1915.

[1] It has been made to appear that the reason the clerk of the court below has failed to file the record is that the stenographer has not filed with him a transcript of the evidence, though the time within which he is required so to do expired some time since. This dereliction of duty on the part of the stenographer is no excuse for the failure of the clerk to file the record in this court on the return day. Under section 69 of the Code, when construed in connection with chapter 111, Laws of 1910, as it must necessarily be, when the stenographer's transcript of the evidence has been filed and dealt with as provided in this last-mentioned statute, or the time within which this can be done has expired and an appeal has been perfected by the filing of an appeal bond, it then becomes the duty of the clerk to make and certify to this court a transcript of the record in the case; that is, the record on file at the time the transcript is made. If the stenographer's transcript of the evidence has not then been filed, the record as it then exists should nevertheless be certified to this court. Should the stenographer's transcript be afterwards filed with, and certified to this court by, the clerk of the court below, the question as to whether or not it is then properly a part of the record will arise only in event a motion is made by appellee to strike it from the record.

[2] Since the failure of the clerk below to file the record on the return day has not operated to materially prejudice the rights of appellee, a writ of certiorari will be issued to the clerk of the court below directing him to send up forthwith whatever record in the cause he may have on file in his office. In event the stenographer's transcript has not yet been filed with him, his compliance with this writ will not prevent him from thereafter certifying to this court such transcript in event it should thereafter be filed, and whether or not it is then properly a part of the record will arise only in event a motion is made by appellee to strike it from the record as hereinbefore set forth.

Motion overruled, and certiorari awarded.

(108 Miss. 755)

QUARTETTE MUSIC CO. v. HAYGOOD
et al. (No. 16703.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

CORPORATIONS—§857 — FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ENFORCEMENT OF DEBTS CONTRACTED.

A note given to a foreign corporation, which had not complied with Code 1906, § 935, requiring every foreign corporation to file in the office of the secretary of state a copy of its charter of incorporation, by a citizen which evidences a debt due to the corporation incurred by him while conducting for the corporation a branch house in the state, cannot be enforced by the corporation by suit in the courts of the state.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536-2541, 2550, 2552-2554; Dec. Dig. §857.]

Appeal from Circuit Court, Lee County; Claude Clayton, Judge.

Action by the Quartette Music Company against J. L. Haygood and another. From a judgment overruling a demurrer to the plea of defendants, plaintiff appeals. Affirmed.

Geo. H. Hill, of Tupelo, for appellant. O. P. Long and J. W. P. Boggan, both of Tupelo, for appellees.

COOK, J. Appellant, a Texas corporation, filed its declaration in the circuit court of Lee county against J. L. Haygood and G. W. Long, demanding judgment for \$225 and interest, evidenced by a promissory note signed by these defendants. To this declaration defendants filed this plea, viz.:

"Now comes the defendants in the above-styled cause, and for plea in their behalf say: That the debt sued for in this cause is not a legal and just demand, against defendants, because the plaintiff, the Quartette Music Company, is a foreign corporation, incorporated under the laws of the state of Texas, and has not qualified to do business in the state of Mississippi, as is required by chapter 24 of the Code of 1906 of the state of Mississippi. That the consideration of said debt was for business done by said corporation, in the state of Mississippi, without first being qualified to do business in the state of Mississippi, as is required by law. A certificate of which hereto attached marked 'A.' And, by reason of same, defendant should not be required to pay said sum, or any part thereof, and ask to be discharged with their reasonable costs."

This plea was sworn to.

Afterwards, by consent of the court, J. L. Haygood filed an amended plea as follows:

"And now comes the defendant in the above-styled cause and for plea in this behalf say: That the debt sued for in this cause is not a legal, subsisting, and valid demand against defendants, because the plaintiff, the Quartette Music Company, was at the time of the contraction thereof, and is now, a foreign corporation, incorporated under the laws of the state of Texas, and had not, at the time of the contraction of said debt, qualified to do business in the state of Mississippi, as is required by chapter 24 of the Code of 1906 of the state of Mississippi. That the note sued on was given to the Quartette Music Company, for a supposed

balance of the amount due it by defendant J. L. Haygood, contracted in and about the business of the said Quartette Music Company, carried on in the city of Tupelo, Lee county, Miss., in the following manner: The said plaintiff had its domicile and main place of business at the city of Ft. Worth, state of Texas, and was engaged in the sale, among other things, of sheet music and music in book form, and about the _____ day of _____, 19____, employed the defendant J. L. Haygood to manage and conduct a branch house for it in said city of Tupelo, and from the time of said employment, up to the time of the giving of said note, continuously kept on hand in the said city of Tupelo, for sale to the citizens of the state of Mississippi, and such other persons as desired to buy said sheet music and music in book form, a large stock of such goods, and the same was being constantly sold out and replenished by said plaintiff through and by defendant J. L. Haygood, acting as its agent, up to the time of the giving of said note. That a certificate from Joseph Power, secretary of the state of Mississippi, together with the seal of his said office attached, is hereto annexed, marked 'Exhibit A,' showing the failure of said Quartette Music Company to comply with chapter 24 of the Code of 1906 of the state of Mississippi. And therefore the defendants say that said note was given for the purpose of setting up a business carried on in violation of the laws and public policy of the state of Mississippi, and is therefore void and uncollectible. All of which defendants are ready to verify."

This plea was sworn to.

Exhibit A is as follows:

"I, Joseph W. Power, secretary of state, in and for the state of Mississippi, do hereby certify that I am custodian of the records of all corporations, authorized to do business, under the laws of the state of Mississippi, as provided by chapter 24 of the Code of 1906 of the laws of said state. That I have made diligent search in my office for the records of qualification under said chapter of a corporation, known as 'Quartette Music Company,' or 'The Quartet Music Company,' and I find, after making diligent search for same, that no such corporation as either of the above named has qualified or been authorized to do business in this state.

"Signed with my hand and official seal this the 15th day of November, A. D. 1912.

"Jos. W. Power, Secretary of State."

Appellant demurred to this plea in the words following, viz.:

"The demurrer of the Quartette Music Company to the plea filed in this cause by J. L. Haygood and G. W. Long, defendants. The said plaintiff demurs to said plea, and prays the judgment of the court if they shall make any further answer thereto; and they show the following causes of demurrer to said plea, to wit: First. Because the law under which said plea is interposed is unconstitutional. Second. Because said plea presents no defense known to the law. Third. For other good causes to be shown at the hearing of this demurrer."

The court overruled the demurrer, and plaintiff appeals.

A long line of decisions of this court support the judgment of the learned trial judge.

Section 935, Code of 1906, provides that:

"Every * * * corporation for profit incorporated under or by virtue of the laws of * * * any other state * * * shall file in the office of the secretary of state a copy of its charter of incorporation."

The statute further provides that:

Any "foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation * * * shall be liable to a fine of not less than one hundred dollars."

In *Bohn v. Lowery*, 77 Miss. 427, 27 South. 605, this rule is approved:

"Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

There are some decisions in our books which apparently conflict with this rule, but they were all overruled by *Woodson v. Hopkins*, 85 Miss. 171, 37 South. 1000, 38 South. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275.

Affirmed.

(108 Miss. 767)

GRACE v. STATE. (No. 17628.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

CONTEMPT \Leftrightarrow 54—CONSTRUCTIVE CONTEMPT—PROCEEDINGS—PROCESS—AFFIDAVIT.

Where an attorney was charged with contempt in that he altered a motion for a continuance without the consent of the court, after the motion had been overruled, such contempt was constructive and not direct, and could be prosecuted only by affidavit or application to show cause properly alleging the specific facts constituting the offense; and hence a conviction based on the citation only directing him to appear and show cause why he should not be punished, containing no statement of the facts constituting the alleged contempt, was void.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 143-149; Dec. Dig. \Leftrightarrow 54.]

Appeal from Circuit Court, Sunflower County; F. E. Everett, Judge.

M. B. Grace was convicted of contempt, and he appeals. Reversed and dismissed.

M. B. Grace, of Greenwood, for appellant. Ross A. Collins, Atty. Gen., for the State.

REED, J. Appellant, an attorney at law, was adjudged guilty of contempt by the circuit court and fined \$25.

We gather from the testimony taken on the hearing that the alleged contempt consisted in appellant's making certain changes in a motion for continuance in a civil suit, in which he was attorney for the plaintiff, without the consent of the court, and after the motion had been overruled.

The trial judge and attorneys representing the defendant testified that consent was not given by the court to the making of the amendments, and that they did not have any knowledge of the alterations in the motion until for a time after they were made.

Appellant testified that, when the application for continuance was called for hearing, he informed the court that he desired to make some changes in the motion; that he then stated the amendments he wished to make, and proceeded with his argument of

the motion, believing that the court understood and consented to the proposed changes. In his testimony appellant further said he understood that the court had granted him permission to write the alterations and additions in the motion after it had been passed on, and that thereupon, after the hearing, he made the changes therein.

The record does not contain any rule against appellant to show cause why he should not be punished for contempt. No order of the court as a foundation for the citation is therein set forth. It is definitely stated in the record that "no motion, petition, bill, or other complaint," setting forth the contempt charged, was on file in the circuit court against appellant. The citation was ordered issued by the trial judge at his own instance, when a motion was made to strike out the certain amendments, etc., made in the motion for continuance. The citation served on appellant did not contain a statement of the facts which constituted the alleged contempt. It only cited him to appear at a certain hour and day and show cause why he should not be punished for contempt of court in a certain matter pending in the court. Appellant was not given information in the citation or in any other way of what the charge against him consisted of, so as to enable him to make his defense.

There is no direct contempt (that is, contempt committed in the presence and view of the court) shown by the facts in this case. If there is contempt in what was done, then it is constructive contempt; that is, an act done not in the presence of the court, but which tends to obstruct, interrupt, or embarrass the administration of justice. In constructive contempt there must be a proper foundation laid before process issues, and the application or foundation of contempt must contain a statement of that which constitutes the contempt. Ency. Plead. & Prac. vol. 4, p. 776; *Parkhurst v. Kinsman*, 2 Blatchf. 76, Fed. Cas. No. 10,759; *Ex parte Wright*, 85 Ind. 504.

In *Parkhurst v. Kinsman*, supra, it was held that, in moving for attachment for contempt, plaintiff must state in the proofs, on which the application is founded, the specific acts or omissions which constitute the alleged contempt.

We quote from the opinion in the case of *Ex parte Wright*, supra:

"A contempt of court is either direct or constructive or, as the latter was anciently called, consequential. A direct contempt is an open insult, in the face of the court, to the person of the judges while presiding, or a resistance to its powers in their presence. A constructive contempt is an act done, not in the presence of the court, but at a distance, which resists their authority, as disobedience to process, or an order of the court, such as tends in its operation to obstruct, interrupt, prevent, or embarrass the administration of justice. For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no farther proof or examination than what is

known to the judges by their senses of seeing, hearing, etc.; but, in rendering the judgment and making up the record, the causes of such contempt should be stated. The grounds of a constructive contempt should be stated by affidavit, by the return of some officer, or in some way made known to the court, *prima facie*, by witnesses or otherwise, so that they may be made a part of the record; and this should be done before a rule or writ is granted against the alleged offender. 4 Bl. Com. 283, 286, 288; Tidd, Practice, 478, 482."

It is stated in 9 Cyc. p. 39, that:

"Before a person can be found guilty of a contempt not committed in the presence of the court, he must have due and reasonable notice of the proceeding. A rule to show cause, an attachment, or other process should issue. The usual course is to issue a rule to show cause why an attachment should not issue."

We quote from 9 Cyc. p. 41, as follows:

"The rule to show cause should inform defendant of the nature of the contempt alleged."

In the case of *Stuart v. Reynolds*, 204 Fed. 709, 123 O. C. A. 13, it was held that in cases of constructive contempt—

"it is proper to adhere substantially to the method of criminal procedure, except in the matter of jury trial, and the attachment or rule should be like an indictment, to the extent of giving the contemnor an opportunity to defend by informing him concerning the nature and particulars of the offense charged. *Bates' Case*, 55 N. H. 325; *Hurst v. Whitly*, 47 Ga. 366; *Langdon v. Wayne Circuit Judges*, 76 Mich. 358, 43 N. W. 310; *Re Bradley*, 7 Wall. 364, 19 L. Ed. 214; *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215."

In *Encyclopedia of Pleading and Practice*, vol. 4, p. 779, it is said that:

"The almost universal method by which contempt proceedings are begun is by an affidavit, and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential."

In the recently decided case of *Sona v. Aluminum Castings Co.*, 214 Fed. 936, 131 C. C. A. 232, it was held (quoting from a head-note):

"In general process of arrest for contempt, not committed in the court's presence, can properly issue only on the filing of an affidavit stating the facts positively and in such a way as *prima facie* to show the commission of a contempt."

In *Wyatt v. People*, 17 Colo. 252, 28 Pac. 961, it was declared that a constructive contempt must be brought to the court's attention by affidavit which should state the facts which, if established, would constitute the offense.

It has been held in some cases that the court, even in contempts out of its presence, may act *sua sponte* and without preliminary information institute proceedings. *Ency. of Plead. & Prac.* vol. 4, p. 776, note; *People v. Court of Sessions*, 82 Hun. 242, 31 N. Y. Supp. 373. In *People v. Court of Sessions*, there was an order to show cause, and the district attorney was directed to prepare an affidavit from which the order to show cause was granted.

Even where the court proceeds upon its

own motion, the party accused must be sufficiently informed of the charge against him, so that he may be able to properly defend against the accusation. The foundation for proceedings in contempt may be based upon an information filed, in which there should be a statement of the facts constituting the contempt. *Ency. of Plead. & Prac.* vol. 4, p. 781.

We find that the practice in this state in some cases has been to base proceedings in constructive contempt upon information filed in the court by the district attorney. This was so in the cases of *O'Flynn v. State*, 89 Miss. 850, 43 South. 82, 9 L. R. A. (N. S.) 1119, 119 Am. St. Rep. 727, 11 Ann. Cas. 530, and *Durham v. State*, 97 Miss. 549, 52 South. 627.

We find in the present case that there was no foundation laid for the process issued and served on appellant. There was no affidavit, nor information nor an order of the court preceding the citation. Appellant was not told of the specific acts charged against him. There was no statement of the facts which, if established, would constitute the offense. He was not informed of the nature of the contempt alleged. His trial and conviction was not lawful.

The case is therefore reversed, and appellant is discharged.

(106 Miss. 776)

HICKS MERCANTILE CO. v. MUSGROVE.
(No. 18041.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

1. APPEAL AND ERROR §621—TIME TO APPEAL—RECORD—FILING—TIME—DEFAULT.

Where a judgment appealed from was rendered March 14, 1914, and the appeal was perfected by filing an appeal bond on May 13th, and the day fixed for the call of the docket of the district from which such appeal was prosecuted at the March, 1914, term was June 1st, so that more than ten days intervened between that date and the filing of the appeal bond, the cause was returnable to the Supreme Court at that term, but, the stenographer's transcript not having been filed as provided by Laws 1910, c. 111, on the arrival of such return day, the clerk of the Supreme Court was not in default for not filing the record until the return day of the same district for the June, 1914, term of the Supreme Court, which was the third Monday in January, 1915.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. § 621.]

2. APPEAL AND ERROR §661—RECORD—FAILURE TO FILE—PREJUDICE—CERTIORARI.

Where a failure to file the record on appeal before the required date has not operated to the prejudice of an appellee, writ of certiorari will be issued to the trial court directing him to send up forthwith whatever record he has on file, and, in the event the stenographer's transcript shall not have been filed, his compliance with the writ will not prevent him from thereafter certifying the transcript when filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2848, 2849; Dec. Dig. § 661.]

3. APPEAL AND ERROR ¶593—TRANSCRIPT—CERTIFICATION.

Whether a transcript is properly a part of the record on appeal can arise only in the event of a motion to strike it from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2621; Dec. Dig. ¶593.]

4. APPEAL AND ERROR ¶639—RECORD—TRANSCRIPT—DISMISSAL.

A transcript of the evidence not being necessary in order that an appeal should be taken, an appeal will not be dismissed because of its absence from the record.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2787, 2829; Dec. Dig. ¶639.]

5. APPEAL AND ERROR ¶671—ASSIGNMENTS OF ERROR—RULINGS ON EVIDENCE.

Assignments of error requiring a review of the evidence will not be considered in the absence of a transcript of the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. ¶671.]

Appeal from Circuit Court, Jones County.

Action by the Hicks Mercantile Company against John Musgrove. Judgment for the latter, and the former appeals. On motion to docket and dismiss. Overruled, and certiorari awarded.

Halsell & Welch, of Laurel, for the motion. D. B. Cooley, of Laurel, opposed.

SMITH, C. J. [1] This is a motion to docket and dismiss for the reason that the record of the cause has not been filed in this court. The judgment appealed from was rendered on the 14th day of March, and the appeal was perfected by the filing of an appeal bond on the 13th day of May following. It appears that the delay in filing this record was caused by reason of the fact that the stenographer has not filed his transcript of the evidence.

The day fixed by order of this court under section 4206 for the beginning of the call of the docket of the district from which this cause comes at the March term, 1914, was Monday, the 1st day of June. Consequently, as more than ten days intervened between that date and the filing of the appeal bond, the cause was then returnable to this court under sections 73, 4902, and 4906 of the Code. Childs v. Rowell, 58 Miss. 512. The effect of these sections of the Code, however, when construed in connection with chapter 111, Laws 1910, which must necessarily be done, is this: That when the return day of a cause arrives, and the stenographer's transcript of the evidence has not been filed and dealt with as provided in chapter 111, Laws 1910, and the time within which this can be done has not expired, the clerk of the trial court is relieved from filing the record in this court on the return day thereof, but must do so on or before the next return day of the district from which the cause comes. Y. & M. V. R. R. Co. v. McCarley, 63 South. 335. The return day of the district from which

this cause comes, next following the 1st day of June, 1914, was the third Monday in January, 1915; so that it follows from the foregoing views that the clerk of the court below was not in default in not filing this record in this court until after this last-mentioned date.

[2] The failure to file the record on or before that date, however, has not operated to the material prejudice of appellee. A writ of certiorari will therefore be issued to the clerk of the court below directing him to send up forthwith whatever record in the cause he may have on file in his office. In event the stenographer's transcript shall not have been filed with him before he complies with the command of this writ, his compliance therewith will not prevent him from thereafter certifying such transcript to this court in event the stenographer should thereafter file it.

[3] Whether or not this transcript is then properly a part of the record will arise only in event a motion is made by appellee to strike it from the record.

[4] A transcript of the evidence is not necessary in order that an appeal may be taken; consequently a cause will not be dismissed simply because the record contains no such transcript.

[5] Should any of appellant's assignments, however, bring into review the evidence, such assignments will, of course, not be considered in the absence of a transcript of the evidence.

Motion overruled, and certiorari awarded.

(106 Miss. 779)

STATE ex rel. HOWIE, Dist. Atty., v. BENSON. (No. 17753.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

1. APPEARANCE ¶9—GENERAL APPEARANCE—PLEA TO THE JURISDICTION AND TO THE MERITS.

Where a nonresident sued as respondent in mandamus proceedings to compel him to operate an electric lighting plant purchased in insolvency proceedings, having filed an answer alleging lack of jurisdiction of the court to grant the relief prayed, because defendant was a nonresident and in addition pleading special matter in bar to the merits, thereby appeared generally and conferred jurisdiction over his person.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. ¶9.]

2. MANDAMUS ¶133—OPERATION OF ELECTRIC LIGHTING PLANT—DUTY TO OPERATE.

Where respondent purchased the assets and franchises of an electric lighting plant, he thereby assumed the duty to operate the same for the benefit of the public, and could be compelled by mandamus to do so.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 268; Dec. Dig. ¶133.]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Mandamus by the State, on relation of J. H. Howie, District Attorney, against R. L.

Benson. Judgment for respondent, and the State appeals. Reversed and remanded.

Ross A. Collins, Atty. Gen., and Howie & Howie, Green & Green, Burch & Stricker, and William Hemingway, City Atty., all of Jackson, for the State. Wells, May & Sanders, of Jackson, for appellee.

COOK, J. The Capital Light & Power Company, a corporation with power to operate an electric lighting plant in Jackson, obtained from the city of Jackson a license, permit, or franchise to operate its plant in the city. This corporation established its plant and for several years operated same and furnished light to the public. The corporation being unable, or failing, to pay its debts was, upon the petition of its unsecured creditors, adjudicated a bankrupt, and all of its assets, including its franchises, were sold by order of the bankrupt court; R. L. Benson becoming the purchaser thereof. This action was begun by a petition filed by the district attorney upon behalf of the state praying for a mandamus to compel R. L. Benson, the owner of the assets and franchises of the corporation, to operate the electric lighting plant and furnish current to the patrons of the corporation. In other words, the petition asks that Benson, the purchaser, be compelled to perform the corporation's duties to the public. To this petition, Mr. Benson filed an answer, in which he seeks to have the action abated because of the alleged lack of jurisdiction of the court to grant the relief prayed for. He avers that he is nonresident—a citizen and resident of the state of Illinois—and, for this reason, the court has no jurisdiction. In addition to this plea to the jurisdiction, special matter in bar of the action is set up in his answer.

It will be observed that Mr. Benson takes the position that the court below has no jurisdiction to try the merits of the case, and yet he submits the merits of the case to the court in bar of the action. The appellant, in his brief, aptly characterizes this form of pleading as a game of "heads I win, tails you lose." Mr. Benson is willing to have the case decided on its merits, provided the decision goes in his favor; but, in the event it goes against him, he submits that the court has no jurisdiction to decide at all.

Section 3234, Code 1906, provides that:

"The petition shall stand for a declaration, and the defendant shall plead to it as if it were an ordinary action at law, and the same rules of pleading and proceeding applicable to actions in the circuit court shall be observed in this action."

It would seem that the defendant submitted himself to the jurisdiction of the court when he entered a plea to the merits. He cannot challenge the power of the court to decide and at the same time ask the court to judicially determine the merits in his favor. It is unnecessary to cite authorities in support of this proposition, viz., a plea to the

merits waives jurisdiction of the person. Experiments of this kind will not be tolerated. If the rules were otherwise, courts of justice would be converted into moot courts. The state traversed the affirmative averments of the answer. The nonresidence of the defendant is admitted; in fact, the original petition so states. The jurisdiction of the person and the "legal sufficiency of said petition" were submitted to the court. As we understand the record, the parties and the court considered the case as though a general demurrer had been interposed by defendant. Treating the case in this way, the court entered this order, viz.:

"Coming on to be heard, this cause and the same having been fully argued by counsel on both sides, it is considered by the court that the petition herein be and the same is hereby dismissed, because the court is of the opinion that it is without jurisdiction of the person of the defendant and because of the legal insufficiency of the petition, to which action the plaintiff by attorneys excepted and the exception was allowed."

[1] As above stated, we think the court erred in holding that it was without jurisdiction of the person.

[2] The petition avers that the Capital Light & Power Company is a Mississippi corporation, and that it secured a charter from the state giving it the power to conduct the business of furnishing to the public electric current; that it procured from the city of Jackson a license or franchise to set its poles and string its wires upon the streets and alleys of the city for the purpose of serving the public; that in the exercise of this license or franchise it did use the streets and alleys and did contract with a large number of the inhabitants of the city to furnish electric current; that for several years the corporation engaged in the active use of its franchise by serving the general public with electric current; that it was eventually adjudicated a bankrupt, and its assets and franchises were sold by order of the court, and were purchased by defendant; that, in pursuance of a combination and conspiracy to bring about a monopoly and destroy competition, the defendant shut down the plant and refused to perform the duty of the corporation to the public.

Will the courts, under these circumstances, refuse to intervene, and compel the successor of the corporation to perform the duties of the corporation? This, we believe, was the precise question presented to the circuit court. Mr. Benson bought the franchise of the corporation to do business in Jackson. The corporation took possession of and enjoyed this franchise for several years. The corporation undertook to and did perform the duties of a public service corporation in exchange for the license or franchise to use the property of the city for this purpose. He cannot hold on to the benefits of his purchase without incurring the obligation to perform the duties of the trust. This seems to be

made certain when it appears that he refuses to assume the burdens, if burdens there be, because he has entered into a compact with others to do so for the purpose of creating a monopoly—of destroying competition.

There seems to be no conflict in the authorities that courts possess in proper cases the power to compel trustees of a public trust to perform the duties of such a trust. Leaving out of view section 910, Code of 1906, it seems clear that Mr. Benson assumed the burdens of an involuntary trustee when he took over the franchise of the corporation, and is declining to use the same for the purpose of creating a monopoly. The apparent conflict in the decisions of the courts upon the power of the courts to compel the performance of legal duties of trustees grows out of the peculiar state of facts in the several cases. In some cases the courts have refused to issue the writ of mandamus because it appeared that the corporation, or trustee, was unable to perform. In other cases the writ was denied because, in the opinion of the courts, to compel the performance of the alleged duty would work a great hardship without a compensating benefit. There is and can be no conflict of judgment that, in proper cases, the courts will and do exercise the power to compel the performance of legal duties. The petition in this case declares a state of facts which justifies the exercise of this extraordinary power.

Reversed and remanded.

(108 Miss. 784)

J. J. NEWMAN LUMBER CO. v. LUCAS.
(No. 18002.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

1. APPEAL AND ERROR ⇐627—DISMISSAL—GROUNDS—DELAY IN FILING RECORD.

An appellant is not required to take steps to compel the clerk below to file the record until the return day has passed; but if no steps are taken by him, and the appellee is thereby prejudiced, the appeal may be dismissed under Code 1906, § 4921, providing that, where the copy of the record shall not be filed in the Supreme Court on or before the return day, the court can, on motion by the appellee, dismiss the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. ⇐627.]

2. APPEAL AND ERROR ⇐627—DISMISSAL OF APPEAL—GROUNDS—DELAY IN FILING RECORD—PREJUDICE.

Where a cause was returnable in the Supreme Court on appeal on the third Monday in January, and the record, including the stenographer's transcript, was filed on February 12th, the appellant's motion to dismiss the appeal will be overruled, since an application by appellant after the return day for certiorari to bring up the record would not have caused it to be filed any sooner, and the appellee was not prejudiced by appellant's failure to make such application.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. ⇐627.]

3. APPEAL AND ERROR ⇐801 — RECORD — STENOGRAPHER'S TRANSCRIPT — DELAY IN FILING—REMEDY.

The failure of the stenographer in the court below to file his transcript of the evidence cannot be raised by motion to dismiss the appeal, where the transcript was filed before the motion was heard, but only by motion to strike the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. ⇐801.]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action by Joseph Lucas, a minor, by Mrs. M. E. Glascoe, his next friend, against the J. J. Newman Lumber Company. Judgment for the plaintiff, and defendant appeals. Motion to dismiss the appeal overruled.

Sullivan & Conner, of Hattiesburg, for the motion. S. E. Travis, of Hattiesburg, opposed.

SMITH, C. J. This is a motion to docket and dismiss, and reads as follows:

"Comes the appellee, by attorneys, and makes known to the court the following: That on the 29th day of May, A. D. 1914, this cause, styled Joseph Lucas, Minor, by Mrs. M. E. (Lucas) Glascoe, Next Friend, v. J. J. Newman Lumber Company, was tried by a jury in the circuit court of Forrest county, and a verdict in favor of this plaintiff was rendered in the sum of \$1,250; that on the 5th day of June, A. D. 1914, the defendant, the J. J. Newman Lumber Company, filed its motion for a new trial herein; that this motion was in due course overruled by the court, and on the 7th day of July, A. D. 1914, the defendant, the J. J. Newman Lumber Company, gave notice to the stenographer to transcribe and file his notes in the above cause; that on the 9th day of July, A. D. 1914, the defendant filed an appeal bond in this cause for the purpose of perfecting its appeal. Appellee would further show that, since the filing of the bond and the giving of the notice in this cause, the stenographer has not filed his notes herein, nor has the time for the filing of same been extended by the trial court, neither has appellant prepared and filed a bill of exceptions as required by law, all of which is certified to by T. J. Mixon, clerk of the circuit court, which certificate is filed herewith and made Exhibit A to this motion; that since the 7th day of July, A. D. 1914, there have been two calls of the docket for this the Second district of the Supreme Court of the state of Mississippi, and that under the law the appellee has been and is being unjustly delayed by reason of the negligence of the appellant herein. Wherefore the appellee moves the court to docket and dismiss the appeal herein."

[1] This cause was returnable to this court, under sections 4902 and 4906 of the Code, on the third Monday of January, 1915. Until the return day of a cause has passed and the clerk of the court in which it was tried has failed to file the record thereof with the clerk of this court, an appellant is not charged with the duty of taking any steps to compel the clerk of the trial court to file the record. When the return day has passed, however, without the record being filed, "it

then becomes the duty of the appellant to seasonably apply to this court for whatever aid he may need to obtain the filing of the record. On his failure so to do, the cause will be dismissed, under section 4921 of the Code, if the rights of appellee have been thereby prejudiced, unless it further appears that appellant was guilty of no negligence in the matter." *Y. & M. V. R. R. Co. et al. v. McCarley*, 63 South, 335.

[2, 3] After the filing of this motion, the record, including the stenographer's transcript of the evidence, was, on February 12th, filed in this court; consequently, appellant's failure to apply for a certiorari has not resulted in any prejudice to appellee, for it is hardly probable that the issuance of such a writ would have caused the filing of the record at an earlier date. The real ground of this motion seems to be that the stenographer in the court below had failed to file his transcript of the evidence. That question, however, does not necessarily arise on a motion to dismiss and, since the record is here, can now only arise on a motion to strike the stenographer's transcript from the record.

Overruled.

BOONE v. STATE. (No. 17751.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

Appeal from Circuit Court, Quitman County; W. A. Alcorn, Jr., Judge.

B. A. Boone was convicted of selling intoxicating liquors, and appeals. Affirmed.

J. D. Stone, of Lambert, and T. E. Williams, of Marks, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

NIX v. GULFPORT & MISSISSIPPI COAST TRACTION CO. (No. 16609.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between Mrs. Mose Nix and the Gulfport & Mississippi Coast Traction Company. From the judgment, Mrs. Nix appeals. Affirmed.

Mize & Mize, of Gulfport, for appellant. Ford & White, of Gulfport, for appellee.

PER CURIAM. Affirmed.

MOORE et al. v. STATE. (No. 17863.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

Appeal from Circuit Court, Yalobusha County; L. M. Burch, Special Judge.

John Moore and another were convicted of grand larceny, and appeal. Affirmed.

Blount & Blount, of Water Valley, for appellants. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

MYAKKA CO. v. EDWARDS. (63 Fla. 372, 382)

(Supreme Court of Florida. Nov. 24, 1914. On Rehearing, Jan. 15, 1915.)

(Syllabus by the Court.)

1. PROCESS \S 106—SERVICE BY PUBLICATION—EQUITY.

The publication provisions of chapter 4129, Acts of 1893, authorizing constructive service of initial process in chancery, have reference to the appearance day stated in the act, and not to rule days on which defaults for failure to plead or demur may be entered under the statute and chancery rules.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 183; Dec. Dig. \S 106.]

2. PROCESS \S 106—CONSTRUCTIVE SERVICE—PUBLICATION—TIME—"FOR FOUR CONSECUTIVE WEEKS."

Under chapter 4129, Acts of 1893, authorizing constructive service by publication of initial process to acquire jurisdiction of a nonresident defendant in a chancery case, where the first publication is less than 4 weeks or 28 days prior to the appearance day fixed in the order of publication, the requirement that such publication shall be "once each week, for four consecutive weeks," is not complied with, and jurisdiction of the person is not acquired (citing Words and Phrases, First and Second Series, For).

[Ed. Note.—For other cases, see Process, Cent. Dig. § 183; Dec. Dig. \S 106.]

3. JUDGMENT \S 16—JURISDICTION—NECESSITY.

Where jurisdiction of a defendant has not been acquired, a decree rendered against him in the cause is not binding upon him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 22, 24; Dec. Dig. \S 16.]

On Rehearing.

4. PROCESS \S 86—SERVICE BY PUBLICATION.

A court of equity has power to proceed in rem in a suit to quiet title or remove a cloud on title to lands in this state, upon the proper publication of an order against a nonresident defendant.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 100; Dec. Dig. \S 86.]

5. JUDGMENT \S 490—COLLATERAL ATTACK—DEFECTIVE PROCESS.

Jurisdiction must be affirmatively shown by the record, where the parties defendant are shown to be nonresidents and constructive service is depended on for jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. \S 490.]

6. JUDGMENT \S 490—COLLATERAL ATTACK—CONSTRUCTIVE SERVICE.

The jurisdiction of the court may be attacked collaterally when it is dependent upon constructive service.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 926-928; Dec. Dig. \S 490.]

7. PROCESS \S 106—CONSTRUCTIVE SERVICE—PUBLICATION—TIME.

The orders for publication required by chapter 4129, Laws of 1893, to be published once a week for 4 consecutive weeks if the defendant be stated to be a resident of the United States, are required to be published once a week for 4 weeks of 7 days each, or at least 28 days from the date of the first publication to the day fixed in the order for the defendant to appear.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 183; Dec. Dig. \S 106.]

(Additional Syllabus by Editorial Staff.)

8. PROCESS \Leftrightarrow 106—CONSTRUCTIVE SERVICE—PUBLICATION—TIME—"FOR."

The word "for," in chapter 4129, Laws 1893, requiring that publication of process against nonresidents shall be had "once a week for four consecutive weeks," means "throughout" or "during the continuance of" such period.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 133; Dec. Dig. \Leftrightarrow 106.

For other definitions, see Words and Phrases, First and Second Series, For.]

Appeal from Circuit Court, Manatee County; F. A. Whitney, Judge.

Suit by Robert J. Edwards against the Myakka Company, a corporation. From an adverse order, defendant appeals. Affirmed.

James F. Glen, of Tampa, for appellant. Arthur F. Odlin, of Arcadia, for appellee.

WHITFIELD, J. On December 4, 1913, Robert J. Edwards filed a bill in equity against Myakka Company, a corporation under the laws of South Carolina, and Junius Beebe, in which it is alleged that:

"Edwards is the owner in fee of certain real estate in Manatee county, Fla., and that such real estate is wild, unoccupied, and unimproved; that the said defendant Myakka Company, a corporation as aforesaid, claims to have some title to, or interest in, or claim upon, said land, the exact nature of which is unknown to your orator, but the same constitutes a cloud upon the title of your orator, deprives him of his right to sell or mortgage his said real estate, depreciates the value thereof; and that as against said Myakka Company your orator is without remedy at law. And your orator further says that the defendant Junius Beebe claims some title to, interest in, or lien upon said land of your orator, the exact nature of which claim, title, or interest your orator is unable to state, yet the same constitutes a cloud upon the title of your orator, deprives him of his right to sell or mortgage his said real estate, depreciates the value thereof, and that as against said Beebe your orator has no remedy at law.

"Therefore your orator prays that, by a decree of this honorable court, the title of your orator may be quieted as against said defendants, each and both of them, so far as said real estate of your orator may be concerned; that said defendants be declared possessed of no title to, interest in, or claim upon said lands, and that the same may be decreed to belong absolutely to your orator.

"And your orator prays for such other and further relief in the premises as equity may require and as to your honor may seem meet. Also, that said defendants may be required to answer this bill and to stand to and abide by all orders and decrees which may be entered herein."

The defendant Myakka Company filed the following plea:

"That this defendant heretofore, to wit, on the 4th day of January, A. D. 1906, filed in the circuit court of Manatee county, Fla., its bill of complaint against the present complainant (Robert J. Edwards) and the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons whose names were unknown as might be interested in the property described in the present bill of complaint, which was particularly described in the said bill of complaint filed by this defendant,

for the purpose of quieting the title of this defendant to the premises described in the present bill of complaint, as against the present complainant as well as against the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons as might be interested in the said premises, whose names were unknown to this defendant; and such proceedings were had in said cause that, to wit, on the said 4th day of January, A. D. 1906, an order of publication was duly made requiring the present complainant to appear to the said bill of complaint on the 5th day of February, A. D. 1906, it being alleged in the affidavit appended to the said bill of complaint that the said Robert J. Edwards was a resident of a state other than the state of Florida, and that the place of residence of the said Robert J. Edwards as particularly as the same was known to affiant was in Boston in the state of Massachusetts, and that in the belief of the affiant the said Robert J. Edwards was over the age of 21 years, and an order of publication was also duly made requiring the unknown defendants to the said bill to appear thereto on the 2d day of April, A. D. 1906, and the said order of publication requiring the said Robert J. Edwards to appear to the said bill was duly published once each week for four consecutive weeks in a newspaper published in Manatee county, Fla., designated in the said order, to wit, the Bradentown Herald, and appeared in the issues of said paper on January 11, January 18, January 25, and February 1, A. D. 1906, and the order of publication directed to the unknown defendants was duly published once each week for 12 consecutive weeks in a newspaper published in Manatee county, Fla., designated in the said order, to wit, the Bradentown Herald, and appeared in the issues of said paper of January 11, January 18, January 25, February 1, February 8, February 15, February 22, March 1, March 8, March 15, March 22, and March 29, 1906, and such proceedings were thereafter had in said cause that upon a certificate being duly made and filed by the clerk of the circuit court of Manatee county, Fla., showing the publication of the notices aforesaid in the manner aforesaid and in the issues of the said newspaper aforesaid, and the posting of copies of the said orders in front of the courthouse door of Manatee county and the mailing of a copy of the said order directed to the defendant, Robert J. Edwards, to him at Boston in the state of Massachusetts, upon default of the said Robert J. Edwards and the unknown defendants to the said bill of complaint to appear thereto or to file any plea, answer, or demurrer thereto, the judge of the said circuit court, to wit, on the 26th day of June, A. D. 1906, ordered, adjudged, and decreed that there had been due and legal service by publication in the said cause in all respects in the manner prescribed by law, and that all and singular the allegations of the said bill of complaint should be taken as confessed by the defendants and entered a decree pro confesso against the said defendants to the said bill of complaint, including the said Robert J. Edwards, and thereupon on the said day by the decree of the said court in the said proceeding it was ordered, adjudged, and decreed that this defendant be quieted in its title to the premises described in the said bill of complaint, and in the present bill, as against the said Robert J. Edwards, as well as against the unknown defendants thereto, and that any and all claims on the part of the said Robert J. Edwards to the said lands or any part or parcel thereof be removed as a cloud upon the title of this defendant thereto, and that he, the said Robert J. Edwards, be required, within 10 days from the date of the said decree, to wit, within 10 days from the said 26th day of

June, A. D. 1906, to make, execute, and deliver to this defendant a proper release of any and all right, title, and interest in and to the said lands and each and every part and parcel thereof, all of which more fully appears by the record of the proceedings in the suit aforesaid, a certified transcript of which is hereto annexed as 'Exhibit A' hereto, and hereby made by reference a part of this plea as fully as if the same were herein incorporated in *hæc verba*.

"All of which matters and things this defendant doth aver and plead in bar of the entire bill of complaint of the complainant, and prays judgment of this honorable court whether it should make any further or other answer to the said bill of complaint."

On this plea the following order was made:

"This cause coming on to be heard upon the argument of the plea of the defendant to the bill of complaint filed herein, it being stipulated by counsel for the respective parties that the plea correctly states the facts in reference to the service of process in the former chancery suit, and should be considered with the same force it would have in case a transcript of the record of the former cause were attached thereto, the former record not being found at the present time, upon consideration thereof, the court being of the opinion that the publication of process in the former suit was insufficient, and that no jurisdiction was acquired thereby to render a decree binding Robert J. Edwards, it is, therefore ordered, adjudged and decreed that the plea shall be deemed and held insufficient and disallowed and overruled as a plea to the said bill of complaint, and that the defendant, Myakka Company, a corporation, be required to answer the said bill of complaint, and the said defendant having announced its appeal from the decree to the Supreme Court of Florida, it is by consent of the respective parties ordered that no answer shall be required until the determination of said appeal, or the further order of the court."

The defendant Myakka Company appealed and assigns error as follows:

"(1) The court erred in and by the decree appealed from in holding and deciding that jurisdiction was not obtained of Robert J. Edwards to render a decree binding on him in the suit mentioned in the plea of this defendant.

"(2) The court erred in holding and deciding that the decree in the former suit mentioned in the plea of this defendant could be collaterally attacked in this proceeding on the ground of the alleged insufficiency of service of publication in the said suit."

The statute under which the asserted constructive service was made is as follows:

"Chapter 4129 (No. 15).

"An act to provide for the service of nonresident defendants and others in chancery causes, being an act to amend section 1413 of the Revised Statutes.

"Be it enacted by the Legislature of the state of Florida:

"Section 1. That section 1413 of the Revised Statutes of the state of Florida be amended so as to read as follows:

"1413. Constructive Service.

"(1) Obtaining Order for Publication.—When ever the complainant or his agent or attorney shall state in a sworn bill or affidavit, duly filed, the belief of the affiant that the defendant is a resident of a state or country other than this state; specifying as particularly as may be known to affiant, such residence, or that his residence is unknown, or that, if a resident, he has been absent more than sixty days next preceding the application for the order of publication, and that there is no person in the state the

service of a subpoena upon whom would bind such defendant, or that he conceals himself so that the process cannot be served upon him, and further states the belief of the affiant as to the age of the defendant being over, or under, twenty-one years, or that his age is unknown, the judge or clerk of the court in which such bill shall have been filed shall make an order against the defendant requiring him to appear to the bill upon a day to be fixed by the order, not less than thirty nor more than fifty days from the time of the making of the order, if he be stated therein to be a resident of the United States; and not less than fifty nor more than eighty days if he be stated to be a nonresident of the United States, or if his residence be stated as unknown.

"(2) Publication of Order.—The clerk shall have all orders of publication against an absent defendant, whether made by the judge or himself, published with as little delay as may be, in such newspaper as may be designated in the order, once a week, for four consecutive weeks if the defendant be stated to be a resident of the United States, and once each week for eight consecutive weeks if he be stated to be a nonresident of the United States, or if his residence be stated to be unknown; he shall also within twenty days of the making of the order post a copy of the said order at the door of the courthouse of the county, and send by mail a copy to the defendant if his residence be shown by the bill or affidavit.

"Sec. 2. This act shall take effect immediately upon its approval by the Governor.

"Approved May 31, 1893."

To accomplish the purpose designed by this statute, it should be so construed and applied as to afford due process of law and effectually protect individual rights of nonresidents, who are not only permitted but encouraged to acquire property in this state, as well as to give ample remedy to those having rights in the property of nonresidents situated in this state.

The question to be determined is whether the publication of constructive service as stated in the above plea gives the court jurisdiction of Edwards, who was a defendant in the former suit involving the property in controversy here. The publication here considered was to make constructive service of initial process to acquire jurisdiction of a nonresident defendant in a suit in equity—not as notice of proceedings in a cause where jurisdiction of the defendant has been duly acquired, or as notice of legislative proceedings as in *Ex parte Lower*, 178 Ala. 87, 50 South. 611.

[1, 2] The above-quoted statute contemplates that, when the defendant is a resident of the United States as in this case, the publication shall begin four weeks before the appearance day. The manifest purpose of the provision requiring the appearance day to be fixed by the order, and, in a case like this, that such appearance day be not less than 30 nor more than 50 days from the making of the order of publication, is to give ample opportunity for the required publication to begin not less than 4 weeks before the appearance day. The publication provisions of the statute have reference to the appearance day stated in the statute, and not to rule days on which defaults for failure to plead

or demur may be entered under the statute and chancery rules. This statute is designed to secure a lawful constructive service of initial process to acquire jurisdiction of a defendant who resides beyond the state, for the purposes of an equity suit affecting the rights of such defendant in lands within the jurisdiction of the court; and the provision that the publication shall be "for four consecutive weeks" means a publication once each week during four weeks, the first publication to be four weeks from the appearance day fixed in the publication. See 3 Words & Phrases, p. 2858; Second Series, p. 594. The first publication was on January 11th, and the appearance day was February 5th.

The requirement here that the publication shall be "once each week, for four consecutive weeks," is not complied with when the publication is made once in each week, where the beginning of the publication period or the first publication is less than four weeks or twenty-eight days from the appearance day to which the publication has reference. See Knowles v. Summey, 52 Miss. 377; Morse v. United States, 29 App. D. C. 433; Early v. Doe, 16 How. 610, 14 L. Ed. 1079; State v. Cherry County, 58 Neb. 734, 79 N. W. 825.

The statute also provides that the appearance day of the defendant shall be fixed by the order to be "not less than fifty nor more than eighty days if he be stated to be a non-resident of the United States, or if his residence be stated as unknown," and that the publication shall be "once each week for eight successive weeks if he be stated to be a nonresident of the United States, or if his residence be stated to be unknown." These particular provisions of the statute are not involved here, but it is argued that these provisions should be considered in construing the provision in question here, since all the quoted provisions are contained in the same section.

Where the publication is required to be "once each week for eight successive weeks," such publication cannot be fully made when the appearance day is less than eight weeks from the date of the order. The statute permits the appearance day to be fixed "not less than fifty nor more than eighty days" from the date of the order. In applying the statute, any real or apparent conflict in it when the defendant is a nonresident of the United States, or his residence is unknown, may be avoided by making the appearance in such cases not less than 8 weeks but not more than 80 days from the date of the order. This practice is doubtless pursued for convenience, if not to make the statute serve the purpose for which it was enacted.

The order of the judge in the former case that due and legal service had been made by publication is not effectual when contradicted by the facts shown.

[3] If the court does not acquire jurisdic-

tion of the defendant sought to be brought in by constructive service, where there is not a substantial compliance with the requirements of the statute both as to the publication and as to fixing the appearance day, and where jurisdiction of the defendant has not been acquired, a default cannot be lawfully entered against him for failure to respond to the bill of complaint by plea, answer, or demurrer as required by the statute and rules of court. Nor will a decree rendered, where jurisdiction of the defendant has not been acquired by proper actual or constructive service or appearance, be binding upon the defendant. See Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116; Shrader v. Shrader, 36 Fla. 502, 18 South. 672.

In *Lafin v. Gato*, 52 Fla. 529, 42 South. 387, it was held that, where the order for publication fixes the appearance day more than 50 days from the making of the order when the defendant is a resident of the United States, the constructive service is ineffectual. For stronger reasons, where the defendant is a resident of the United States, a publication for a period beginning less than four weeks from the designated appearance day is ineffectual to give the court jurisdiction of the defendant for the purpose of adjudicating his rights in property within the jurisdiction of the court.

The order appealed from is affirmed.

SHACKLEFORD, C. J., and TAYLOR, COCKRELL, and HOCKER, JJ., concur.

On Rehearing.

ELLIS, J. This cause was considered by this court during the June term, A. D. 1914, and the decree of the court below was affirmed.

Upon petition filed by appellant a rehearing was ordered.

The bill of complaint, the plea of the defendant Myakka Company, and the order of the court from which this appeal was taken are fully set out in the former opinion by this court.

The act of the Legislature which was under consideration by this court, and which was quoted in full in the opinion written by Justice WHITFIELD, was intended, as its title and provisions recite, to provide generally for constructive service of original process to acquire jurisdiction of nonresident defendants or defendants whose places of residence are unknown, in chancery causes.

The first section of the act directs the judge or clerk of the court in which a bill shall have been filed, upon proper showing made in a sworn bill or affidavit duly filed, to make an order against the defendant requiring him to appear to the bill upon a day to be fixed by the order not less than 30 nor more than 50 days from the time of the mak-

ing of the order, if the defendant be stated therein to be a resident of the United States, and not less than 50 nor more than 80 days if he be stated to be a nonresident of the United States or his residence be stated as unknown.

The second paragraph of the section deals with the publication of the orders so made by the judge or the clerk and directs the clerk to have all orders of publication against an absent defendant, whether made by the judge or himself, published with as little delay as may be in such newspaper as may be designated in the order, once a week for four consecutive weeks, if the defendant be stated to be a resident of the United States, and once each week for eight consecutive weeks if he be stated to be a nonresident of the United States, or if his residence be stated to be unknown. The clerk was also required, within twenty days of the making of the order, to post a copy of the order at the door of the courthouse of the county, and send by mail a copy to the defendant if his residence be shown by the bill or affidavit.

The suit in which the decree was adjudged to be void by the court below was according to the plea in this cause brought by the appellant in January, 1906, in the circuit court for Manatee county against Robert J. Edwards, the appellee in this cause, and the unknown heirs of George B. Nichols and Weston Lewis, deceased, and such other persons whose names were unknown as might be interested in the property described in the bill, for the purpose of quieting the title of appellant to the same lands described in the bill of complaint in this cause as against the said Edwards as well as against the unknown heirs of the said Nichols and Lewis and such other persons as might be interested in the premises whose names were unknown to the appellant. An affidavit appended to the bill in that cause contained the statements that the said Robert J. Edwards was a resident of a state other than the state of Florida; that the place of residence of the said Edwards as particularly as the same was known to the affiant was in Boston, Mass.; and that in the belief of the affiant the said Edwards was over the age of 21 years.

According to the plea on the 4th day of January, 1906, an order was made requiring the said Robert J. Edwards to appear to the bill of complaint on the 5th day of February, 1906, 32 days from the time of making the order counting the last day. The order was published in the newspaper in Manatee county designated in the order and appeared in 4 consecutive weekly issues of that paper, as follows: On January 11, 18, 25, and February 1, 1906. From the date of the first publication of the order to and including the day fixed in the order for the appearance of the defendant Edwards, there were 25 days. There was a certificate by the clerk showing the publication of the order in the

newspaper designated therein and at the times mentioned, also the posting of copies of the order at the courthouse door of Manatee county, and the mailing of a copy of the order directed to the said Edwards at Boston, Mass.

Edwards failed to appear to the bill, and on June 26, 1906, the judge of the circuit court made an order that the bill of complaint be taken as confessed against the said Edwards, and reciting that there had been due and legal service by publication, and on the same day made the final decree against Edwards, which the court below in this cause held to be void.

We hold that the pro confesso order made by the judge of the circuit court on June 26, 1906, reciting that there had been due and legal service by publication, was equivalent to a finding by the court that the order requiring the defendant to appear to the bill, had been published by the clerk with as little delay as might have been in the newspaper designated in the order.

[4] A court of equity has power to proceed in rem in a suit to quiet title or remove a cloud on title to lands in this state, upon the proper publication of an order against a nonresident defendant. Gen. Stat. § 1950; chapter 4129, Acts of 1893; Gen. Stats. § 1866; 1 Pomeroy, Eq. Jur. par. 135; *Tenant's Heirs v. Fretts*, 67 W. Va. 569, 68 S. E. 387, 29 L. R. A. (N. S.) 625, 140 Am. St. Rep. 979; *Arndt v. Griggs*, 134 U. S. 816, 10 Sup. Ct. 557, 33 L. Ed. 918.

The jurisdiction of the court, therefore, to proceed in rem or quasi in rem to quiet title or remove a cloud on title to land in this state, as against nonresident defendants, depends upon the statute providing for constructive service upon such defendants; in this case upon chapter 4129, Acts of 1893. By such statutes the power is given the court to remove a cloud from the title to lands without having actual jurisdiction over the person of the defendant by means of personal service. It is true that the state can deal with the property within its limits even though owned by nonresidents. The limitation upon this power of the state, said Judge Shiras, in *Bennett v. Fenton* (C. C.) 41 Fed. 283, 10 L. R. A. 500, is as to the mode of procedure.

In *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, the court announced the principle that, when by legislation of a state constructive service of process by publication is substituted in place of personal service, the statutory provision must be strictly pursued in order to bind a citizen of another state not personally served. "Every principle of justice exacts a strict and literal compliance with the statutory provisions."

Mr. Justice Brown, in *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 11 Sup. Ct. 512, 35 L. Ed. 116, said there is scarcely a state in

the Union in which the same principle has not been announced and reaffirmed.

[8-7] Jurisdiction must be affirmatively shown by the record where the parties are shown to be nonresidents, and constructive service is depended upon for jurisdiction. This is the rule even where the jurisdiction is attacked collaterally. *Guaranty Trust & Safe Deposit Co. v. Buddington*, 27 Fla. 215, 9 South. 246, 12 L. R. A. 770.

In the latter case the court held that the term "months," as used in the Act of November 7, 1828 (page 128, § 13) section 8, p. 154, *McClellan's Digest*, providing for the publication of orders in chancery causes against defendants to appear and plead and for decrees pro confesso in default thereof, means calendar months, and that no jurisdiction was obtained of the absent defendant, as it appeared that there had not been four months' "publication prior to appearance day."

The term "week" is as certain, clear, and definite a designation of time according to our division of it as it is possible to make.

It was the evident purpose of the Legislature in the enactment of chapter 4129, Laws of 1893, to require the judge or the clerk in making the order against the absent defendant to regard the facilities for publication which might exist in the county in which the bill was filed and the order made. The judge or clerk in the order designated the newspaper in which it was to be published, but the statute prescribed the duration of such publication. Its language is "once a week for four consecutive weeks" or "once each week for eight consecutive weeks." The language is not that the order shall be published four times or eight times. It specifies the number of weeks, not the number of times. The evident purpose in providing that the publication should be "once a week" or "once each week" was to avoid a construction that a daily publication could have been contemplated. If the Legislature had intended otherwise, it could very easily have used language to so indicate. Therefore it was deemed proper by the Legislature to leave a margin of time between 30 and 50 days in one case, and 50 and 80 in the other, in which the judge or clerk could adjust the time for appearance to the period of publication which the statute requires. It is true that, in cases where the residence of defendants is unknown, the statute requires the appearance day to be not less than 50 nor more than 80 days from the time of making the order, and that full 8 weeks' publication of the order could not be secured in cases where the order required the defendant to appear on the fiftieth day from the time of making the order; but it by no means follows that a period of less than 8 weeks' publication was thereby required or permitted by the act. At the time the act was passed, it is doubtful if in six counties in the state daily

newspapers were published. So that, in counties where there were published weekly newspapers, an order might have been made, as contended by appellant's counsel, requiring an absent defendant whose residence was unknown to appear on a day 50 days from the time of making the order; yet, if the first publication could not be made in the week the order was made, the clerk could not, by publishing the order "with as little delay as may be," secure more than seven publications before the appearance day. It could not be contended that such a publication would be valid under the act. There is no dispute that there must be at least eight publications in cases where the residence of the defendant is stated to be unknown. It would seem to follow therefore that it was the purpose of the statute to require the judge or clerk, in making the order, to consider the facilities existing in the particular county for the publication of the order, and adjust the time for appearance to the period during which the statute requires the order to be published.

In the former opinion in this case the court held in effect that the use of the word "for" in the statute, in connection with the word "weeks," prescribing the period of publication of the order, signified duration of time; and that the requirement of the statute that the publication shall be "once a week for four consecutive weeks" is not complied with when the publication is made once "in" each week when the first publication is less than four weeks or twenty-eight days from the appearance day to which the publication has reference.

Our reinvestigation of this case has not led us to a different conclusion. We do not find, as the learned counsel for appellant contends, that the weight of recent authority is against the view of this court as expressed in the former opinion.

The opinion expressed by the court in *State v. Cherry County*, 58 Neb. 734, 79 N. W. 825, has not been overruled according to our reading of the decisions of that court. The court construed the word "for" to mean "during" when applied to time. In the case of *State ex rel. Harris v. Hanson*, 80 Neb. 724, 115 N. W. 294, cited by appellant's counsel to show that the Nebraska court had receded from the view expressed in *State v. Cherry County*, it was said that:

Where the "time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned."

The court was construing an act providing for the publication of a notice for holding an election to determine whether a drainage district should be established, in our view quite a different matter from the one under consideration in this court, where the state is exer-

cising the power through a court to adjudicate on constructive service merely the rights, interest, or claims of a nonresident defendant to property in this state.

In the case of *Burr v. Finch*, 91 Neb. 417, 136 N. W. 72, a still later Nebraska case, the statute construed omitted the word "for." The question being whether publication of a notice on Thursday, September 14th, Thursday, September 21st, Thursday, September 28th, and Friday, October 6th, constituted "four" consecutive publications, it being insisted that the last publication was a day late. The court held this publication sufficient, relying on *Davis v. Huston*, 15 Neb. 28, 16 N. W. 820, and *Medland v. Linton*, 60 Neb. 249, 82 N. W. 866. The court in *State v. Cherry County*, supra, pointed out that the word "for" was omitted from the statute construed in the *Davis Case*, and in the *Medland Case* the court defined a "week" as a period of time commencing Sunday morning and ending Saturday night. The effect of the decision in the *Finch Case* seems to be that, where two certain dates fall upon days of the same week, a publication upon either of those days is a publication "in" that week.

In the case of *McDonald v. Nordyke Marmion Co.*, 9 N. D. 290, 83 N. W. 6, the court referred approvingly to its former opinion in the case of *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584, in which it was held that where a statute requiring a notice to be given "by publishing the same for six successive weeks at least once in each week" meant that such notice must be published weekly "for" and "throughout" a period of six full and consecutive weeks and embrace an aggregate of 42 days time, and nothing short of 42 days time would satisfy the statutory mandate. The court held that the earlier statute had been superseded by section 5848 of the Revised Code, providing that publication must be made "six times, once in each week for six successive weeks," that the period of duration of the publication which was the decisive test under the earlier law had ceased to be controlling under the existing statute, and that the number of publications was one of the controlling factors. In *Grandin v. Emmons*, 10 N. D. 223, 86 N. W. 723, 54 L. R. A. 610, 88 Am. St. Rep. 684, the court reaffirmed the construction placed upon the later statute in *McDonald v. Nordyke Marmion Co.*

There is a great deal of apparent conflict of opinion between the decisions of the various states on this question of publication of notice, but that contrariety of opinion arises upon the construction of the various statutes of the different states. We have found no case in which the statute construed was couched in precisely the same language as ours. Similar language occurs in many statutes. In some states the statute contains additional provisions that control or influence the construction. Some of the statutes

relate to tax sales, sheriffs' sales, probate proceedings, attachment, notice in elections, legislative proceedings, etc.; but in each case some word or phrase contained in the particular statute, or the character of the proceedings, leads the court to its particular conclusion.

In *Banta v. Wood*, 32 Iowa, 469, the court considered the notice published in an attachment proceeding. The statute under which the order of publication was made directed that it be published "for such length of time as may be deemed reasonable," "not less than once a week for four weeks," and "that service shall be deemed complete at the expiration of the time prescribed in the order of publication." It also provided that the defendant against whom publication is ordered, or his representative, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action, and, except in an action for divorce, the defendant or his representative may in like manner, upon good cause shown, be allowed to defend after judgment at any time within one year after notice thereof and within seven years after its rendition on such terms as may be just. The order for publication directed that it be made for four weeks. The court held the service complete at the last publication.

So in *Morrow v. Weed*, 4 Iowa, 77, 66 Am. Dec. 122, the question was as to the validity of an administrator's sale of realty upon the order of a probate court. The act authorized the court to order notice of sale, in lieu of another notice, to be published "three weeks successively in any newspaper." The court had jurisdiction of the subject-matter by sufficient petition of the administrator to sell the lands to pay debts. The order directed notice to be published "three successive weeks." The court held publication one day in each week sufficient.

The case of *Marling v. Robrecht*, 13 W. Va. 440, was one in which the court ordered an account to be taken. It was a notice of subsequent proceedings in a case in which the party complaining had been served with process and was apprised of the institution of the suit.

In *Saving & Loan Society v. Thompson*, 32 Cal. 347, the summons required the defendant to answer within a given number of days after service of the summons. The day for the defendant to act was left open by the summons depending on the time when the service was made complete. The act required the summons to be published "once a week" not less than "three months." The first publication was January 10, and the last April 9, 1865; there was publication each week during that period. The court said the month contemplated by the statute meant calendar month, that the time defendant was required to answer did not commence to run until April 10th.

In *Knowlton v. Knowlton*, 155 Ill. 158, 39 N. E. 595, the court was considering the validity of a decree of divorce granted in Connecticut. The statute of that state provided that, in petitions for divorce, when the adverse party resides out of or is absent from the state, the court or clerk may make such order as he shall deem reasonable, relative to notice. The order required that notice be given to respondent of the pendency of the petition by publishing a copy of the order for "two weeks successively before the term of the court." The order was published once in each of two successive weeks. The Illinois court held the publication sufficient.

In *Tidd v. Grimes*, 66 Kan. 401, 71 Pac. 844, the question was the validity of a deed based on a tax sale. The statute required publication of the notice "once in each week for four consecutive weeks prior to the sale."

In *Alexander v. Alexander*, 26 Neb. 68, 41 N. W. 1065, in the matter of the probate of a will, the statute provided that the court having jurisdiction should appoint a time and place for proving the will when all concerned may appear, it provided for personal service on all persons interested or by publication under an order in a newspaper "three weeks successively." The court held that the words meant three weekly publications.

In *Smith v. Collis*, 42 Mont. 350, 112 Pac. 1070, Ann. Cas. 1912A, 1158, the statute required summons by publication to be published "once a week for four successive weeks." The court said the statute furnished the key to its own interpretation. The statute expressly provided that "the service of summons is complete on the day of the fourth publication." The court said that was a legislative declaration that only four publications were required if there was one in each of four successive weeks.

[8] Our conclusion that the word "for" in our statute means "throughout" or "during the continuance of," and that "for four weeks" means 28 days, and "eight weeks" 56 days, is supported by the following authority: *Finlayson v. Peterson*, 5 N. D. 587, 67 N. W. 953, 33 L. R. A. 532, 57 Am. St. Rep. 584; *Market National Bank v. Pacific National Bank*, 89 N. Y. 397; *Dever v. Cornwell*, 10 N. D. 123, 86 N. W. 227; *Wilson v. Northwestern Mut. Life Ins. Co.*, 65 Fed. 38, 12 C. C. A. 505; *Wilson v. Thompson*, 26 Minn. 299, 3 N. W. 699; *State ex rel. Weber v. Tucker*, 32 Mo. App. 620; *Parsons v. Lanning*, 27 N. J. Eq. 70; *Wade on Notice*, par. 1105; *Foster v. Vehmeyer*, 133 Cal. 459, 65 Pac. 974; 32 Cyc. 490; *Guaranty Trust & Safe-Deposit Co. v. Buddington*, 27 Fla. 215, 9 South. 246, 12 L. R. A. 770.

As to the second proposition of appellant that the jurisdiction cannot be attacked collaterally, we think the law is settled in this state contrary to that view. *Guaranty Trust & Safe-Deposit Co. v. Buddington*, supra.

The former opinion of the court is sustained, and the order appealed from is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(69 Fla. 21)

WELCH v. STATE.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

1. STATUTES \S 118—TITLE AND SUBJECT-MATTER—"DESERPTION."

Under the title "An act to provide punishment for the desertion of wife or child," the Legislature may punish the withholding of means of support from such dependents.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. \S 118.]

2. HUSBAND AND WIFE \S 303—"DESERPTION"—STATUTE.

The word "desertion" has a broader meaning than mere physical separation.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 635; Dec. Dig. \S 303.

For other definitions, see Words and Phrases, First and Second Series, Desertion.]

Error to Circuit Court, Alachua County; J. T. Wills, Judge.

Habeas corpus by W. B. Welch against the State. From a judgment remanding Welch to custody, he brings error. Affirmed.

Fred Cubberly and W. L. Hill, both of Gainesville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. This is a writ of error to a judgment remanding to custody the plaintiff in error, who, upon habeas corpus, sought to test the constitutionality of the statute covering the offense of which he was charged.

[1] The sole point presented is whether the title to the act (chapter 6483, Laws of 1913) being "An act to provide punishment for the desertion of wife and child or children, or wife when there is no child, and for the desertion of child or children," be not too restrictive to embrace within its scope a provision in the body of the act punishing the withholding of means of support from these dependents.

[2] This contention attaches too narrow a meaning to the word "desertion," as confined solely to physical separation. See *Rector v. Rector*, 78 N. J. Eq. 386, 79 Atl. 295. Moreover, this statute is amendatory of section 3569 of the General Statutes, entitled "Desertion of Wife and Children," which also included withholding the means of support as a subdivision of the crime.

We must assume that the Legislature is familiar with the previous legislation it is amending, and that no one can be supposed to have been misled or lulled to indifference

by a title directed so pointedly to the former legislation.

Even without the aid of the former legislation on the subject, no decision by this court would be authority for so narrow a construction as the one now contended. The case of *Ex parte Knight*, 52 Fla. 144, 41 South. 786, 120 Am. St. Rep. 191, is chiefly relied on. We there decided that the punishment for removing turpentine from a tree after it had been cut was not within the purview of our act purporting to penalize only the cutting and removal of timber. The word "desertion" conveys the idea of neglect of a duty. I desert a friend, not merely by leaving his presence, but by failing to perform a service for him that he had a reasonable right to expect of me, and a man may be said to desert his family if he withholds from it the means necessary to its support. We cannot say that withholding the means of support from a wife or child is not fairly and reasonably included in the concept of desertion of wife and child or children.

Judgment affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(68 Fla. 555)

TOOMER v. FOURTH NAT. BANK OF JACKSONVILLE.

(Supreme Court of Florida. Jan. 11, 1915.)

(Syllabus by the Court.)

1. EXECUTION — 188 — STATUTORY CLAIM PROCEEDINGS — EXCLUSIVENESS OF REMEDY.

The statutory claim proceedings permitted a stranger whose property is levied upon are not exclusive.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. §§ 560, 562, 563; Dec. Dig. —188.]

2. EXECUTION — 464 — WRONGFUL LEVY — TROVER.

Trover lies against the plaintiff in execution for an injured party whose property is seized wrongfully by the sheriff under the express direction of such plaintiff.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 1394; Dec. Dig. —464.]

3. INFANTS — 77 — TROVER AND CONVERSION.

An infant, suing by his next friend, may bring trover for the wrongful conversion of his property.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 192-194, 231; Dec. Dig. —77.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action by W. M. Toomer, Jr., by next friend, against the Fourth National Bank of Jacksonville, a corporation. Judgment for defendant, and plaintiff brings error. Reversed.

W. H. Surrency, of Jacksonville, for plaintiff in error. Kay & Doggett, of Jacksonville, for defendant in error.

COCKRELL, J. This is a writ of error to a judgment final pronounced upon sustaining a demurrer to a declaration.

Omitting the formal parts, the declaration reads:

"(1) That on May 30, 1912, W. M. Toomer, Jr., was a minor of the age of 18 years. That on said date he was the owner of one model L 1911 roadster Cole 30 H. P. 4-cylinder automobile car No. 2542, motor No. 556, of the value of \$1,500. On said May 30, 1912, said defendant Fourth National Bank, by express direction given the sheriff of Duval county, Fla., caused that officer to seize, levy upon, and take possession of said described automobile under and by virtue of an execution issued on March 23, 1912, upon a judgment obtained March 21, 1912, in the circuit court of the Fourth judicial circuit, Duval county, Fla., by said defendant against W. M. Toomer, the father of the said W. M. Toomer, Jr. After said levy, seizure, and conversion of said described property and before the filing of this complaint, due demand was made upon said Fourth National Bank by said W. M. Toomer, Jr., for the release, surrender, and delivery of said automobile or the payment of the value thereof, and said demand was then and there refused. The said W. M. Toomer, Jr., has been since the said 30th day of May, 1912, deprived of the use and enjoyment of said automobile which was of the fair value of one dollar a day.

"Wherefore plaintiff brings this his suit for the value of said automobile and its use of which the said W. M. Toomer, Jr., has been deprived, and claims \$3,000 damages."

The grounds of the demurrer are:

"(1) Said declaration sets up no cause of action against this defendant.

"(2) Said declaration sets up a demand by a minor upon this defendant.

"(3) Said declaration shows on its face that the plaintiff did not pursue the remedy prescribed by statute for the interposition of claim proceedings.

"(4) Said claim proceedings prescribed by the statute are exclusive.

"(5) It became the duty of the plaintiff to interpose a claim to minimize the alleged damages.

"(6) The failure of the plaintiff to interpose a claim reduces the alleged damages to mere nominal damages of which this court has no jurisdiction."

[1] We are clear that the statutory claim proceedings are not the exclusive and only remedy, when a stranger's property is seized under a levy by the sheriff. Under the language of the statute, the permissive word "may" is used, and there are no words indicative of an intent to abolish the common-law remedies. A bond is required in the statutory proceedings, and the shortness of time, too, might well deprive the owner of his property without an opportunity to assert his rights. This remedy is concurrent and not exclusive. This court may have been unfortunate in its use of language in *Price v. Sanchez*, 8 Fla. 136, in calling this proceeding a substitute for the common-law actions; but the opinion in that case is no warrant for holding that the proceeding is exclusive.

Even if a negligent failure to pursue the statutory proceeding be a consideration on the quantum of damages—a point not decided—there is nothing here to indicate that

the claim as disclosed by the declaration in good faith does not exceed \$500, being for the value of the machine, as well as specific damages for its detention.

[2] Many verbal criticisms, more or less serious, readily occur upon an inspection of the declaration, yet they are readily amendable, and should therefore have been specifically attacked. Speaking generally, trover lies for the injured party whose property is seized wrongfully by the sheriff under the express direction of the plaintiff in execution, and the first ground of the demurrer goes only to a denial of this general proposition.

[3] We know of no reason, and counsel suggests none, why an infant may not bring trover for the wrongful conversion of his property. He sues by his next friend, as in other torts.

Judgment reversed.

TAYLOR, C. J., and SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(68 Fla. 558)

STEPHENS v. KEEN.

(Supreme Court of Florida. Jan. 11, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 882—ESTOPPEL TO ALLEGE ERROR—RECEPTION OF EVIDENCE—INVITED ERROR.

The party offering a preliminary contract in evidence, as an aid to the construction of the subsequent contract, may not complain that it was so used.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. \S 882.]

2. MORTGAGES \S 310—RELEASE—AGREEMENT—CONSTRUCTION.

The holder of a purchase-money mortgage upon lands sold to speculators agreed to release from the mortgage such of the lands as might be unsold, at the rate of one acre for every \$50 paid him. Such mortgagee will not be compelled to release that percentage of acreage upon the payment of an installment note by the mortgagor.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 901, 906; Dec. Dig. \S 310.]

Appeal from Circuit Court, Polk County; F. A. Whitney, Judge.

Action by S. M. Stephens against J. M. Keen. From a judgment for defendant, complainant appeals. Affirmed.

E. Tucker, Sr., of Lakeland, for appellant. Wilson & Boswell, of Bartow, for appellee.

COCKRELL, J. A bill was filed to compel a mortgagee to release a certain number of acres of land from the mortgage lien. At the time the purchase-money mortgage was given another contract was executed, whereby the mortgagee agreed "to release the southwest quarter and the west half of the southeast quarter of section 22, in said township and range, in five-acre tracts or more,

upon payment of \$10 per acre, and he likewise agrees to release the balance of the said land upon payment of \$50 per acre."

Whenever the mortgagor sold off any of the land, he paid the mortgagee at the rate of \$50 per acre of the land so sold and received the release. When, however, he paid off one of the maturing notes, he demanded a general release of so much acreage as there were \$50 in the amount of the note so paid, and this was refused. To support this construction of the contract, he introduced in evidence a previous contract in which it was stipulated that whenever any of the lands were sold the mortgagee would release the same on mutual agreement. Acting upon this evidence, the chancellor construed the two contracts together, and held that the agreement to release had reference only to land sold, and was not to the payment of the mortgagor's independent obligation upon the notes.

[1] Error, if any, in construing the two contracts together cannot avail the appellant, who by his own voluntary action invited such construction.

[2] We further think the true construction was placed upon the contract for release. It was evidently entered into for the sole purpose of facilitating sales by the mortgagor, and not to reduce the mortgagee's security as against the mortgagor's personal obligation to pay the indebtedness.

The payment of the note is not within the terms of the contract "a payment of \$50 per acre," but a general reduction of the mortgage indebtedness.

The decree dismissing the bill of complaint is affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(69 Fla. 15)

ROESS v. MALSBY CO.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

LIMITATION OF ACTIONS \S 12—FOREIGN CORPORATIONS—ACTION AGAINST—RIGHT TO PLEAD LIMITATIONS.

A foreign corporation, transacting business in Florida, which maintains an agent in such state, upon whom process may be served in accordance with the provisions of paragraph 5 of section 1406 of the General Statutes of Florida, and against which a personal judgment may be rendered, is entitled to plead the statute of limitations in an action instituted against such corporation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 40-50, 52-55; Dec. Dig. \S 12.]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by M. J. Roess against the Malsby Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. M. Hampton, of Ocala, for plaintiff in error. R. A. Burford, of Ocala, for defendant in error.

SHACKLEFORD, J. M. J. Roess, doing business under the name and style of Roess Lumber Company, instituted an action of assumpsit against the Malsby Company, a corporation organized under the laws of the state of Georgia and doing business in Marion county, Fla. The defense relied upon is set forth in the following plea:

"And for a third and further plea this defendant says that the said alleged cause of action sued upon in this cause did not accrue within three years before the commencement of plaintiff's action. That the said defendant is a foreign corporation organized and existing under the laws of the state of Georgia, and was doing business in the state of Florida, and kept and maintained an agent transacting business for it in said state of Florida, upon whom any process against said defendant could have been served in pursuance of paragraph 5 of section 1406 of the General Statutes of the state of Florida, at the time of the commencement of plaintiff's action and continuously immediately prior thereto for a period of more than three years."

To this plea the plaintiff interposed the following demurrer:

"Now comes the plaintiff in the above cause, by its undersigned attorney, and demurs to the third plea of defendant of the statute of limitations filed herein, and says that the same is bad in substance, and for points of law to be argued in support of this demurrer, said plaintiff states the following:

"(1) That the domicile of a foreign corporation is in the state under the laws of which it was organized and incorporated, and defendant is therefore a nonresident of the state of Florida, and not entitled to invoke or rely upon the statute of limitations.

"(2) The mere fact that a corporation organized and existing under the laws of another state, and not under the laws of the state of Florida, may keep and maintain an agent in the state of Florida for the transaction of its customary business, and upon whom process could have been served under paragraph 5 of section 1406 of the General Statutes of the state of Florida, does not authorize or permit such foreign corporation to rely upon or plead to statute of limitation."

The following proceedings were then had:

"The sole question argued and submitted under the demurrer is whether a foreign corporation may plead and rely upon the statute of limitations in this state; the defendant contending that a foreign corporation doing business in this state, and having an agent in the state, upon whom service of process could be made, is just as much entitled to plead and rely upon the statute of limitations as would be a domestic corporation. This question, so far as this court is advised, has not been directly passed upon by the Supreme Court of this state; nor does it appear to have been raised in any case that has been called to the court's attention. The courts construing similar provisions of statutes are not at all in harmony; one line holding that a foreign corporation cannot invoke the statute of limitations, and the other line holding just as positively that it can. The abstract proposition that a foreign corporation cannot invoke the provisions of the statutes of limitations I cannot agree with. If such were the law, then we would have a condition providing

for the serving and bringing into court of a foreign corporation, through its local agents, to answer demands against it, and then denying to it the other provisions of the statute in answer to those demands upon the sole theory that its domicile is out of the state.

"It is ordered and adjudged that the said demurrer be and is hereby overruled, to which ruling the plaintiff excepts.

"At the time of making this order the plaintiff, being present in court by his attorney, announced that the plaintiff did not desire to make further reply to defendant's third plea of the statute of limitations, and thereupon declined and refused to join issue or to make replication to said third plea, and announced in open court that the said plaintiff did not desire to join issue or reply further to said plea, or to join issue upon or reply to the first plea.

"And it appearing to the court that by reason of plaintiff's refusal to join issue upon, or otherwise reply to said pleas that said action cannot be tried, the said ruling upon demurrer is therefore made final, and it is ordered and adjudged that this action be and the same is hereby dismissed at the cost of the plaintiff, and that the defendant go hence without day, and recover its costs in this behalf expended taxed by the clerk at two dollars.

"Done and ordered at chambers at Ocala, Florida, on this 10th day of July, A. D. 1914.
"W. S. Bullock, Judge."

As is agreed by the respective counsel for the parties litigant, the only point presented to us for determination is as to whether or not a foreign corporation can plead the statute of limitations as a defense to an action in the courts of Florida. The plaintiff in error relies upon paragraph 4 of section 1715 of the General Statutes of Florida, which reads as follows:

"If, when the cause of action shall accrue against a person, he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action shall have accrued he depart from the state, the time of his absence shall not be part of the time limited for the commencement of the action."

The plaintiff in error contends that, as the quoted section makes no exception as to a corporation, under the provisions thereof a foreign corporation cannot plead the statute of limitations. The defendant in error contends that by reason of the fact that paragraph 5 of section 1406 of the General Statutes of Florida provides for service of process upon an agent transacting business for a foreign corporation in this state, in the absence thereof of certain enumerated officers, such foreign corporation is entitled to plead such statute. Paragraph 5 of section 1406 is as follows:

"If a foreign corporation shall have none of the foregoing officers or agents in this state, service may be made upon any agent transacting business for it in this state."

It is undoubtedly true, as stated by the circuit judge, that the authorities are in conflict upon this point. We shall not attempt the impossible task of reconciling them, and neither shall we undertake to cite them all. After a careful consideration of all that have been cited to us by the respective counsel

and of such others as we have been able to find, we are of the opinion that the ruling of the circuit judge was correct. As was well said in *Wall v. Chicago & N. W. R. Co.*, 69 Iowa, 498, text 501, 29 N. W. 427, text 428:

"The theory of the statute of limitations is that it operated to bar all actions, except as against persons and corporations upon whom notice of the action cannot be served because of their nonresidence. If such notice can be served, and a personal judgment obtained which can be enforced, in the mode provided by law, against the property of such person or corporation, wherever found, then such person or corporation is not a nonresident, as contemplated by the statute of limitations."

We would also call especial attention to the case of *Vollvar v. Richmond Cedar Works*, 152 N. C. 656, 68 S. E. 200, 21 Ann. Cas. 623, wherein the holding of the Iowa court, which we have just quoted, is approved, and many authorities from other jurisdictions are cited to the same effect. Prior decisions of the North Carolina court to the contrary were overruled. In addition to the authorities which we have cited, cases upon either side of the question will be found in the notes on page 9 of 1 Ann. Cas., and page 624 of 21 Ann. Cas.

The judgment will be affirmed.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 4)

SYMMES v. PRAIRIE PEBBLE PHOSPHATE CO.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐1028—HARMLESS ERROR.

Where the evidence would not legally sustain a verdict for the plaintiff, and the verdict and judgment for the defendant are proper, errors, if any, committed by the trial court in the progress of the cause, that could not reasonably have injuriously affected the substantial rights of the plaintiffs, will not justify a reversal of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4034; Dec. Dig. ⇐1028.]

2. NEW TRIAL ⇐27—GROUNDS—IMMATERIAL ERRORS.

Where the evidence required a verdict for the defendant, and no material or prejudicial errors of law or procedure appear, the plaintiff's motion for a new trial was properly denied.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 40, 41; Dec. Dig. ⇐27.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by E. P. Symmes against the Prairie Pebble Phosphate Company, a corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 66 Fla. 27, 63 South. 1.

Hilton S. Hampton, of Tampa, for plaintiff in error. P. O. Knight, of Tampa, for defendant in error.

WHITEFIELD, J. The declaration herein in effect alleges that Symmes had the exclusive right to construct an oyster bed for the propagation and cultivation of oysters in a stated portion of the bed of Alafia river in Florida; that he duly became possessed of, constructed, and planted a certain oyster bar in said grant; that for a long period of time since the granting of such right he has utilized, used, and enjoyed the usufruct from said oyster bar or bed pursuant to said right; that the defendant phosphate company, "in the conduct of its business along or near the shore of the Alafia river above the point where the plaintiff's said property is situated, well knowing the premises, but continuing and wrongfully intending to injure and damage the plaintiff and to interfere with the possession, occupation, and enjoyment of said oyster bed, wrongfully and injuriously from day to day caused great quantities of mud and other refuse to be deposited and flow into said Alafia river above the point where the said property of the plaintiff is situated, and still continues to wrongfully and injuriously, from day to day, cause to be discharged from its phosphate plant into said river at said point large quantities of mud and refuse; and, by reason of the discharge of said mud and refuse, the regular flow of the said river has been gradually interfered with, in that the said mud and said refuse discharged as aforesaid by the defendant into said river has diverted the flow thereof, has caused the channel of the same to become clogged at or near said point where the said oyster bed of the plaintiff is situated, and has covered and destroyed the same with said mud and refuse, as well as the oysters therein." See *Symmes v. Prairie Pebble Phosphate Co.*, 64 Fla. 480, 60 South. 223; *Id.*, 66 Fla. 27, 63 South. 1.

A demurrer to the declaration was overruled, pleas were filed, a demurrer to one of them was overruled, and a demurrer to replications to such plea was sustained. Issue was joined on the pleas, and a trial thereon was had. A verdict for the defendant was rendered, on which judgment was entered, and, a motion for new trial being denied, the plaintiff took writ of error.

[1, 2] As the evidence could not legally sustain a verdict for the plaintiff, the verdict and judgment for the defendant were proper; and the judgment should not be reversed for errors, if any were committed by the trial court, in the progress and trial of the cause, since it is clear that such errors, if any, could not have injuriously affected the substantial rights of the plaintiff in error. See *Welles v. Bryant*, 68 South. 562, decided last term.

It is alleged that the defendant, "intending to injure and damage the plaintiff," "caused great quantities of mud and other

refuse to be deposited and flow into" the river, and by reason of this discharge of said mud and refuse into the river it "has covered and destroyed the" oyster bed "with said mud and refuse, as well as the oysters therein."

The testimony is that "the phosphate business in general is the whole cause" "of the mud in the Alafia river"; that "the Alafia river is a bed of mud;" that "all phosphate companies" "were putting their refuse in the river at the time"; that defendant's plant is about 70 miles above the plaintiff's oyster bed; that between the defendant's plant and the plaintiff's oyster bed there were and are several separate phosphate plants in operation from which plants the refuse entered the river; that the defendant emptied its mud into tributaries of the Alafia river; that "the heavy substance, such as the dirt, lodged pretty soon"; that when such substance is put into the stream "it would reach the Alafia river, main run, in thick muddy water, and gradually drift on down and meet the tide"; that, "prior to the beginning of the phosphate operations on the Alafia river," there was a sand and pebble bottom and no mud at Mr. Symmes' place, but the muddy water there is now about three feet deep at extreme high tide, and there was mud there when the oyster bed was planted. There is other evidence of this general nature, but there is no evidence that the defendant, intending to injure the plaintiff, caused great quantities of mud to be deposited into the river, as alleged, or that the plaintiff's oyster bed and oysters were in whole or in part covered and destroyed by refuse or mud from the defendant's plant 70 miles away and above the several other phosphate plants operating on the river or its tributaries whose refuse entered the river below the point where the refuse from the defendant's plant entered the river. Nor is there any evidence that the refuse from the defendant's plant actually passed below the location of the other plants operating on the river or its tributaries, except possibly the general statement that, when such refuse is put into the river, the thick muddy water would gradually drift on down and meet the tide; but, the further away the water went, the less muddy it was, and the heavy substance such as the dirt lodged pretty soon.

There is no allegation or showing of a joint tort, and as the evidence wholly fails to show that the plaintiff's oyster bed was in whole or in part "covered and destroyed" by mud and refuse deposited into the river by the defendant, as alleged, the verdict for the defendant was proper, and there was no error in denying a new trial.

The judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(89 Fla. 1)

ROESSLER v. ARMSTRONG et al.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

MORTGAGES \S 125—PROVISION FOR ATTORNEY'S FEES—CONSTRUCTION—"OR OTHERWISE."

Where the note does not provide for attorney fees, and the express covenants of the mortgage, given to secure the payment of the note, provide for attorney fees only when collection is "by foreclosure," a statement, in the defeasance clause of the mortgage, that the lien will be void upon payment of the note with interest and attorney fees incurred in collecting "by foreclosure or otherwise," does not require the payment of attorney fees when the collection is not "by foreclosure," though the collection is made by an attorney (citing Words and Phrases, Otherwise).

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. \S 211½, 244, 245; Dec. Dig. \S 125.]

Appeal from Circuit Court, Manatee County; F. M. Robles, Judge.

Suit by Susan E. Roessler, as executrix, against F. C. Armstrong and others. From decree for defendants, complainant appeals. Affirmed.

C. C. Whitaker, of Tampa, for appellant. Singeltary & Reaves, of Bradentown, for appellees.

WHITFIELD, J. Suit was brought by the appellant against a purchaser of the original mortgaged property, to enforce a mortgage lien upon lands for a balance of \$285.21 alleged to be due on the mortgage indebtedness as principal, interest, cost, and reasonable attorneys' fees. At the final hearing the bill of complaint was dismissed, and complainant appealed.

The note does not require the payment of an attorney's fee for the collection of the indebtedness. The defeasance clause of the mortgage provides that upon the payment of the "note * * * with interest * * * together with all costs, charges and expenses, including a reasonable attorney's fee," incurred "in collecting the same by foreclosure or otherwise," then the mortgage shall "be absolutely null and void." There is an express covenant in the mortgage to pay the "note with interest and all costs, charges and expenses, including a reasonable attorney's fee, * * * in collecting the same by foreclosure." The defendants purchased the property subject to the mortgage, but did not expressly covenant to pay the amount for which the mortgage lien was given.

It appears that the mortgage was put in the hands of an attorney for collection; that payments were made to the attorney reducing the amount; that the final payment demanded was \$1,949.21 for balance due as principal, interest, and attorney fees; that all of this final amount demanded by the attorney was paid except \$285.21, which was the amount demanded as attorney fees; and

this suit is brought to enforce the payment.

The expression "or otherwise," appearing in the quotation from the defeasance clause of the mortgage, should receive an ejusdem generis interpretation, when considered in connection with the provision for attorney's fees when the collection is "by foreclosure." See Words and Phrases, "Otherwise," and cases therein cited.

The terms of the defeasance clause of the mortgage cannot be given a greater effect than is warranted by the note secured by the mortgage or by the express covenants contained in the mortgage. As the note does not provide for attorney's fees, and as the express covenants of the mortgage provide for attorney fees only when collection is "by foreclosure," the statement in the defeasance clause that the lien will be void upon payment of the note with interest and attorney's fees incurred in collecting "by foreclosure or otherwise" does not require the payment of attorney's fees when the collection is not "by foreclosure." The balance of \$235.21 sought to be enforced in this suit is the amount of the attorney's fees claimed not for collection "by foreclosure," but for collection made by the attorney without "foreclosure" or other suit or action. The demand therefore is not covered by the note or the mortgage, and the amount claimed cannot be collected in this suit brought to enforce the lien of the mortgage.

Decree affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(89 Fla. 11)

SAVOY SHIRT CO. v. CALLAWAY CLOTHING CO.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

SALES §178—ACCEPTANCE—WHAT CONSTITUTES.

In an action for goods sold and delivered, where the evidence as to the amount of the goods ordered is conflicting, and it clearly appears that when received the goods were placed on the vendee's shelves by mistake and without authority, and that when the amount of the shipment was discovered, all the goods were promptly returned because they were in excess of the order, there being no acceptance of the goods or any act of the vendee inconsistent with the ownership of the vendor, a verdict for the defendant vendee will not be disturbed; no harmful errors of law or procedure appearing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 451-455; Dec. Dig. §178.]

Error to Circuit Court, St. Johns County; Geo. Couper Gibbs, Judge.

Action by the Savoy Shirt Company, a corporation, against the Callaway Clothing Company, a corporation. Judgment for defendant, and plaintiff brings error. Affirmed.

Marks, Marks & Holt, of Jacksonville, for plaintiff in error. E. N. Calhoun, of St. Augustine, for defendant in error.

WHITFIELD, J. In an action under common counts for goods sold and delivered and a plea of never was indebted, there was a verdict and a judgment for the defendant, and the plaintiff took writ of error.

There is a conflict in the testimony as to the amount of the goods ordered; the plaintiff contending that the order amounted to \$617.13 for shirts, while the defendant insists that the amount was about \$300. The evidence shows that the goods were received at the defendant's store, and some of them were placed on the shelves by mistake and without authority; but, when the excessive shipment was discovered, all the goods were promptly returned. The evidence does not show an acceptance of the goods by the defendant, or any act of the defendant inconsistent with the ownership of the plaintiff. The conflict in the testimony as to the amount of the order was settled by the jury. As the evidence is not such as to justify this court in disturbing the verdict, and as errors of procedure, if any, could not reasonably have injured substantial rights of the plaintiff, the judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(89 Fla. 12)

POWELL et al. v. PETTEWAY.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

USURY §130—ESTOPPEL—PURCHASER OF MORTGAGED PROPERTY.

A subsequent purchaser, who expressly assumes the payment of a prior existing mortgage upon the property he buys, as a part of the purchase price for such property, is estopped to defend against the foreclosure of such mortgage upon the ground of usury; and a person claiming title under one who is estopped will also be bound by the estoppel, even though the last right is based on a quitclaim deed, containing no express recognition of the usurious mortgage, and even though the penalty for usury extends only to the interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 386-391; Dec. Dig. §130.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Suit by G. A. Petteway, Receiver, etc., against Maggie E. Powell and others. From an order sustaining exceptions to the answer, defendants appeal. Affirmed.

K. I. McKay, of Tampa, and O. M. Phipps, of Terra Cela, for appellants. McMullen & McMullen, of Tampa, for appellee.

WHITFIELD, J. It appears that on May 1, 1907, E. Valentine, W. H. Godwin, and Polly V. Godwin, wife of W. H. Godwin, ex-

ecuted a mortgage lien on certain lots 3 and 4 of block 1, Greenville's subdivision, Hillsborough county, to the Ybor City Building & Loan Association; that on June 28, 1907, Valentine conveyed his interest in the premises to Polly V. Godwin, subject to the mortgage, which mortgage debt the grantee expressly assumed; that on January 6, 1910, Godwin and wife conveyed the property to Annie L. Ritter, "subject to a certain mortgage held by the Ybor City Building & Loan Association, * * * which the said party of the second part agrees to pay as part of the consideration within mentioned"; that on January 10, 1910, Annie L. Ritter, joined by her husband, conveyed lot 4 to J. B. Abbott, as guardian for Earley L. Abbott, subject to the mortgage, and the grantee expressly agreed "to assume one-half of said mortgage as part of the consideration herein mentioned"; that on January 13, 1910, Annie L. Ritter, joined by her husband, conveyed lot 3 to J. W. Dansby, who expressly agreed "to assume one-half of said mortgage as part of the considerations herein mentioned"; that on July 15, 1913, Dansby quitclaimed lot 3 to Maggie E. Powell; that on March 14, 1913, Abbott, as guardian, quitclaimed the interest of Earley L. Abbott in lot 4 to Maggie E. Powell; that on December 27, 1912, P. V. Godwin, joined by her husband, quitclaimed lot 3 to Maggie E. Powell. Proceedings to enforce the mortgage lien on the two lots were brought by the receiver of the Building & Loan Association, the mortgagee, against Maggie E. Powell and her husband, who present usury as a defense. The court sustained exceptions to the answer, setting up the defense of usury, and the defendants appealed.

In *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 South. 599, Ann. Cas. 1914A, 173, this court held on the ground of estoppel that "a subsequent purchaser, who expressly assumes the payment of prior existing mortgages upon property that he buys, as part of the purchase price for such property, is estopped to defend against the foreclosure of such mortgages, * * * upon the ground of usury"; and that "it is well settled also that a person, claiming title under one who is estopped, will also be bound by the estoppel." This holding is adhered to and makes it unnecessary to discuss the contention as to the proper construction of the statute of this state relative to usury.

It is argued that the above rule should not be applied in this case, since the title of the appellants "is based upon quitclaim deeds which contain no condition whereby the payment of any part of said usurious mortgage is imposed upon them." But the appellants have no greater rights as to defenses than their immediate predecessors in title had under whom they are claiming and to whom the rule excluding the defense of usury was applicable. And the rule is not made inapplicable because there was no express

recognition of the here asserted usurious character of the mortgage indebtedness, or because the statute only cuts off all interest as a penalty for usury.

The further argument that, as one of the original mortgagors, P. V. Godwin, quitclaimed lot 3 to Maggie E. Powell, the latter may assert a defense that would be available to the original mortgagor, cannot avail for the reason that Maggie E. Powell claims title to lot 3 by conveyances from the original mortgagors through Ritter, Abbott, and Dansby, and the quitclaim from Polly V. Godwin to Maggie E. Powell is not material here, even if it could confer the right to plead usury.

The order appealed from is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 8)

YAEGER & BETHEL HARDWARE CO. et al.
v. PRITZ.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

1. MORTGAGES \S 275—DEFENSE—RIGHTS OF PURCHASER.

Purchasers for a nominal consideration of property mortgaged may not defeat the mortgage by alleging that, though executed by the proper officers of the mortgagor corporation, they were not "duly, properly, or lawfully authorized by the corporation so to do, either at or before the execution of the notes and mortgage."

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 772-781, 1218; Dec. Dig. \S 275.]

2. EQUITY \S 184 — PLEADING AFFIRMATIVE DEFENSE.

An affirmative defense is not made out as matter of pleading by merely demanding proof of a fact alleged positively in the bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 422-425; Dec. Dig. \S 184.]

Appeal from Circuit Court, Leon County; D. J. Jones, Judge.

Bill by Amelia H. Pritz, as executrix, etc., against the Yaeger & Bethel Hardware Company, a corporation, and others. From an order striking a portion of the answer, defendants appeal. Affirmed.

J. A. Edmondson, of Tallahassee, for appellants. W. H. Ellis, of Tallahassee, for appellee.

COCKRELL, J. A bill was filed in November, 1913, to enforce the lien of a mortgage to secure an indebtedness of \$5,000, due from the Tallahassee Tobacco Company to one Charles Blum, the mortgage being executed in its name by the president and secretary of the corporation, under seal, these officers in their acknowledgments claiming to act under the authority of the directors. This mortgage, covering about 288 acres in Leon county, was duly recorded. Subsequent to this recordation, the Yaeger & Bethel Hardware Company obtained judgment in said

county against the tobacco company, and at the execution sale thereunder the sheriff sold the land to the hardware company and Louis C. Yaeger for the nominal sum of \$10.50. A decree pro confesso was taken against the tobacco company, the mortgagor; but the hardware company and Yaeger answered the bill severally, admitting that the notes and mortgage were assigned in due course to the complainant, but demanded strict proof as to the original indebtedness and subsequent payments on the notes. While admitting that they had record notice of the mortgage when they obtained the judgment and sheriff's deed, yet they allege that the president of the tobacco company executed the notes, and the president and secretary executed the said mortgage, "without being duly, properly, or lawfully authorized by said Tallahassee Tobacco Company so to do, either at or before the execution of the notes and mortgage." Upon the motion of the complainant, the court struck the portion of the answer seeking to make out the defense indicated in the quoted language, and this ruling constitutes the contention on this appeal.

[1, 2] We discover no error in this ruling. If it be permitted to subsequent purchasers at an execution sale to question the power of the officers, designated by the statute, as the proper officers to execute the mortgages of a corporation, when the corporation declines to do so, a showing stronger than the one before us must be made. It is apparent that the small bid at the execution sale, about three cents an acre, was the result of the overhanging mortgage of \$5,000 upon this land. No fraud or collusion between the mortgagor and the mortgagee is even suggested, the mortgage antedating the judgment more than two years. It is clear that the facts alleged in the bill and not denied in the answer work an estoppel upon the mortgagor corporation, which makes no defense to the suit, and yet this answer stops short of allegation when it comes to the question of estoppel—it denies authority of the officers only up to the precise time of the execution of the mortgage, when as matter of law any lack of power might have been conferred the next day by express ratification or by estoppel. An affirmative defense is not made out as matter of pleading by merely demanding proof of a fact alleged positively in a bill.

This portion of the answer did not set up an equity for these defendants, who had to make out a defense that would be available to their predecessor in title when their rights accrued. To destroy its mortgage, the tobacco company would have had to allege more than a want of authority in its president and secretary at or before the execution of a mortgage, for an existing indebtedness, that it had subsequently ratified by partial payments. It may further be mentioned here that the notes, the evidence of the in-

debtedness the mortgage was given to secure, were negotiable instruments and passed before maturity to innocent holders.

The order appealed from is affirmed.

TAYLOR, C. J., and SHACKLEFORD and WHITFIELD, JJ., concur. ELLIS, J., disqualified, took no part.

(69 Fla. 23)

STATE ex rel. SIMPSON v. ACKERLY, City Recorder, et al.

(Supreme Court of Florida. Jan. 15, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §57—POWERS—EXERCISE—SCOPE.

While municipal authority must appear from express or implied statutory provisions, yet, when the authority does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of authority or a violation of organic or fundamental rights.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 144, 148; Dec. Dig. §57.]

2. INTOXICATING LIQUORS §10—MUNICIPAL REGULATIONS—CHARTER POWERS—EXERCISE.

Under the authority given in the charter of the city of Jacksonville to "regulate * * * retailers of liquors" and to provide "for the health, convenience, and safety of the citizens," the municipality may, by the due exercise of its police power, circumscribe the area within which intoxicating liquors may be sold in an election district within the city where such sale is lawful under the state law, when such municipal action is not so arbitrary and unreasonable as to deny due process or equal protection of the law; the regulation being designed not to unlawfully effectuate prohibition but merely to localize sales of intoxicating liquors in the election district in the city.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. §10.]

3. CONSTITUTIONAL LAW §225 — EQUAL PROTECTION OF LAWS—DISCRIMINATION.

The mere fact that only one liquor dealer is affected by a municipal regulation designed to localize the sale of liquors in an election district in the city does not show arbitrary and unreasonable or unjust discrimination in violation of organic rights.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 681, 682; Dec. Dig. §225.]

4. CONSTITUTIONAL LAW §87 — RIGHTS OF PROPERTY—POLICE POWER.

Property is held and used subject to the lawful exercise of the police power of the state, and an unlawful exercise of such power is not shown in this case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 156-171; Dec. Dig. §87.]

5. CONSTITUTIONAL LAW §48—EQUAL PROTECTION—BURDEN OF PROOF.

The burden is on those who assert a denial to them of the equal protection of the laws to make such denial in fact appear; and that burden is not successfully carried in this case.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. §48.]

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Mandamus by the State, on the relation of T. H. Simpson, against G. D. Ackerly, as City

Recorder, and others. Judgment for defendants, and relator brings error. Affirmed.

J. E. & Julian Hartridge, of Jacksonville, for plaintiff in error. Odom & Crawford, of Jacksonville, for defendants in error.

WHITFIELD, J. An alternative writ of mandamus was issued from the circuit court commanding the city officials to recommend the issuance of and to issue to the relator a license to sell intoxicating liquors at 400 and 402 Bridler street in the city of Jacksonville, or to show cause for not doing so. The alternative writ in effect alleges that the relator had complied with the law which would authorize him to procure a license to engage in the retail sale of intoxicating liquors in a certain election district in Duval county embracing a portion of the city of Jacksonville at a place where he had for several years engaged in such business, and that a renewal of the city license was denied him because the city had by an amended ordinance "peremptorily and without valid reasons eliminated" lots 1 and 8 in block 38 from the circumscribed area in such election district in which intoxicating liquors may be sold, and that the relator's place of business is in said lot 8. It is alleged that the action of the city and its officials is unauthorized and deprives the relator of property rights secured to him by organic law. A demurrer to the alternative writ, being equivalent to a motion to quash, was sustained, and the relator declining to plead further, final judgment for the respondents was rendered, to which the relator took a writ of error.

[1] The charter statutes authorize the city, by ordinance, "to license, tax and regulate * * * retailers of liquors," and "to pass all ordinances necessary for the health, convenience and safety of the citizens."

While municipal authority must appear from express or implied statutory provisions, yet, when the authority does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of authority or a violation of organic or fundamental rights.

[2] It is clear that the municipality may, under its charter authority, "regulate * * * retailers of liquors" and provide "for the health, convenience and safety of the citizens," by the direct and reasonable exercise of its police power in circumscribing the area within which intoxicating liquors may be sold in an election district, where such sale is lawful under the state law, when such municipal action is not so arbitrary and unreasonable as to deny to any one due process of law or the equal protection of the laws, and the regulation does not unlawfully effectuate a prohibition but simply localizes such sales in the election

district. See *Howland v. State ex rel. Zirklebach*, 56 Fla. 422, 47 South. 963, 21 L. R. A. (N. S.) 192, where the right of the city to regulate the places where liquors could be sold was recognized, and the action of the city was not upheld because the regulation was through the taxing power and not the police power, and the license tax was on the admitted facts held to be apparently excessive, so as to unjustly discriminate and to be unreasonable and arbitrary. This holding does not conflict with *Ex parte Thelsen*, 30 Fla. 529, 11 South. 901, 32 Am. St. Rep. 36, or with *Mernaugh v. City of Orlando*, 41 Fla. 433, 27 South. 34, and *Malone v. City of Quincy*, 66 Fla. 52, 62 South. 922.

The facts alleged in the alternative writ and admitted by the demurrer do not show that the city acted "without valid reasons," and that the relator's place of business was arbitrarily and unlawfully excluded from the area wherein liquors may be sold within the election district, where such sales are lawful.

[3-5] The original ordinance prescribes that liquors shall not be sold by retail, "except on property fronting or abutting on" stated streets, including "on Bridler street from Duval street to Church street." It appears that the block upon which relator formerly conducted his liquor business is the only block on Bridler street between Duval and Church streets, and consequently the only block on Bridler street where the sale of intoxicating liquors was permitted. The amendment here assailed in effect merely forbids the sale of liquors in that block fronting on Bridler street, which it is stated "is entirely separated from the other parts of the district"; and such action may be designed to effectuate better police supervision and regulation, or for other purposes to conserve "the health, convenience and safety of the citizens." The mere fact that relator may be the only liquor dealer affected by the amended ordinance does not show arbitrary and unreasonable or unjust discrimination in the regulation which is a direct exercise of the police power of the city relating to localities and not to persons, and adopted presumably in the interest of the general welfare, possibly to meet changed conditions or other matters affecting the health and safety of the citizens. The original ordinance apparently discriminated in favor of the relator, and the amendment avoids such discrimination. Property is held and used subject to the lawful exercise of the police power of the state, and an unlawful exercise of such power is not shown in this case. The burden is on those who assert a denial to them of the equal protection of the laws to make such denial in fact appear; and that burden is not successfully carried in this case.

Judgment affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(190 Ala. 586)

FIRST NAT. BANK OF ABBEVILLE v. JOHNSON et al. (No. 531.)(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)**1. ADVERSE POSSESSION §40—REQUISITES—ACTUAL POSSESSION.**

One claiming by adverse possession not under color of title must show an actual possession of the land in controversy for the statutory period.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 148-183; Dec. Dig. § 40.]

2. ADVERSE POSSESSION §115—EVIDENCE—SUFFICIENCY.

In ejectment, evidence held sufficient to take to the jury the question whether defendant's predecessor had been in actual possession of the land for the statutory period, though he did not live thereon and cultivated it only 5 scattered years out of 15.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 314, 691-701; Dec. Dig. § 115.]

3. EJECTMENT §9—RIGHT OF ACTION—POSSESSION OF GRANTOR.

Plaintiff in ejectment, suing in its own name, cannot recover if any conveyance in its chain of title, executed prior to the enactment of Code 1907, § 3839, providing that the action shall be brought in the name of the person entitled to possession, though he obtained his title from a grantor who was not in possession, was executed while the land was adversely held.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.]

4. ADVERSE POSSESSION §38—ADMISSIBILITY OF EVIDENCE—CLAIM OF POSSESSOR.

Where adverse possession is in issue, evidence that one in possession was claiming the land is admissible, since that is an essential element of adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 147; Dec. Dig. § 38.]

5. APPEAL AND ERROR §1052—HARMLESS ERROR—ADMISSION OF EVIDENCE—CURE.

The erroneous admission in ejectment upon disclaimer of evidence, admissible only to show adverse possession, was cured by the subsequent injection of the general issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4171-4177; Dec. Dig. § 1052.]

Appeal from Circuit Court, Henry County; M. Sollie, Judge.

Ejectment by the First National Bank of Abbeville against Frank Johnson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Plaintiff claims through J. R. Ward, and defendants claim through E. C. Ward, by adverse possession. J. R. Ward and E. C. Ward are brothers, and sons of C. Ward, who owned the track in controversy and the adjacent lands. On March 7, 1891, C. Ward conveyed to J. R. Ward, in addition to the other tracts, "all the land known as the land I bought from W. H. Johnson, lying north of the upper Abbeville and Franklin roads, containing about 60 acres." On the same day he conveyed to E. C. Ward, besides other tracts, certain subdivisions of

sections 10 and 11, township 28, range 7, wherein lay the land in suit, part of the W. H. Johnson land, but with the recital, "except 60 acres, more or less, being all of said W. H. Johnson land, lying north of the upper Abbeville and Franklin roads, which we have deeded to our son J. R. Ward." Both J. R. and E. C. Ward testified to the effect that E. C. Ward received possession of the land in suit (lying just west of the Lawrenceville and Franklin roads) from their father, who pointed out this road to them as the boundary between their respective lands; that E. C. Ward claimed all of this tract under his deed, and held possession of it until he conveyed it to defendant's landlord in 1906; and that J. R. Ward did not hold it or claim it at any time.

Espy & Farmer, of Dothan, and H. L. Martin, of Ozark, for appellant. W. L. Lee, of Columbia, for appellees.

SOMERVILLE, J. [1] It is clear that upon the paper titles exhibited the plaintiff would have been entitled to recover the tract of land in controversy. It is clear also that, the defendants' predecessor in title, E. C. Ward, being without color of title, they could defeat the plaintiff's paper title only by showing an actual adverse possession of the tract by E. C. Ward for at least three years and three months prior to April 23, 1906, the date of his sale to the defendant Hutto, whose possession since then is not controverted.

[2] It is insisted for the appellant (plaintiff below) that the evidence fails to show such a possession by E. C. Ward, and that therefore the plaintiff was entitled to a peremptory instruction to the jury.

But there is testimony that E. C. Ward held possession from 1891 until 1906. It is true it clearly appears that he did not live on the land, and that it was cultivated by his tenants only about 5 scattered years out of the 15; but it does not appear that he did not have possession all the while by some other acts or means, and, as the evidence stands, the question of title by adverse possession was an issue properly submitted to the jury.

[3] It may be remarked that if any of the mesne conveyances in the plaintiff's chain of title, of date prior to the operation of section 3839 of the Code of 1907, were executed while the land in suit was adversely held, the plaintiff could not recover, as it here sues, in its own name. Grant v. Nations, 172 Ala. 83, 55 South. 310. The burden of proof was, of course, upon the defendants to show such a status on the dates of those conveyances.

[4] On the issues of adverse possession, it was proper for the defendants to show that E. C. Ward was claiming the land during

the possessory period; that being an essential element of adverse possession.

[5] And although, when this evidence was admitted, it was not relevant to the then sole issue upon disclaimer, it became relevant by the subsequent injection of the general issue; and the error of its original admission was thereby rendered harmless.

The judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(190 Ala. 411)

MONTGOMERY BANK & TRUST CO. v. JACKSON. (No. 108.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. NOVATION — REQUISITES — DISCHARGE OF EXISTING OBLIGATION.

To constitute a novation, the extinguishment of the original contract and liability thereunder must be a result of a new independent contract, and whether there is a substitution of a new contract for the original depends on the intention of the parties, ascertained from the facts.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. ¶ 4.]

2. NOVATION — REQUISITES — DISCHARGE OF EXISTING OBLIGATION.

A stockholder was indebted to the corporation on a note for money loaned to him. The corporation, as an extension of the note, obtained a new note executed by a third person as maker and the stockholder as indorser. Held, that the original note was not extinguished by novation, and the corporation, entitled to enforce a lien, under Code 1907, § 3476, on the stock as against the original note, retained the right, as against another creditor of the stockholder.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 4; Dec. Dig. ¶ 4.]

3. BILLS AND NOTES — PAYMENT — NEW NOTE.

The execution of the new note was not a payment of the original note, so as to extinguish the lien of the corporation.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1251-1256; Dec. Dig. ¶ 430.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Suit by William Jackson against the Montgomery Bank & Trust Company, to determine priority of debt and to subject the property and assets on which the company has a lien for the payment of its debts other than the stock held by complainant and for an order of sale of the stock and the payment of complainant's debt out of the proceeds of the same. From a decree for complainant, defendant appeals. Reversed and rendered.

Ball & Samford, of Montgomery, for appellant. W. A. Gunter, of Montgomery, for appellee.

McCLELLAN, J. This bill sought, and the decree below made effective, a lien, in favor

of complainant (appellee Jackson) upon shares of the capital stock of the appellant banking company superior to that asserted by the banking company, another creditor of the common debtor, Lasseter, as upon the right provided by Code, § 3476, which, as presently important, reads:

"All such corporations have a lien on the shares of its stockholders, for any debt or liability incurred to it by a stockholder, before a notice of a transfer or levy on such shares."
* * *

The conclusion there prevailed:

"That there was a complete novation of the original contract of indebtedness of Lasseter to the bank when the bank took his (Lasseter's) liability as an indorser to the note in question and discharged him of his primary liability as a maker of the note February 28, 1912. The novation of the contract of indebtedness of Lasseter to the bank was made after notice to the bank of the hypothecation of the stock by Lasseter to Jackson. * * *"

[1] An essential factor in novation is the discharge from liability, under the original contract, of him who is bound by the original obligation of which novation is asserted. The "extinguishment of the old contract" must be a result of the new, independent contract. 29 Cyc. pp. 1130, 1131, 1133-1136; McDonnell v. Ala. Ins. Co., 85 Ala. 401, 413-415, 5 South. 120. Whether in a given case this essential feature, viz., substitution of a new contract for the old, was present, is a question of intention, to be deduced from the facts and circumstances. McDonnell v. Ala. Ins. Co., supra; 29 Cyc. pp. 1134, 1135.

In order to sustain the view prevailing below, it must be found from this record that there was an intent, common, at least, to the banking company and the original debtor, that the original contract of February 27, 1912, was extinguished by the dealings of March 28, 1912, in which dealings the banking company accepted notes of the Hill Crest Land Company, indorsed by Lasseter.

[2] By the agreed statements of facts the presence of that intention is affirmatively denied. That agreement contains these recitals:

"That the Montgomery Bank & Trust Company held, as collateral security for these loans, the various items as set out in the answer to the first interrogatory, and on the 27th of January, 1913, foreclosed its several collateral mortgages and all of the collateral held, except as hereinafter stated, buying in the same itself, at and for the sum of seven thousand one hundred forty-six dollars (\$7,146), which said seven thousand one hundred forty-six dollars (\$7,146) was at that time due to the Montgomery Bank & Trust Company by the Hill Crest Land Company, for the principal, interest and attorneys' fees on three notes due October 1st, November 1st, and December 1st, 1912, which three notes were a continuation and extension of the amount due to the Montgomery Bank & Trust Company before that time, extending back to December, 1910; the said debts being originally contracted by L. Lasseter & Company. That, in addition to the amount above set out, the Hill Crest Land Company was and is still indebted to the Montgomery Bank & Trust Company, upon a note dated March 28, 1912, and indorsed by L. Lasseter, payable on demand, which said

note is an extension of a note given by L. Lasseter for money loaned him on the 27th day of February, 1912, payable on demand, to secure which there was deposited at the time warehouse receipts representing forty (40) bales of cotton, which cotton subsequently, without the consent or knowledge of the bank, was sold and disposed of by G. L. Harden & Company, of which firm L. Lasseter was a partner, to parties unknown to respondent, and both G. L. Harden and L. Lasseter have since been declared bankrupts; none of the proceeds of which were paid to the Montgomery Bank & Trust Company, and for which it has received nothing."

It there appears that the dealing of March 28, 1912, was an extension of original obligations, both from Lasseter and the Hill Crest Land Company; and that the note of the last-named date, signed by Lasseter as indorser, was "an extension of a note given by L. Lasseter for money loaned him on the 27th day of February, 1912." These terms affirmatively exclude the idea that the original obligation of February 27, 1912, was intended to be extinguished. On the contrary, the process and intent was to continue that obligation, and not to substitute for it the contract or contracts of March 28, 1912. We do not find in the record any evidence of the surrender by the banking company of the note of February 27, 1912. If Lasseter had not become a bankrupt, and the banking company had sued him on the note of February 27, 1912, he could not, on the facts here disclosed, have sustained a defense that his liability under the contract of February 27, 1912, had been extinguished by the subsequent acts and dealings of March 28, 1912. The fact that the banking company accepted, on March 28, 1912, cumulative security, whereon Lasseter was an indorser of the note of the Hill Crest Land Company, does not, of course, establish an intention on the part of banking company, the creditor, to substitute the latter obligation for the former. The result is that, even though notice of the transfer of the shares of stock by Lasseter as collateral for the note given by him to appellee was effectively given the banking company's officer and representative on March 12, 1912, the lien of the banking company had theretofore attached to the stock, in virtue of the statute before quoted, and was not extinguished by a novation effected on March 28, 1912.

[3] It is further insisted for the appellee that the Lasseter note of February 27, 1912, was paid by the subsequent, in order, credit item, placed on the Lasseter account on the books of the banking company, which credit item was, in turn, based upon the obligations of March 28, 1912. The principle relied on in this connection is thus stated in the first and second headnotes of the leading author-

ity cited on brief for appellee, viz., *Harrison v. Johnston*, 27 Ala. 445:

"(1) When there is a running account between debtor and creditor, a general payment, in the absence of any application by the parties, and where the character of the dealings or other circumstances do not show a different intention, will be applied by law to the charges in the order of time in which they accrued, without reference to the fact that one item may be better secured than another, since the particular parts, being blended together in one common account, have no longer any separate existence, and the balance only is considered as due.

"(2) The foregoing rule applies in this case, where the defendant became surety for the debtor on a note given to his commission merchant, with whom he had a running account for advances made, cotton sold, etc., on which the note was credited when received, and debited when due; an account current being rendered to the debtor after the maturity of the note, showing a balance against him larger than the amount of the note, and the subsequent payments being credited on general account."

After restating the substance of the rule reproduced above, reference thereto was thus made in *Stickney v. Moore*, 108 Ala. 590, 597, 19 South. 76, 80:

"This principle applies where there are several distinct demands, or to a running account consisting of several items of debit and credit, unless facts exist which show that, according to the justice and equity of the case, or the intention of the parties deducible from the circumstances, a different application should be made."

Of course, before there can arise in any case a question as to the application of payments, there must be a payment; that is, the delivery by the debtor or his representative to the creditor or his representative of money or some other value with the intention on the part of the debtor to pay the debt in whole or in part and the acceptance thereof, by the creditor, as payment. *Smith v. Pitts*, 167 Ala. 461, 468, 52 South. 402. An inquiry of payment vel non comprehends the ascertainment of intention. *Lee v. Green*, 83 Ala. 491, 3 South. 785. Under the agreed statement of facts, particularly the features thereof before referred to in this opinion, there was no intention to satisfy and extinguish the obligation of which the dealing of March 28, 1912, was a continuation—an extension.

The lien created by the statute (section 3476) attached before notice was given appellant of the transfer of the stock to appellee; and it was not extinguished by novation or by payment of the indebtedness by the dealings of March 28, 1912. The decree is laid in error. It is reversed; and a decree will here be entered denying the relief prayed in the amended bill.

Reversed and rendered.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 10)

AUTREY v. STATE. (No. 836.)

'Supreme Court of Alabama. Nov. 19, 1914.
Rehearing Denied Jan. 21, 1915.)

1. JURY \hookrightarrow 70—IMPANELING—VENIRE.

That a copy of the venire contained the names of persons not drawn and summoned is no ground for motion to quash, in view of Jury Act 1909 (Acts Sp. Sess. 1909, p. 317) § 29, providing that no objection can be taken to any venire except for fraud in not drawing and summoning jurors.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. \hookrightarrow 70.]

2. HOMICIDE \hookrightarrow 203—EVIDENCE—DYING DECLARATIONS.

Statements by deceased as to the cause of the killing, made after he had been informed that his wounds were fatal, were admissible as dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. \hookrightarrow 203.]

3. HOMICIDE \hookrightarrow 214—EVIDENCE—DYING DECLARATIONS.

A dying declaration that there was no cause for the killing is relevant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. \hookrightarrow 214.]

4. CRIMINAL LAW \hookrightarrow 695—TRIAL—OBJECTIONS—SUFFICIENCY.

Where a dying declaration, if objectionable, was so only because a conclusion of the witness, and no objection was made on that ground, its reception in evidence was proper; the grounds assigned being inapt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. \hookrightarrow 695.]

5. HOMICIDE \hookrightarrow 214—DYING DECLARATION—SCOPE.

That part of a dying declaration in which deceased said that accused had murdered him and that he hoped that the people of the county would see that accused was dealt with justly is inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 448-450; Dec. Dig. \hookrightarrow 214.]

6. CRIMINAL LAW \hookrightarrow 695—TRIAL—OBJECTIONS.

Accused cannot complain of the admission of a dying declaration because a part of it was improper, where other portions were admissible, and the only objection which was to the whole was not well taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1633-1638; Dec. Dig. \hookrightarrow 695.]

7. CRIMINAL LAW \hookrightarrow 1120—APPEAL—SHOWING.

In the absence of a showing as to what would have been the answer, the exclusion of a question to a witness cannot be held erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. \hookrightarrow 1120.]

8. HOMICIDE \hookrightarrow 163—EVIDENCE—ADMISSIBILITY.

Without evidence of self-defense, testimony of deceased's threats and bad character for peace and quiet was inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. \hookrightarrow 163.]

9. CRIMINAL LAW \hookrightarrow 1144—APPEAL—PRE-SUMPTIONS.

Where the bill of exceptions did not show that the whole of the showing for one of the absent witnesses was excluded, it must be pre-

sumed on appeal that the admissible portions were received.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2768-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. \hookrightarrow 1144.]

10. CRIMINAL LAW \hookrightarrow 600—EVIDENCE—CONTINUANCE—SHOWING.

Without the consent of the state's solicitor, accused cannot change the showing for an absent witness as originally agreed to and admitted by the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1604; Dec. Dig. \hookrightarrow 600.]

11. CRIMINAL LAW \hookrightarrow 390—HOMICIDE \hookrightarrow 169—EVIDENCE—ADMISSIBILITY.

Testimony by accused, that he did not get out of his buggy for the purpose of fighting deceased, that deceased had once attempted to cut his throat, and that accused had avoided deceased at several places, is inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 858; Dec. Dig. \hookrightarrow 390; Homicide, Cent. Dig. §§ 341-350; Dec. Dig. \hookrightarrow 169.]

Appeal from Circuit Court, Clarke County; John T. Lackland, Judge.

John Thomas Autrey was convicted of murder, and he appeals. Affirmed.

The motion to quash was based on three grounds: (1) Because there appears upon said copy of the venire served upon defendant the name of Elvin G. Adams, and no such person is drawn and summoned. (2) Same as to Riggle Williams. (3) Same as to Wm. H. Mobley. Dr. Pugh stated that, while deceased did not say anything about dying, yet he asked him (the doctor) after he had made the examination, what he thought of his condition, and he told him he was fatally shot; that deceased then sent for an attorney to fix up his business, and after the business had been arranged, and in about six hours after he was shot, deceased died; that all that was said about death was that he (the doctor) told deceased his wounds were fatal; whereupon the dying declarations were admitted.

T. J. Bedsole, of Grove Hill, and J. V. Boyles, of Thomasville, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SOMERVILLE, J. [1] The motion to quash the special venire on the ground of discrepancies between the original venire and the copy served on the defendant was without merit. Jury Act of Aug. 31, 1909, § 29; Bell v. State, 115 Ala. 25, 22 South. 526.

[2] It sufficiently appeared that the declarations of the deceased, as testified to by the witnesses for the state, were made under a sense of impending dissolution, and the objections based upon the insufficiency of the predicate were properly overruled.

[3, 4] The deceased's declaration to Dr. Pugh, that there was "no cause" for the killing, was obviously relevant; and, if objectionable at all, it was objectionable only because it was a conclusion of the witness.

No such objection was made, and the grounds assigned were inapt.

[5, 6] One Stewart, a witness for the state, was allowed to testify to the declaration of deceased that defendant "had willfully murdered him, and he hoped that the good people of Clarke county would see that he was dealt with justly, according to the crime he had committed." It is obvious that this statement contains matter that is outside the scope of a dying declaration, which should be limited to the facts and circumstances of the killing. However, the objection to its admission was to the statement as a whole, and only on the ground of an insufficient predicate, and, as this ground was without merit in fact, and the first part of the statement was relevant, the objection was properly overruled.

[7] Defendant's witness McMullen testified to a conversation with deceased at Grove Hill the year before, which indicated the existence of trouble between deceased and defendant. The witness was asked if deceased told him what he (deceased) was up there for; and upon his answering, "Yes," he was then asked to state what deceased said. In the absence of a showing that what deceased said was in some way relevant to the issues of the case, the exclusion of this question by the trial court cannot be pronounced erroneous. *B. R., L. & P. Co. v. Barrett*, 179 Ala. 274, 60 South. 262, and cases cited.

[8] It was not competent for defendant to show threats by deceased, nor the bad character of deceased for peace and quietude, in the absence of any evidence tending to show that the killing was in self-defense. At the time defendant offered his showings for absent witnesses, containing evidence of threats and bad character, there was no evidence before the court tending to show self-defense, and the state's objection was properly taken and sustained. The entire showings for the witnesses Chapman and Davis were properly excluded; and the entire showing for the witness Morgan might well have been excluded, instead of only a portion of it.

[9, 10] The only competent and relevant matter contained in the showing for the witness Bumpers is the statement that the defendant's character and general reputation in the community where he lives is good. But if the entire showing was excluded, as seems to be assumed by defendant's counsel, that action was manifestly erroneous. However, while the bill of exceptions shows a remark by the trial judge that he thought the showing as a whole was bad, it does not appear that any ruling of exclusion was made; and, as the record stands, we are bound to presume that the showing was not excluded. Defendant afterwards asked leave to make a change in the wording of the showing. Without the consent of the solicitor for the state, it is clear that defendant had no right

to change the showing as originally agreed to and admitted by the state.

[11] It was not competent for defendant to state that he did not get out of the buggy for the purpose of fighting deceased, nor that deceased had once "attempted to cut his (defendant's) throat," nor that defendant had dodged or avoided deceased at various times and places.

A careful scrutiny of the record discloses no error in the rulings of the trial court, and the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(190 Ala. 140)

KNIGHT v. TOMBIGBEE VALLEY R. CO.
(No. 852.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 21, 1915.)

1. CARRIERS §314—INJURY TO PASSENGER—COMPLAINT.

Counts of a complaint for injuries to a passenger, failing to show any duty owing by the carrier to plaintiff, were fatally defective.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. §314.]

2. CARRIERS §314 — INJURIES TO PASSENGERS—COMPLAINT.

A complaint for injuries to a passenger, charging that the injury was due to the willful and wanton acts of defendant, who was then and there operating its trains, etc., which train was operated without a headlight, though the injury was done at night, was demurrable, under the rule that where a complaint avers negligence generally, and then charges particular acts as constituting negligence, without more, it is insufficient, unless the acts specified in themselves constitute negligence as a matter of law.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1260, 1270, 1273, 1274, 1276-1280; Dec. Dig. §314.]

3. CARRIERS §318—INJURY TO PASSENGER—DERAILMENT—WILLFULNESS.

Where a passenger was injured by a derailment, and the evidence rebutted any presumption of defective cars, foreign obstructions, or excessive speed, a count charging that the injury was due to the willful misconduct of defendant or its servants was unsustainable.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1270, 1307-1314; Dec. Dig. §318.]

4. CARRIERS §316—INJURY TO PASSENGER—WILLFULNESS—DERAILMENT.

An allegation of willful injury to a passenger, resulting from a derailment, cannot be sustained by a prima facie presumption of the carrier's negligence, resulting from an unexplained derailment.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1261, 1262, 1283, 1285-1294; Dec. Dig. §316.]

5. CARRIERS §315—INJURY TO PASSENGER—PRESUMPTION OF NEGLIGENCE—ISSUES AND PROOF.

Under a complaint charging that defendant so negligently conducted its business of carrying passengers as to injure plaintiff, a passenger, proof could be made of any breach of duty,

whether relating to the operation of the train, the condition of the cars and roadway, or the skill of defendant's servants; but under a specification of negligence in the "operation of the train" evidence of a defective roadway would be incompetent, so that a presumption of a negligently defective roadway would not be available to plaintiff in an action for injuries resulting from a derailment under counts charging negligence in the operation of the train and in the construction and equipment of its engines and cars, etc.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1270, 1281, 1282; Dec. Dig. § 315.]

Appeal from Circuit Court, Washington County; John T. Lackland, Judge.

Action by Woodie S. Knight against the Tombigbee Valley Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Granade & Granade, of Chatom, for appellant. Inge & Armbricht, of Mobile, for appellee.

SOMERVILLE, J. The defendant company, a common carrier, was operating a mixed train of passenger and freight cars, and three of the freight cars left the track while moving at a speed of about 15 miles an hour, resulting in a severe shake-up of the passenger coach, upon which the plaintiff was riding, and (as alleged) personal injury to the plaintiff by being thrown forward against a car seat.

[1] Counts 1, 5, and 6 of the complaint are defective in not showing any duty owed by the defendant to the plaintiff. Count 3 alleges that the injury was due "to the willful and wanton acts of defendant, who was then and there operating its trains, etc., which train was operated without a headlight, although the injury was done at night." This count is not sufficient, for the reasons stated in *Johnson v. B. R. L. & P. Co.*, 149 Ala. 529, 43 South. 33. The trial court properly sustained the demurrers to these several counts.

[2] As amended, counts 1, 2, 4, and 5 of the complaint are based simply upon the defendant's *negligence in the operation of the train*; count 3, upon operating the train "without a headlight," no negligence being otherwise charged; count 6, upon defendant's negligence "in constructing and equipping its engines, locomotives, and coaches, or cars, on which plaintiff was traveling"; count 7, upon "the willful and wanton acts of the said defendant * * * in the operation of its trains at a point between Fairfield and Calvert"; and count 8, upon the willful and wanton wrecking of the train, by the servants of defendant. Other than the mere fact that the wheels of the three freight cars left the rails, and the statement of one witness that the cross-ties looked rotten, there is nothing in the evidence which tends in any way to indicate the cause or

causes of the wreck. The testimony of the conductor, who was a witness for plaintiff, shows that there was no defect in the wheels of the cars, or in their equipment, which could have caused the derailment. Conceding that there was no headlight on the engine, it is clear that its absence had nothing to do with the derailment of the cars behind the engine, which was not itself derailed; and no obstruction was found about the track by the conductor, who promptly made an examination.

[3, 4] The plaintiff bases his right to recover in this case mainly upon the prima facie presumption of the carrier's negligence which is raised by law, in view of the unexplained derailment of the defendant's cars. A derailment, we conceive, may in such cases be due to defective car wheels, a defective roadway, including rails and ties, a foreign obstruction, or an excessive rate of speed. As already noted, the evidence rebuts any presumption of defective cars, foreign obstructions, or excessive speed; and there is nothing tending in the slightest degree to show willful or wanton misconduct on the part of defendant or its servants, proof of which must be affirmative, and cannot be supplied by the presumption of law referred to.

It may be conceded, we think, that the evidence does not rebut the presumption that the derailment was due to a defective condition of the rails, ties, or roadbed; and the decisive question, therefore, is whether the specification of negligence in the first, second, fourth, and fifth counts of the complaint, viz., the *negligent operation of defendant's train*, is broad enough to cover any negligence of defendant with respect to the *condition of its roadway*.

[5] The scope of this legal presumption of negligence is, of course, limited to and controlled by the specifications of the complaint. Under a complaint charging that the defendant so negligently conducted its business of carrying passengers as to injure the plaintiff passenger, proof could be made of any breach of duty, whether relating to the operation of the train, to the condition of vehicles and roadway, or to the skill of the servants employed. *K. C., etc., R. R. Co. v. Sanders*, 98 Ala. 293, 304, 13 South. 57. And so such a complaint might be supported by a presumption of negligence with respect to a defective condition of cars or roadway, or to the operation of the train. But it is quite clear, both upon reason and authority, that a specification of negligence in the *operation of the train* does not embrace, and cannot be supported by proof of, a defective condition of the roadway. This principle is clearly declared in the case of *Bell v. Ala. Midland Ry. Co.*, 108 Ala. 286, 19 South. 316. Hence, in the present case, the presumption of a negligently defective roadway, which would

arise and be available to the plaintiff, either under a general allegation or under an appropriate specification, is not available under any count of the complaint here exhibited.

An examination of the numerous cases in which this presumption of negligence has been recognized by this court discloses nothing in conflict with the views above expressed. It results that the general charge was properly given for the defendant as to all the counts of the complaint, and other points presented by the assignments of error are immaterial, and need not be noticed.

Affirmed.

ANDERSON, C. J., and DE GRAFFENRIED and GARDNER, JJ., concur.

(190 Ala. 641)

Ex parte SEALS PIANO CO. (No. 144.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MANDAMUS \S 36 — PROHIBITION \S 5 — CORRECTION OF ERRORS OR IRREGULARITIES.

Where the circuit court overruled a plea traversing a ground of attachment after a trial of the plea on issue joined, a writ of prohibition, mandamus, or other extraordinary writ would not be issued to compel that court to abate the attachment, even though, as claimed, the evidence showed without dispute that there was no ground for the attachment, as prohibition lies to prohibit a usurpation of power, and not to correct errors and irregularities on the part of a court or judge having jurisdiction and not having exceeded that jurisdiction or followed any mode of procedure disallowed by the laws of the land, while mandamus issues only to compel action when a matter is presented for decision before an officer charged in that regard who refuses to hear and determine, and never to control judicial action, and, while it may issue in a proper case to compel an inferior court to hear and decide a controversy of which it has jurisdiction, it is not a proper function of the writ to direct what particular judgment such court shall render.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. $\S\S$ 79, 80; Dec. Dig. \S 36; Prohibition, Cent. Dig. $\S\S$ 20-30; Dec. Dig. \S 5.]

For other definitions, see Words and Phrases, First and Second Series, Mandamus; Prohibition.]

2. PROHIBITION \S 5 — LACK OF OTHER REMEDY.

The Supreme Court has a discretionary power to grant writs of prohibition to all the inferior courts of the state, but the writ should never be granted except where the inferior court has clearly exceeded its jurisdiction and the relator has no other remedy to which he can resort for his protection.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. $\S\S$ 20-30; Dec. Dig. \S 5.]

Original application by the Seals Piano Company for a writ of prohibition, mandamus, or other remedial writ. Writ denied.

See, also, 66 South. 143.

W. A. Gunter and Tilley & Elmore, all of Montgomery, for appellant. Rushton, Williams & Crenshaw, of Montgomery, for appellee.

MAYFIELD, J. This is an original application to this court for a writ of prohibition, mandamus, or other remedial writ, to require the judge for the circuit court for Montgomery county to abate an attachment against the property of the petitioner. The facts as shown by the petition are stated by counsel for petitioner substantially as follows:

[1] Petitioner, who deals in pianos and organs, selling the same as a merchant, took a lease of a store from Bell and others in the city of Montgomery running for several years, on a rent maturing monthly during the lease, and had in said store a stock of pianos and organs. It concluded to cease business in Montgomery and move its stock of goods to Birmingham, Ala., where its principal store and headquarters were, and to dispose of its stock from that store in the due course of trade with the stock already in the Birmingham store, when an attachment was sued out by the lessor, Bell, for the whole rent for the entire term running to maturity, but none of which was due. The affidavit for this attachment was on the ground that an installment of the rent was due and unpaid. The plaintiff, finding that no rent was due, amended the affidavit, placing the attachment on the ground that defendant "was about to fraudulently dispose of its goods." Thereupon the defendant contested the truth of the ground of attachment by traversing the ground of attachment alleged. The court tried this plea on issue joined, without a jury, and overruled the same. A bill of exceptions, shown on page 25 of the record, was signed, setting out all the evidence which it is contended is shown without dispute; that petitioner was perfectly solvent, was worth \$100,000 in excess of liabilities, and was simply moving its goods, consisting of pianos and organs, from Montgomery to Birmingham, to be disposed of there in the regular course of trade, and without any intention of making any fraudulent disposition thereof.

Conceding the facts as shown by the bill of exceptions to be as contended for by the petitioner, no case is made for the issue of a writ of prohibition, mandamus, or other extraordinary writ, as prayed. This record shows that the circuit court acquired jurisdiction of the parties and of the subject-matter, and does not show that it has exceeded its jurisdiction. It shows the institution and prosecution of an attachment suit, upon statutory grounds. The most that is claimed is that the court or the judge erred in finding the issue in favor of the plaintiff on the traverse of the ground of attachment alleged in the affidavit. If this could be conceded to be error, it cannot be corrected or cured by the extraordinary process of prohibition or mandamus, and can and should be remedied by appeal.

The following authorities in this state are conclusive against awarding the writ of prohibition in this case:

The writ of prohibition is to prohibit usurpation of power, and, where a special judge is appointed that acquires jurisdiction in the premises, his errors and irregularities, if any, must be corrected in some other way, and not by prohibition. *Epperson v. Rice*, 102 Ala. 668, 15 South. 434; 1 Mayf. Dig. 734.

[2] The Supreme Court has a discretionary power to grant writs of prohibition to all the inferior courts of the state; but the writ should never be granted except in cases where the inferior court has clearly exceeded its jurisdiction in the order complained of, and the relator has no other remedy to which he can resort for his protection. *Ex parte Morgan Smith*, 23 Ala. 94; 1 Mayf. Dig. 736.

The writ of prohibition cannot be made to serve the purpose of the writ of certiorari to correct mistakes of the court, as to questions of law or fact within the jurisdiction of such courts. *Smith v. Whitney*, 116 U. S. 167, 6 Sup. Ct. 570, 29 L. Ed. 601; *Ex parte Gordon*, 104 U. S. 515, 26 L. Ed. 814; 1 Mayf. Dig. 736.

If the inferior court rightfully has jurisdiction, and in its proceedings commits error, prohibition is not the remedy for their correction. *Ex parte Morgan Smith*, 23 Ala. 94; *Ex parte Greene & Graham*, 29 Ala. 52; *Ex parte Smith*, 34 Ala. 455; 1 Mayf. Dig. 737.

Prohibition is not a revisory writ and should not be awarded unless the complaining party has been drawn ad aliunde examen, into a jurisdiction or mode of procedure disallowed by the laws of the land, or where, by handling matters clearly within their cognizance, the inferior courts transcend the bounds prescribed to them by the law. *Ex parte Boothe*, 64 Ala. 312; *Ex parte Roundtree*, 51 Ala. 42; *Ex parte State*, 51 Ala. 60; *Ex parte Hamilton*, 51 Ala. 62; *Ex parte Brown*, 58 Ala. 536; *Ex parte M. & O. R. R. Co.*, 63 Ala. 349; *Atkins v. Siddons*, 66 Ala. 453; 1 Mayf. Dig. 738.

That mandamus will not lie is well settled by the following authorities:

Mandamus issues only to compel some action when the matter is presented for decision before an officer charged in that regard, and who refuses to hear and determine; but it never issues to control judicial action, or to direct a judicial officer how to act, or what conclusions to reach. *Ex parte Jones*, 94 Ala. 84, 10 South. 429; *Ramagnano v. Crook*, 85 Ala. 226, 3 South. 845; *Dunbar v. Frazer*, 78 Ala. 538; 1 Mayf. Dig. 606.

Mandamus may issue from the Supreme Court, in a proper case, to compel an inferior court to hear and decide a controversy of which it has jurisdiction; but it is not a proper function of the writ to direct what particular judgment the inferior court shall render in a pending cause, much less to com-

pel such court to retrace its steps, and, on the ground of error, reverse its decision already rendered. *Ex parte Redd*, 73 Ala. 548; *Ex parte South & N. A. R. Co.*, 65 Ala. 599; *State v. Williams*, 69 Ala. 311; *Ex parte Hayes*, 92 Ala. 120, 9 South. 156; 1 Mayf. Dig. 608.

It therefore follows that this application is denied.

Writ denied.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 649)

KING v. THOMAS et al. (No. 535.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

ESTOPPEL — 23—MORTGAGE—CONSTRUCTION
—“WARRANTY.”

By a chattel mortgage given by a husband and wife on all of their farming tools and implements, live stock, and other personal property, which contained a covenant that they were seised of an indefeasible estate in fee simple free from incumbrance, that the property was their own, and that they had a right to convey it, the husband merely conveyed what he owned in severalty and the wife what she owned in severalty, it not appearing that they owned anything jointly, and the wife did not undertake to convey what the husband owned, and did not warrant his title thereto, as a “warranty” is a collateral undertaking on the part of the seller as to the title to personal property sold by him, and is not an undertaking on the part of a third party; and, where the husband's property was covered by a prior mortgage of which the subsequent mortgagee had notice, the wife was not precluded by the mortgage from purchasing the property from the prior mortgagee or estopped from showing that such property was the property of the husband and that she had acquired title through the prior mortgagee.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 52-60; Dec. Dig. —23.

For other definitions, see *Words and Phrases*, First and Second Series, *Warranty*.]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Detinue by G. W. King against J. H. Thomas for certain personal property, with claim thereto by Bannie Thomas. Judgment for claimant, and plaintiff appeals. Transferred from Court of Appeals. Affirmed.

H. L. Martin, of Ozark, and W. O. Mulkey, of Geneva, for appellant. Riley & Carmichael, of Elba, for appellees.

DE GRAFFENRIED, J. J. H. Thomas and wife, Bannie Thomas, executed and delivered to G. W. King a mortgage on, among other things, “all our farming tools and implements; all our live stock and other personal property,” etc. The mortgage was executed and delivered to secure the payment of a note which purports to be the joint obligation of the husband and wife. In the mortgage we find the following:

“And we covenant with said mortgagee that we are seised of an indefeasible estate in fee

simple in and to said property, freed from incumbrance; that it is our own and that we have a right to convey the same."

This mortgage was made by the said Thomas and wife to secure a debt which was created at the time of the execution of the mortgage, and the plaintiff shows, by his evidence, that the signature of the wife to the note and mortgage was procured for the purpose of rendering her and also her property liable to the payment of the note. Whether this transaction resulted in fixing liability upon the wife or in fastening a lien upon any of the property of the wife, we need not decide. We will treat the case as if it did fix a liability upon the wife and upon her property.

It will be noticed that by the terms of the above mortgage there is a representation that the property mortgaged was free from incumbrance, and there is also a stipulation that the mortgagors warrant the title to the property to be good in them.

At the time of the execution of the mortgage, there was a prior recorded mortgage on all of the personal property of the husband, J. H. Thomas, and the plaintiff knew this fact. The parties, when the mortgage was prepared, evidently used a printed form in which the above words appeared, and they were not erased. We advert to this fact for the purpose of indicating that the plaintiff does not claim that he was deceived by the representation in the mortgage that the property conveyed therein was free from all incumbrance.

2. In this connection, we desire to say that we are not called upon to determine whether the mortgage operated to convey the title of the mortgagors to the personalty which each owned in severalty, or whether it only operated to convey that personalty which they jointly owned. What we do decide is that each mortgagor—if the mortgage was operative upon the separate personalty of each—is to be held, under the facts of this case, to have conveyed only his or her interest in that personalty which he or she, at the time of the execution and delivery of the mortgage, owned.

"A mortgage of all the personal property of any kind of which the mortgagor is possessed passes all such property in existence and in his possession at the time of the execution of the conveyance." Jones on Chattel Mortgages (5th Ed.) § 54b.

In other words, in so far as this mortgage and the question which we are called upon to decide are concerned, the husband is to be held to have conveyed only that personalty which he, when the mortgage was executed, owned in severalty, and the wife is to be held to have conveyed only that personalty which she owned in severalty at the time of the execution of the mortgage. The evidence falls to show that the parties jointly owned any personalty, and to hold that the husband, by the warranty clause, intended to warrant a perfect title in the wife of all the personalty

which was then in her possession, or to hold that the wife, by that clause, intended to warrant the title to all of the property which was then in her husband's possession and to which she laid no claim of ownership, would stretch the meaning of the words of this mortgage far beyond the evident intent of the parties when they executed it. The wife cannot thus be estopped from showing the truth as to the title which her husband had in the personalty of which he was then possessed in severalty.

"If the truth appears upon the face of the deed, there is no estoppel." Coke on Litt. 352b.

A "warranty" is, in so far as this case is concerned, a collateral undertaking on the part of the seller as to the title to personal property sold by him. It is not an undertaking on the part of a third party, but is an undertaking on the part of a seller of personal property. In this blanket mortgage—which, to be effective as to the property conveyed, must be aided by parol—the wife has not undertaken to sell property to which she had no title. She has only undertaken to sell the personalty which she owned, and her warranty as to title must be referred to the personalty which she conveyed. If the mortgage had embraced property which belonged jointly to the husband and wife, then their warranty as to the title to the joint property would have been jointly binding on them. This is the plain meaning of the term "warranty," as it is used by the parties in this mortgage and the warranty should not be extended beyond its plain intent.

3. In this case there was, as already stated, a prior blanket mortgage on the personalty of the husband. After the execution of the mortgage to the plaintiff, the mortgagee in the prior mortgage, under the power contained in the prior mortgage, sold to the wife two of the mules upon which the prior mortgage was operative. We see no reason why she did not, under the evidence in this case, have the right to buy those mules, and thus acquire the prior title which the first mortgagee had to the mules. If, in the mortgage to the plaintiff, a list of the personalty conveyed by it had been scheduled and the mortgage had shown specifically what articles in the schedule belonged to the husband and what articles in the schedule belonged to the wife, and the mortgage had contained a warranty on the part of the husband that his title to his property so scheduled was perfect, and a similar warranty had appeared in the mortgage on the part of the wife, as to her property so scheduled, we presume that the plaintiff would not question the propriety of this purchase by the wife.

The true legal effect of the mortgage to the plaintiff was not greater upon the rights of the parties than it would have been if it had contained the above schedules and had contained the above warranties, as the mortgage, when given the interpretation which its

words, properly construed, demand, cannot be held to have intended more. The trial judge cannot be put in error for refusing the written charges which the plaintiff requested him to give to the jury.

If the note which the wife signed is, in fact, binding on her, the plaintiff can obtain a judgment against her and force her, by execution, to pay it; but we do not think that the wife, under the facts of this case, is estopped from showing that the two mules were, when the mortgage was executed, the property of the husband, and that she has acquired title to them through a prior incumbrancer.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 315)

O. H. BROUN, JR., TIMBER CO. v. COLEMAN. (No. 849.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. APPEAL AND ERROR ¶719—QUESTIONS PRESENTED—ASSIGNMENT OF ERROR.

The defendant, who alone appeals from a judgment against several defendants, cannot rely upon the failure of the complaint to show that there was more than one defendant sued, where there was no assignment of error on that point, especially where he had appeared in the action and filed special pleas.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2968-2982, 3490; Dec. Dig. ¶719.]

2. APPEAL AND ERROR ¶518—RECORD—STRICKEN PLEAS.

Where special pleas were stricken because filed too late, the action of defendant in having them immediately marked as refiled did not make them part of the record, where no leave of the court to refile was obtained, and the court stated that he had already stricken those pleas, and would not consider them any further.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2342-2355; Dec. Dig. ¶518.]

3. PARTNERSHIP ¶214—ACTIONS AGAINST—SPECIAL PLEA—NECESSITY.

Under Code of 1907, § 3966, providing that every written contract purporting to be signed by the party sought to be charged, or his partner, is evidence of the debt or of the duty, but may be impeached by plea, where a suit against a partnership and the individual partners is founded upon a note signed by one of them, the execution of the instrument and its effect as the partnership obligation can be put in issue only by a verified plea.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 410-418; Dec. Dig. ¶214.]

4. PLEADING ¶380—RECEPTION OF EVIDENCE—APPLICABILITY TO PLEADINGS.

The exclusion of evidence which was admissible only to support a special plea is not erroneous, where the special plea had been properly stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1237, 1239-1252; Dec. Dig. ¶380.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by James L. Coleman against the

O. H. Broun, Jr., Timber Company, a co-partnership consisting of Olney H. Broun and G. T. Loper. Judgment for the plaintiff, and defendant Loper appeals. **Affirmed.**

Webb & McAlpine, of Mobile, for appellant. R. H. & R. M. Smith, of Mobile, for appellee.

GARDNER, J. Suit upon promissory note signed: "O. H. Broun, Jr., Timber Co., by O. H. Broun, Jr." The suit was begun by garnishment. The garnishment affidavit set out the name of each defendant as O. H. Broun, Jr., Timber Company, and Olney H. Broun and G. T. Loper, and so also does the bond. The two garnishment writs each show the same, and each contains the further recitation that the O. H. Broun, Jr., Timber Company is a partnership composed of Olney H. Broun, Jr., and G. T. Loper. The complaint seems to be without a caption, and does not name the defendants. There was a formal appearance duly filed by counsel for "all of the defendants," and special pleas were subsequently filed by G. T. Loper, one of which special pleas set up that on the 30th day of October, 1913, the "partnership between O. H. Broun and this defendant was dissolved," etc. The trial was had before the court without a jury, resulting in a verdict against all the defendants, including said G. T. Loper, but not without right of exemptions as to same by said Loper. The appeal is taken by G. T. Loper, who is sole appellant.

[1] The point is made in brief of counsel for appellant that the complaint fails to show there was more than one defendant, although the judgment entry shows judgment against more than one. This insistence can be of no avail to this appellant. There is no assignment of error taking this point, and it seems to have been first raised in brief of counsel on this appeal. In addition to this, appellant appeared and filed special pleas, as shown by this record, and from the judgment he prosecutes this appeal. Had the question been presented by due assignment of error, we do not wish to be understood as indicating that other parts of the record, as hereinabove shown, could not be looked to for the purpose of identification of the parties in connection with the judgment entry. This it is unnecessary to determine. We cite, however, *Greer & Walker v. Lipfert-Scales Co.*, 156 Ala. 572, 47 South. 307.

The bill of exceptions in its first recitals shows that the suit was brought upon promissory note against O. H. Broun and G. T. Loper, individually, and O. H. Broun, Jr., Timber Company, a partnership composed of Olney H. Broun, Jr., and G. T. Loper.

[2] The defendant Loper filed several special pleas. They were stricken from the file on motion of plaintiff because they were filed too late. The first five assignments of error relate to this action of the court, but these assignments are by appellant's counsel ex-

pressly waived or abandoned in his brief. Confessedly, therefore, these special pleas were properly stricken.

The bill of exceptions then shows that counsel for appellant immediately again handed said pleas to the clerk and instructed him to mark them refiled, at the same time announcing that said pleas were being refiled. The clerk indorsed on said pleas, "Refiled April 3, 1914," and while they were then being so marked plaintiff's counsel said to the court, "I suppose it is not necessary for me to again move to strike these pleas, as the court has already struck them out on my former motion." To this the court replied, "No, sir; I have already ruled on your motion and struck the pleas, and I do not propose to consider them any further." Counsel for appellant then said he insisted the pleas were in, and that they had been by the clerk refiled, and the court responded that he was satisfied with its ruling, and that, if the rule meant anything relative to filing pleas, it meant that there was no legal right to file pleas so late. No record entry was made relative to said pleas after the clerk had marked them refiled.

It is here insisted that the special pleas, under these facts, were in and a part of the case. They had been stricken, and evidently correctly so, as the action of the court so striking them is not here insisted upon as error. Clearly these pleas could not again become a part of the case and proper pleading therein unless and until permission of the court was first obtained to that end.

On the contrary, the above statement of the court amounted, in substance, to a declaration on the part of the court to permit them to be filed, and clearly, under these circumstances, the mere marking on them "Refiled" by the clerk could not have the effect of restoring them as part of the record after having been stricken by the court.

We think it quite clear that the special pleas were not in the case. Although it seems to be nowhere expressly shown that the cause proceeded to trial upon the plea of the general issue, yet we may concede such was the case.

[3] As above stated, the suit was against the O. H. Broun, Jr., Timber Company, a partnership composed of O. H. Broun, Jr., and G. T. Loper, and against the latter as individuals. The note introduced in evidence purported to be signed: "O. H. Broun, Jr., Timber Co., by O. H. Broun, Jr."

"When a suit against a partnership is founded on an instrument in writing, the due execution of the instrument, and that it is a partnership obligation can be put in issue only by a verified plea." *Cain Lbr. Co. v. Standard Dry Kiln Co.*, 108 Ala. 348, 18 South. 832; *Palmer v. Scott*, 68 Ala. 390; *Goetter, Weil & Co. v. Head*, 70 Ala. 532.

See, also, sections 3966, 3967, and 3969, Code, 1907.

[4] As heretofore shown, there were no special pleas on file in this cause. They had been properly stricken. The evidence offered by appellant was such as required for its support special pleas as shown by the above authorities, and the same applies to objection of appellant to introduction of the note. We need not consider the several questions and assignments separately. Indeed, as we read the brief of counsel for appellant, the insistence for error in the ruling of the court as to the evidence rests very largely upon the assumption that the special pleas were in the case and a part of the pleadings. To this contention we have ruled adversely.

The matters sought to be proven being such as were required to be specially pleaded, and there being no special pleas the rulings of the court as to the evidence were proper and, no error appearing, the judgment of the court below is therefore affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 417)

MOBILE & B. R. CO. et al. v. LOUISVILLE & N. R. CO. (No. 835.)

(Supreme Court of Alabama. Dec. 17, 1914.)

INJUNCTION \Leftrightarrow 38—GROUNDS OF RELIEF—ENFORCEMENT OF JUDGMENT PENDING APPEAL.

Where one railroad company had secured from the probate court a judgment condemning the right to cross the track of another, and pending the appeal to the circuit court, which subsequently denied the right to condemn, the petitioner had taken possession under the statute without giving bond and paying the damages into court, the petitioning railroad was entitled to an injunction to prevent the other road from destroying its track at the crossing pending the appeal which had been duly perfected from the circuit court judgment; the object of the bill not being to stay the judgment of the circuit court pending the appeal, but to restrain a threatened trespass and preserve the status quo.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 86-90; Dec. Dig. \Leftrightarrow 38.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the Mobile & Birmingham Railroad Company and others against the Louisville & Nashville Railroad Company, to restrain respondent from interfering with complainant crossing over respondent's track pending an appeal in condemnation proceeding. From a decree discharging the temporary injunction, the complainants appeal. Reversed, and decree rendered for complainants.

Bestor & Young and Stevens, McCorvey & Dean, all of Mobile, for appellants. Gregory L. & H. T. Smith and Wm. G. Caffey, all of Mobile, for appellee.

MAYFIELD, J. Appellant Mobile & Birmingham Railroad Company filed its applica-

tion in the probate court of Mobile county to condemn a right of way across the track of the Louisville & Nashville Railroad Company. This application was granted by the probate court, and the damages were fixed at \$1,000. From this judgment the Louisville & Nashville Railroad Company appealed to the circuit court of Mobile county, where a trial de novo was had, resulting in the denial of the right to condemn the crossing. Pending the appeal to the circuit court, the Mobile & Birmingham Railroad Company executed a bond, and paid the amount of damages into court, as authorized by the statutes in such cases, and proceeded to construct the crossing. Upon the rendition of the judgment in the circuit court, the Mobile & Birmingham Railroad Company executed bond, as required by statute, and appealed to this court, and also filed this bill in the chancery court of Mobile county, alleging that the Louisville & Nashville Railroad Company, its servants, agents, or officers, were about to proceed to tear up complainant's track where it crossed the track of the Louisville & Nashville Railroad Company, as constructed by complainant pending the appeal to the circuit court. The bill sought only to restrain the defendants from thus tearing up the track of complainant, as was alleged to be threatened, and was in danger of being done, unless they were restrained therefrom by the court. The chancery court, without notice, issued a temporary injunction, as prayed, but on a subsequent hearing, on application to dissolve and discharge, granted the respondent's application to discharge the injunction, from which decree this appeal is prosecuted.

We are of the opinion that the chancellor erred in discharging the injunction. It appears from the opinion of the chancellor that he misconceived both the equity and the purpose of the bill. His opinion is as follows:

"This cause coming on to be heard was submitted on motion to discharge and dissolve the injunction heretofore issued in this cause. It appears that the relief sought by the bill of complaint is to stay the judgment of the circuit court pending an appeal without allegations of any independent equity, or of any fraud, accident, mistake, or surprise in the judgment. I am of opinion the chancery court has no jurisdiction to grant such relief, and there is no equity in the bill. *Clarke v. Board of Education*, 76 N. J. Eq. 326, 74 Atl. 319; *Norwood v. L. & N. R. R. Co.*, 149 Ala. 163, 42 South. 683. It is therefore ordered, adjudged, and decreed that the motion to discharge and dissolve the injunction heretofore issued in this cause be and the same is hereby granted, and the injunction discharged."

The bill was not one to stay the judgment of the circuit court or of any other court; it sought no relief as against that judgment or any other judgment. The sole equity of the bill was to restrain a threatened trespass, in the tearing up of complainant's railroad tracks which had been laid in accordance with the law and the statutes, until the cor-

rectness of the judgment in the circuit court could be tested by appeal, which was authorized by statute. The bill sought only to have the court of chancery, by proper injunction or restraining order, to maintain the status quo of the crossing, pending the appeal from the circuit court to the Supreme Court. This is a separate and distinct ground of equity jurisdiction, though jurisdiction for that purpose is not often invoked or exercised.

The rule is thus stated in *Cyc.* (volume 22, p. 825):

"The unsuccessful party, in an action at law, may be granted an injunction, where it appears that otherwise there will be such a change in the status of the subject-matter of the controversy as may render nugatory the judgment of the court of review, when announced."

Such a case we find made by this record. See, also, 1 *High on Injunctions*, 583; *Beach on Mod. Eq. Jur.* § 710.

The law on the subject is well stated in the headnote to the case of *People's Traction Co. v. Central Passenger Railway Co.*, 67 N. J. Eq. 370, 58 Atl. 597:

"A litigant, against whom a cause has been finally decided in the Supreme Court, who has in good faith promptly taken a writ of error to the Court of Errors and Appeals, which he is diligently prosecuting, and who is unable to secure from any law court a restraint against such a change in the status of the subject-matter of the controversy as may make nugatory the judgment of the court of review when pronounced, has (if the matter in dispute is one worthy to be considered by a court of justice) an independent equity, which this court will recognize and protect, to prevent his successful opponent from radically altering the situation of the subject-matter in dispute, pending the determination of the writ of error." *Syllabus by the Court.*

The Supreme Court of the United States, speaking through that clear and concise justice, Mr. Field, has thus stated the doctrine upon which the equity of cases like this is based:

"It was formerly the doctrine of equity, in cases of alleged trespass on land, not to restrain the use and enjoyment of the premises by the defendant when the title was in dispute, but to leave the complaining party to his remedy at law. A controversy as to the title was deemed sufficient to exclude the jurisdiction of the court. In *Pillsworth v. Hopton*, 6 Vesey, 51, which was before Lord Eldon in 1801, he is reported to have said that he remembered being told in early life from the bench that if the plaintiff filed a bill for an account and an injunction to restrain waste, stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction. This doctrine has been greatly modified in modern times, and it is now a common practice, in cases where irreparable mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the cutting down of timber, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. The authority of the court is exercised in such cases, through its preventive writ, to preserve the property from destruction, pending legal proceedings for the determination of the title. *Jerome v. Ross*, 7 John. Ch. [N. Y.] 815, 332 [1 Am.

Dec. 484]; *Le Roy v. Wright*, 4 Sawy. 530, 535." *Erhardt v. Boaro*, 113 U. S. 537, 538, 5 Sup. Ct. 565, 566 (28 L. Ed. 1116).

This same doctrine has been recently announced and applied by this court, in an original hearing between these same parties, as to this same subject-matter, and relative to this same decree.

There are no decisions of this court, so far as we know, to the contrary; but we think the cases of *Southern Railway Co. v. Birmingham, Selma & New Orleans Railway Co.*, 131 Ala. 663, 29 South. 191, and *Id.*, 130 Ala. 660, 31 South. 509, by analogy, support our holding. The rule we here announce is not contrary to the rule often announced by us, that equity will not interfere where the controversy resolves itself into a naked dispute as to the strength of legal titles. *E. & W. R. R. Co. v. E. T., V. & G. R. R. Co.*, 75 Ala. 283. The doctrine we here declare, or a kindred one, was announced by this court in the case of *Wadsworth v. Goree*, 96 Ala. 227, 10 South. 848. The decision is well stated in the second headnote of that case, as follows:

"Injunction to Restrain Waste; When Damage Suffered is Not Recoverable at Law.—A bill which alleges that the complainant, the owner of a sawmill, had acquired the legal title to heavily timbered land in the vicinity of his mill, for the purpose of obtaining timber to be converted into lumber, that he had brought ejectment for the land against the defendant, who was cutting and removing the timber, but that, owing to the crowded state of the docket, the case could not be tried before the next term of the court, and that, unless the defendant was restrained, all the timber suitable for sawmill purposes would be taken before there could be a trial of the ejectment suit, makes a case for an injunction, since, although the complainant might recover damages, in an action at law, for removal of the timber, he could not recover at law for the loss to him of the use of his mill, or for the loss of the profits to be derived from converting the timber into lumber."

The real merits of the rights of these litigants, as to the crossing in question, are now before this court, on the appeal from the circuit court, and will therefore be decided on that appeal. They cannot be decided on this appeal, because not litigated in the chancery court, from which this appeal is prosecuted. In fact, as before stated, the equity of the suit in chancery was to maintain the status quo, until the appeal from the judgment in the circuit court, which will settle the respective rights of the parties as to the crossing, can be determined.

The decree of the chancellor must be reversed; and one will be here rendered, restoring the injunction until the decision of this court is rendered on the appeal from the circuit court, above referred to in this opinion.

Reversed and rendered.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 319)

AMERICAN TIE & TIMBER CO. v. NAYLOR LUMBER CO. (No. 325.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. SALES —1—CONTRACT—CERTAINTY—ACTION FOR BREACH.

An unexecuted contract for the sale of as many cross-ties as it is possible for the sellers to accumulate at a certain place for 12 months is insufficiently certain to be the basis of an action for the breach thereof, where it appears that the quantity of cross-ties which may be thus accumulated depends on uncertain elements and contingencies.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. —1.]

2. SALES —169—INDEFINITE CONTRACT—EFFECT OF DELIVERY—RIGHT OF ACTION.

Where the seller delivers cross-ties at a point specified in the contract, he may recover for the buyer's failure to accept the ties so delivered, though the contract is not sufficiently certain as to the quantity of ties to be delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 422, 423; Dec. Dig. —169.]

3. CONTRACTS —143—CONSTRUCTION—VALIDITY.

Contracts will, if possible, be so construed as to render them enforceable, rather than void for uncertainty.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 723, 743; Dec. Dig. —143.]

4. APPEAL AND ERROR —193—OBJECTION BELOW—PLEADING.

A judgment for plaintiff will be reversed where the complaint fails to state any cause of action, though the complaint was not demurred to.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1238, 1240; Dec. Dig. —193.]

5. BAILMENT —18—COMPENSATION FOR STORAGE—RIGHT TO RECOVER—REASONABLE NOTICE.

Where a company buying cross-ties agreed that the seller could store the ties free of charge in a boom for an indefinite time, the seller was entitled to a reasonable time within which to remove its ties, after notice of the termination of the contract, before it could be charged for storage.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. —18.]

6. BAILMENT —30—STORAGE CHARGES—COMPLAINT—SUFFICIENCY.

In an action for storage charges, counts of the complaint, alleging merely that plaintiff had agreed for defendant to store cross-ties in plaintiff's boom for an indefinite time, and had terminated this contract by a notice stating that a certain storage charge would be made thereafter, and alleging that defendant, notwithstanding such notice, continued to store ties in the boom, were demurrable for failure to allege that defendant permitted the ties to remain in the boom for more than a reasonable time after the notice was given.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 123; Dec. Dig. —30.]

7. PLEADING —17—COMPLAINT—REQUISITES.

While facts averred in the complaint may be established inferentially from other facts in evidence, the cause of action relied on should be stated in the complaint and not left in inference.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 38, 41, 195, 350; Dec. Dig. —17.]

8. BAILMENT ~~§~~18—STORAGE CHARGES—CONTRACT.

Where the owner of a boom notifies a company, which has stored cross-ties therein under a contract entitling it to do so free of charge for an indefinite time, that a certain charge will be made for storage of all ties left in the boom or thereafter placed therein, the act of the company in permitting its ties to remain in the boom for more than a reasonable time thereafter obligates it to pay the storage charge specified in the notice.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. ~~§~~18.]

9. BAILMENT ~~§~~33—STORAGE CHARGES—REASONABLE TIME—QUESTION FOR JURY.

In an action on a contract obligating the defendant to pay storage charges on cross-ties which it has permitted to remain in a boom for more than a reasonable time after being notified that a charge will be made for storage, the question of reasonable time is for the jury.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. § 56; Dec. Dig. ~~§~~33.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Naylor Lumber Company against the American Tie & Timber Company, for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Inge & Armbrecht, of Mobile, for appellant. Clarke, Brown & Howard, of Mobile, for appellee.

DE GRAFFENRIED, J. [1] This action was brought by the appellee against the appellant to recover damages for the alleged breach of a contract for the purchase of cross-ties as well as to recover compensation for services in the matter of forwarding certain cross-ties to the Isthmian Canal Commission at the port of Colon, and for compensation for the storage of appellant's cross-ties in a certain boom belonging to the appellee at Moss Point, Miss.

In the sixth count of the complaint appellee alleges that on the 19th day of February, 1913, it entered into a contract with the appellant, which contract was in writing, as follows:

"New Orleans, La., Feb. 19, 1913.

"The Naylor Lumber Company, New Orleans, La.—Gentlemen: For and in consideration of the sum of \$1.00 each and to us in hand paid, we agree to take and they to deliver as many heart cross-ties as it is possible for them to accumulate at Moss Point, for twelve months from the above time, at the following price:

"7x9-8'6" ties at 52 cents.

"7x8-8'6" ties at 47 cents.

"6x3-8" ties at 44 cents.

"Upon completion of delivery of two hundred thousand (200,000) or more ties by the Naylor Lumber Company in twelve months' time or less, we agree to pay them one cent (1¢) additional on the said 200,000 ties on any further quantity they deliver. This agreement to stand good for twelve months.

"It is further agreed by the parties hereto that the said American Tie & Lumber Co. shall have supervision over the inspection of all the ties delivered to them by the Naylor Lumber Company. That they shall also pay all drafts

drawn by inspector of the Naylor Lumber Co. for actual cost of ties delivered in boom or on wharf in Moss Point, when inspector's certificate is attached to draft drawn by said inspector.

Yours truly,

"American Tie & Lumber Co.,

"C. Y. Naylor, Agent.

"Naylor Lbr. Co.,

"By W. E. Clark, Secy. & Treas."

After setting out the contract, the count further alleges, in substance, that the appellee complied with all of the provisions of the contract up to the 19th day of March, 1913, and that at that time it stood ready and willing and offered to carry out the provisions of the contract on its part to be performed, but that on the 19th day of March, 1913, the appellant notified the appellee that it would no longer carry out the provisions of said contract, and that since that time the appellant had wholly failed and refused to comply with the provisions of the contract. Several grounds of demurrer were interposed to this count, but none of them raised the question of indefiniteness or want of mutuality in the contract. It is urged on appeal that this count does not state a substantial cause of action, and for that reason will not support a verdict.

The contract, in short, is that the appellee would sell and deliver and the appellant would buy for a fixed price "as many heart cross-ties as it is possible for them [appellee] to accumulate at Moss Point for twelve months" from the date of the contract, which cross-ties were to be of certain dimensions. This agreement is readily distinguishable from those where the quantity to be bought and sold is "ascertainable with reasonable certainty." It has been correctly held that a contract to purchase the entire output of a certain mill or manufacturing plant, for a given time, at a given price, is valid; and likewise a contract to purchase all of the coal of a certain quality that might be needed for a certain plant, at a certain price and for a fixed period, is valid. In such cases the quantity, though it may depend to some extent on the will or effort of one of the contracting parties, can be ascertained with reasonable certainty; but in the present case the quantity depends upon so many uncertain elements and contingencies that we cannot say that it can be brought within the foregoing principle. The quantity to be bought and sold under the present contract (as many heart cross-ties as it is possible for the appellee to accumulate at Moss Point within 12 months) depends on the financial ability, the business capacity, the industry, the efficiency, and credit of the appellee, the supply of labor, all under constantly changing conditions, as well as on the supply and demand for heart cross-ties with the world as a market, and also on the uncertainty of transportation facilities and the responsibility of dealers in heart

cross-ties and their respective abilities to perform such contracts as they might make with the appellee for cross-ties which might be bought from such dealers by the appellee for delivery under this contract.

An examination of the face of the contract, without more, shows that no breach could be assigned upon it which could be compensated for in damages capable of being computed with reasonable certainty; but it contains a promise for a promise, and is executory, extending over a period of 12 months; and though uncertain in its incipency, by partial performance on the part of the Naylor Lumber Company, it might be made certain and enforceable to that extent. The time for making payments under the contract is not clearly stated therein, but the evidence shows that the parties themselves have construed the contract to mean that payments should be made on delivery, at different times during the year.

[2, 3] There is evidence in the case, somewhat conflicting, to the effect that, prior to the time when the appellant refused to further perform the contract, the Naylor Lumber Company had accumulated a quantity of cross-ties at Moss Point under the contract and according to the specifications. After these cross-ties had been so accumulated, the contract was executed to that extent, and it would be unconscionable to allow appellant to say that it would not comply with the terms of the contract and refuse to accept the cross-ties so accumulated. *McIntyre Lumber & Export Co. v. Jackson Lumber Co.*, 165 Ala. 268, 51 South. 767, 138 Am. St. Rep. 66; *Central R. R. & Banking Co. v. Cheatham*, 85 Ala. 292, 300, 4 South. 828, 7 Am. St. Rep. 48. The law does not favor the destruction of contracts for uncertainty, and leans against such a construction as renders them unenforceable. *McIntyre Lumber & Export Co. v. Jackson Lumber Co.*, supra; *Boykin v. Bank*, 72 Ala. 262, 47 Am. Rep. 408.

If the sixth count of the complaint had alleged, in effect, that, prior to the time the appellant notified the appellee that it would not further perform the contract, the appellee had accumulated at Moss Point, under and pursuant to the contract, a certain number of cross-ties of the specified quality and dimensions, a substantial cause of action would have been stated.

[4] It has been held by this court that the complaint may be sufficient to support a judgment after verdict when attacked by motion in arrest of judgment, or on appeal, although it may have been subject to demurrer, if properly filed; but it is "the settled law of this state that a judgment for the plaintiff will be reversed where the facts appear on the face of the complaint and show that no substantial cause of action was disclosed, though the complaint was not demurred to." 3 Mayf. Dig. p. 1174, subd. 825; *Turnipseed v.*

Burton, 4 Ala. App. 612, 58 South. 959. On the face of the contract, in the present case, the quantity appears to be too indefinite to warrant an enforcement of the contract, in the absence of averments in the complaint that the appellant had performed the contract up to the time that the appellee was notified that the appellant would no longer perform the same. It cannot be said that this count by intendment alleges that, prior to the time when the appellant notified the appellee it would not further perform the contract, the appellee had accumulated at Moss Point, under and in accordance with the contract, a certain number of cross-ties, of the specified quality and dimensions. The sixth count of the complaint, therefore, does not state a substantial cause of action, and will not support a verdict. For this reason the trial court committed reversible error in not charging the jury, at the written request of the appellant, that they could not find for the appellee under said sixth count.

[5, 6] In the tenth, eleventh, and twelfth counts of the complaint the appellee sought to recover from the appellant for storage of cross-ties which were placed in the appellee's boom by the appellant. These counts allege, in substance, that there was a contract between the appellee and the appellant under which the appellee had agreed to allow the appellant to store certain ties in a boom belonging to the appellee, the term of which contract was indefinite, and that the appellee terminated this contract by notice to the appellant and informed the appellant that for any ties that were stored in the said boom on the day of the notice, or that might be placed in said boom by the appellant or kept therein thereafter, a charge of three cents for each tie per month would be made, and that the appellant, notwithstanding the said notice, did keep stored, or cause to be stored, a large number of ties in said boom during a certain month.

The agreement for the use of the boom, being for an indefinite period, could be terminated by the owner of the boom at any time; but the appellant, after receiving the notice of the termination of the contract, had a reasonable time within which to remove its ties from the boom.

[7] Demurrers were interposed to each of these counts, to the effect that they did not allege that the defendant was given a reasonable time, after the notice of the termination of the agreement, to remove the ties from the boom.

"Good pleading requires that the facts which constitute the cause of action relied on shall be stated in the complaint and not left in inference. Facts, when averred, may be established inferentially from other facts shown in evidence, but this is a rule of evidence and not of pleading." *Fidelity & Deposit Co. of Maryland v. Walker*, 158 Ala. 129, 48 South. 600; *Daniels v. Carney*, 148 Ala. 31, 42 South. 452, 7 L. R. A. (N. S.) 920, 121 Am. St. Rep. 34, 12 Ann. Cas. 612.

These counts should contain such allegations as would show that the appellant permitted its ties to remain in the boom for more than a reasonable time after the termination of the agreement under which the cross-ties had previously been stored.

[8, 9] One ground of demurrer interposed to the foregoing counts was to the effect that they did not show a promise by the appellant to pay the appellee for the alleged storage of cross-ties. It is true that these counts do not allege an express contract, but they allege facts from which a promise to pay may be implied in fact. The notice that a charge of three cents per tie would be made for all ties that were left in the boom, or that might thereafter be placed therein, was an offer on the part of the appellee which might be accepted by the conduct of the appellant. As was said in *Mott v. Jackson*, 172 Ala. 448, 453, 55 South. 528, 529:

"It is familiar contract law that where one party makes an offer, dependent upon some act of the other party, and the other party performs the act, that is an acceptance of the offer, and constitutes a sufficient consideration to support the contract." *Central R. R. & Banking Co. v. Cheatham*, 85 Ala. 292, 4 South. 828, 7 Am. St. Rep. 48.

If, after notice, the appellant permitted its cross-ties to remain in the boom for more than a reasonable time, or after receiving the notice, it placed more cross-ties in the boom, it became obligated to pay three cents for each cross-tie per month so stored or permitted to remain stored. The question of reasonable time would be for the jury to determine, under the evidence in the case.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 563)

McARTHUR v. BRUE et al. (No. 821.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. PUBLIC LANDS §223—GRANTS—WHEN TITLE PASSES.

Under Act Cong. March 3, 1819, c. 100, 3 Stat. 528, adjusting claims to land founded on grants, etc., from the Spanish government, the title did not pass until the issuance of a patent, as there was no attempt to grant any land by the act, which only provided for a survey or location or identification of certain claims, and, when so located and identified, for a grant by the issuance of a patent.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 705-719, 721-725; Dec. Dig. § 223.]

2. PUBLIC LANDS §114—"PATENT"—CONSTRUCTION AND OPERATION.

A "patent" to land from the United States may constitute a grant, or conveyance of title out of the United States, or may be merely a ratification or confirmation, or evidence of, a previous grant or conveyance.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 814-822; Dec. Dig. § 114.]

For other definitions, see Words and Phrases, First and Second Series, Patent.]

3. EJECTMENT §9—TITLE TO SUPPORT ACTION—NECESSITY OF LEGAL TITLE.

In ejectment, the legal title must prevail. [Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. § 9.]

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Ejectment by George Brue and others against John McArthur. Judgment for plaintiffs, and defendant appeals. Affirmed.

L. H. & E. W. Faith and Frank S. Coffin, all of Mobile, for appellant. Gregory L. & H. T. Smith, of Mobile, for appellees.

MAYFIELD, J. [1] The pivotal and decisive question here involved is whether the legal title to the land in question passed from the United States by an act of Congress approved March 3, 1819 (3 Stat. 528, c. 100), or by a patent of October 7, 1912. It is conceded that the legal title has passed out of the United States, and that it passed either by the act of Congress or by the patent. If such title passed by the act of Congress, then there are other material and important questions to be decided; but if such title did not pass until and except by, the issuance of the patent, then appellant cannot recover the lands in ejectment, nor defend such action by the appellees, and a decision of the other questions is wholly unnecessary.

It appears to us that the opinion and decision of this court in the case of *Nelson v. Weekley*, 177 Ala. 130, 59 South. 157, and that of the Supreme Court of the United States in *Michigan Land Co. v. Rust*, 168 U. S. 589, 18 Sup. Ct. 208, 42 L. Ed. 591, are decisive of this question, to the effect that the legal title to the land in question did not pass by the act of Congress, but only by the patent. This question, of course, must depend upon the construction to be placed upon the act of Congress in question. If title did pass by this act, then it could not be defeated by a subsequent act of Congress alone, nor by a survey, nor the issuance of a patent, even if it attempted to convey title. Likewise, if the act of Congress in question provides that the title shall vest, by virtue of the act, when a survey is made, and the survey was so made, before the issuance of the patent, then the patent is merely a confirmation of the grant, survey, and location, by the Land Department of the government, and not the grant itself. What was said in the case of *Price v. Dennis*, 159 Ala. 629, 49 South. 250, is applicable here:

"If Congress had granted the land, and had thereby provided that the title should pass on selection as provided for in the act, the date of the selection would be the date of the passage of the legal title, as well as the equitable title, out of the government. The legal title can pass out of the United States as well by such a grant of Congress as by a patent; and if a patent

is issued thereafter it may be that it is merely evidentiary of the prior grant and selection. But this is not the case in the present action. It was intended by Congress that the patent should pass the legal title, and that it should not pass until the patent was issued."

On the other hand, if the act of Congress, and the survey, merely authorized the grant to be made by a patent; then, of course, the title passed only when the patent issued. This last condition we find from this record to be the true situation. It appears that there was not even an attempt to grant any land by the act of Congress in question, but only to provide for a survey, or location or identification, of certain claims, and, when so located and identified, for a grant by the issuance of a patent, which was accordingly done in this case.

[2] All patents issued from or by the Land Department of the United States to the public lands must of course depend for their authority, validity, and effect upon some act or acts of Congress. According to these acts, the patent may answer as the grant or conveyance of title out of the United States, or it may be merely a ratification or confirmation or evidence of a previous grant or conveyance, or be of other effect, as may be provided by the act or acts authorizing or requiring the issuance of the patent.

[3] The action being one of ejectment, the legal title, so far as this case is concerned, must prevail; and if the legal title passed out of the government of the United States only by the patent in 1912, as we decide it did, then it follows necessarily that the appellant could not defend in the court below on the ground of adverse possession, nor on the ground of any equitable title. It is therefore unnecessary to consider other assignments of error, for the reason that, under the undisputed evidence in this record, if all other assignments of error were sustained, they would each and all be without possible injury or prejudice to the appellant. Affirmed.

ANDERSON, C. J., and SOMERVILLE
and GARDNER, JJ., concur.

(190 Ala. 455)

SMITH v. IRVINGTON LAND CO.
(No. 833.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. QUIETING TITLE \S 10—SUITS—RIGHT TO MAINTAIN—STIPULATIONS.

An agreement of counsel that plaintiff was in actual possession of the land at the time of filing his bill to quiet title is a sufficient showing to warrant the maintenance of the bill, under Code 1907, \S 5443, requiring proof of plaintiff's peaceable possession.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 36-42; Dec. Dig. \S 10.]

2. QUIETING TITLE \S 6—SUITS—RIGHT TO MAINTAIN.

A bill to quiet title cannot be defeated because another claims the land; the existence of

an adverse claim being an essential to the maintenance of the bill.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 4; Dec. Dig. \S 6.]

3. QUIETING TITLE \S 44—SUITS—BURDEN OF PROOF.

In a suit to quiet title, plaintiff, who is in peaceful possession, need not prove his title; but those asserting adverse interests must establish theirs.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 89-92; Dec. Dig. \S 44.]

4. QUIETING TITLE \S 44—SUITS—EVIDENCE.

In a suit to quiet title, evidence of a former proceeding between other parties not in privity with plaintiff to quiet title to the land is wholly irrelevant and immaterial, being *res inter alios acta*.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. \S 89-92; Dec. Dig. \S 44.]

Appeal from Chancery Court, Mobile County; Stewart Brooks, Special Chancellor.

Bill by G. Hardy Smith, pro ami, against the Irvington Land Company, to quiet title to land. Decree for respondent, and complainant appeals. Reversed and rendered.

The following is the agreed statement of facts, dated October 18, 1913:

(1) That the complainant purchased the lands described in the bill of complaint at a sale by the register in chancery of this court, had under a decree of said court in a cause therein then pending, and received from said register a deed of and to all of the right, title, and interest of all the parties to said cause in and to said lands; that the complainant entered upon and took possession of said lands, under said register's deed, and that, at the time of said entry and taking possession, said entry was peaceable; that the complainant has remained in actual and peaceable possession of said lands since the date of said entry, and that said date was shortly prior to the filing of the bill of complaint in this cause, not being over one month before such filing; that at the time of said purchase and of said entry the complainant knew of the claim to said lands by the respondent, and that said claim was adverse to the claim of the parties sold by the register as aforesaid; that the complainant took possession of said lands, intending to file this bill of complaint and of testing the validity of the respective adverse claims to said lands.

(2) That at the time of the filing of said bill of complaint there was not pending any suit, at law or in equity, in which the title to said lands, either of the complainant or of the respondent, was in any wise involved, and that there is now pending no such suit save this suit alone.

(3) It is further agreed that these lands were duly patented to Robert B. S. Hargis by the United States government prior to the filing of said bill of complaint by Catherine Bancroft hereinafter mentioned.

(4) That Jonathan P. May conveyed the land to Wm. Otis by warranty deed dated September 20, 1873, and Wm. Otis devised it with other property to Charles M. Bancroft by will duly admitted to probate in Mobile county March 19, 1891. Charles M. Bancroft died, leaving a will which was duly admitted to probate in Mobile county October 26, 1895, which contained the following provisions:

"Item 2. I hereby will, devise and bequeath all my property of every nature, character and kind to my wife, Catherine Bancroft, for and during the term of her natural life, for her to manage, control and use for the benefit of her-

self and our children, including my daughter Cora, by my first wife, so long as they shall live together as one family, and if it should happen that the rents, income and profits of my estate should become insufficient to provide my said wife and children with a comfortable support and properly educate my minor children, then it is my will, and I hereby give my wife full power and authority to use and appropriate so much of the corpus of my estate as may be necessary for that purpose."

"Item 6. It is my will and I hereby give my wife, Catherine Bancroft, full power and authority to sell and convey any property of my estate and reinvest the proceeds in such other property as in her judgment would be to the interest of herself and my children, taking the title to such property as she may so purchase in her own name in trust for herself during her natural life and upon her death, for my children in equal shares and with power to sell such property purchased by her, and to reinvest the proceeds and so on."

Catherine O. Bancroft conveyed the land by statutory warranty deed to Gerhardt C. Mars by deed dated November 24, 1903, recorded January 21, 1904. Gerhardt C. Mars conveyed it to the Irvington Land Company by warranty deed dated March 14, 1913. Catherine O. Bancroft is still living. C. C. Kauffman conveyed it to Ferdinand Kirchner by statutory warranty deed dated September 2, 1887. Ferdinand Kirchner conveyed it to Agnes W. Kauffman by quitclaim deed dated September 2, 1887. Earl Kauffman, Roy Kauffman, Alger Kauffman, Claude Kauffman, and Carrie Grady Price, heirs at law of Agnes W. Kauffman, deceased, conveyed it to Peter J. Brown by quitclaim deed dated September 20, 1905. Peter J. Brown conveyed it to the Century Realty Company by quitclaim deed dated October 18, 1905. Century Realty Company conveyed it to Peter B. Nelson by warranty deed dated April 9, 1906. Peter B. Nelson conveyed it to Southern Timber & Colonization Company by statutory warranty deed dated January 5, 1909. Southern Timber & Colonization Company conveyed it to Irvington Land Company by quitclaim deed dated April 13, 1912. That before Catherine O. Bancroft conveyed it to Gerhardt C. Mars, she filed a bill in the chancery court of Mobile county, being No. 7476, against Robert B. S. Hargis, or his heirs at law, to quiet the title against them, and on October 22, 1903, she obtained a decree in said cause quieting title to said land.

(5) Either party may introduce either the originals or certified copies of any of the conveyances under which they claim, and also any other evidence material to the issues in the cause.

Gregory L. & H. T. Smith and James H. Kirkpatrick, all of Mobile, for appellant. Ervin & McAleer, of Mobile, for appellee.

MAYFIELD, J. This was a statutory bill to quiet and determine title to land. The bill contained the statutory requirements as to averments, and sought to have the respondent's title to the land in question determined, and the complainant's quieted, so far as the respondent's claim was concerned. There was no cross-bill requiring the complainant to establish his title or claim; but the answer did seek to show and establish the respondent's claim or title to the land in question. The respondent sought no affirmative

relief, as it might have done. Code, § 5445, and annotations thereto.

[1-3] The case was submitted on bill, answer, and proof, including an agreement of counsel as to certain facts upon which the equity of the bill depended. The special chancellor who heard the cause dismissed the bill, on the ground that complainant had not shown such a "peaceable possession" of the lands as the statute (section 5443 of the Code) requires to maintain the bill. In this there was error. The agreement of counsel fully and expressly supplied this proof, and of course was binding on the parties on this trial. In fact, we find no proof of any actual possession at the time of the filing of the bill, except that of complainant. It is true that respondent was claiming title to the land, but had no actual possession. The fact that complainant knew of this claim was no impediment to his filing this bill. The bill was filed for the very purpose of testing the validity of this claim of title. In fact, there would be no equity in the bill if the defendant or any other person was denying or disputing complainant's title, and was not claiming or asserting title or right to the lands. It is only in such cases that the statute authorizes the filing of the bill. It is not the fact that others, or the respondent, is claiming the land, that defeats the bill; it is only the fact that they are in possession, or that there is a scrambling possession, which defeats the bill. It is not necessary for the plaintiff, in a case like this, to prove his title, further than to prove his peaceable possession; but the bill is to test the validity of the respondent's title, and the burden is on the respondent to prove his title. *Newell v. Manley*, 173 Ala. 207, 55 South. 495; *Vaughan v. Palmore*, 176 Ala. 72, 57 South. 488. The respondent in this case failed to show any valid paper title, and failed to show any possession which had ripened into title, against this complainant, and, of course, the respondent could not succeed in this suit.

[4] The former proceeding between other parties to quiet title to these lands was wholly irrelevant and immaterial. It was *res inter alios acta*. The complainant or his privies in title were not parties to the proceeding, and, of course, could not be bound by such a proceeding.

It therefore follows that the special chancellor erred in dismissing the bill, and that he should have granted the relief as prayed in the bill, and as is provided for in the statute. The decree of the lower court is accordingly reversed, and one will be here rendered in accordance with the prayer of the bill.

Reversed and rendered.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 437)

HAUSER v. FOLEY & CO. (No. 834.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. JUSTICES OF THE PEACE §127—JUDGMENT—VACATION.

A judgment of the justice of the peace, which is regular on its face, but void because the defendant was never served with process, cannot be vacated by the justice after the day of its rendition; the remedy being by appeal in equity or a statutory writ of certiorari.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. § 401; Dec. Dig. §127.]

2. JUDGMENT §407—VACATION—JURISDICTION—REMEDY AT LAW.

Equity has jurisdiction to vacate a judgment regular on its face, but void for failure to serve process on defendant without regard to complainant's failure to resort to cumulative legal remedies.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 768-771, 773, 774; Dec. Dig. §407.]

3. JUSTICES OF THE PEACE §128—JUDGMENT—EQUITABLE RELIEF—BILL—LACHES.

A bill to vacate a judgment of the justice of the peace, which alleges that no process was served upon the judgment debtor, and that he had no knowledge of the judgment until two months after it was rendered, that thereafter the justice of the peace told him that he would set aside the judgment, and that he heard no more about it until action was instituted thereon in another court five years after rendition of the judgment, is not demurrable as showing laches by the judgment debtor, since it does not show that any injury resulted to the other party from the delay nor that the delay was inexcusable.

[Ed. Note.—For other cases, see Justices of the Peace, Cent. Dig. §§ 402-407; Dec. Dig. §128.]

4. JUDGMENT §456—EQUITABLE RELIEF—DEFENSES—LACHES.

The fact that a judgment debtor allowed an action on the judgment to proceed to final judgment before he filed his bill in equity to vacate it does not preclude his subsequent resort to chancery.

[Ed. Note.—For the other cases, see Judgment, Cent. Dig. §§ 863-866; Dec. Dig. §456.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by J. J. Hauser against Foley & Co. to enjoin the enforcement of a judgment at law and to vacate and annul the judgment. Decree for respondent, and complainant appeals. Reversed, and decree rendered for complainant.

The bill as amended shows that about August 28, 1908, Foley & Co. recovered a judgment against complainant for \$72 and costs in a certain justice court, without service of summons or other process upon him, and without his having any knowledge in fact of the pendency of the suit against him; that the return of the officer shows due and regular service upon complainant, and the jurisdiction was thereby acquired of complainant's person; that complainant did not know that said suit or judgment against him for two months or more after the judgment was rendered; that upon being informed thereof he saw the justice, J. E. Alford, and informed

him of the absence of service for notice in the cause; that said Alford thereupon told complainant that the judgment was irregular and void and that he would set it aside and make an entry showing that action; that complainant relied upon Alford's statement, and took no further steps in the matter, and heard no more from it until Foley & Co. brought suit on said justice judgment in the inferior city court of Mobile about November 1, 1913; that he was unable in said last trial to avail himself of his defense to the original suit or to impeach the justice judgment for want of jurisdiction of complainant's person; and that therefore he was compelled to suffer judgment against himself in said city court. The bill as amended states that complainant has a meritorious defense to the claim upon which he was sued, and sets out the defense in detail. As last amended, the bill avers that, after complainant's conversation with said Alford about the judgment rendered by him, B. B. Chamberlain, Esq., who brought said suit and recovered said judgment for Foley & Co., in said Alford's court, was by Alford informed of the absence of notice to complainant and consented to the setting aside of the judgment as promised by Alford to complainant. The last amendment also shows the judgment entry on Alford's docket which recites the sheriff's return of the summons as executed. Demurrers were sustained to the original bill and also to the bill as first and last amended, and, complainant declining to plead further, the bill was dismissed.

Foster K. Hale, Jr., of Mobile, for appellant. D. B. Cobbs, of Mobile, for appellee.

SOMERVILLE, J. [1] In the absence of a statute providing otherwise, a justice of the peace has no control over a judgment after the day of its rendition; and such judgment, if valid upon its face, cannot be thereafter vacated by him on the motion of a party for any sort of irregularity in fact. 24 Cyc. 596d.

In the present case the complainant could not by direct motion have procured the vacation of the judgment erroneously rendered against him by the justice of the peace, except, of course, by the consent of the plaintiff therein; and his only remedy was by the statutory writ of certiorari within six months, or by bill in equity. The case of *Glass v. Glass*, 76 Ala. 368, 370, is not opposed to this conclusion. It was there said:

"All courts possess the inherent power to vacate, within a reasonable time, any order they may have made, which is on its face void, or so grossly irregular as not to reach the ends which the record shows were aimed at. Such correction is made, on motion, in the court where the judgment is rendered; and there should be notice of such motion, unless the judgment or order is void on its face."

[2] In the instant case the judgment is, upon the record, affirmatively regular and

valid. The distinction is illustrated by the authorities cited in *Hatchett v. Billingslea*, 65 Ala. 16, 29, 30; *Chamblee v. Cole*, 128 Ala. 649, 30 South. 630. However, equity has independent and original jurisdiction of such a bill, and proceeds to its exercise without regard to the complainant's failure to resort to cumulative legal remedies. *Todd v. Leslie*, 171 Ala. 624, 55 South. 174; *Evans v. Wilhite*, 167 Ala. 587, 52 South. 845.

[3] The only debatable question raised by the demurrer to the amended bill is whether or not it exhibits such laches in the assertion and prosecution of the complainant's right to vacate the judgment in question as to forfeit that right in a court of equity.

"The true doctrine concerning laches has never been more concisely and accurately stated than in the following language of an able living judge: 'Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.' *Stiness, J.*, in *Chase v. Chase*, 20 R. I. 202, 37 Atl. 804." 5 Pom. Eq. Jur., § 21.

"Laches, as has been well said, does not, like limitation, grow out of the mere passage of time, but it is founded upon the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relation of the property, or the parties. *Galliber v. Cadwell*, 145 U. S. 368 [12 Sup. Ct. 873, 38 L. Ed. 738]." *First Nat. Bank v. Nelson*, 106 Ala. 535, 18 South. 154.

This theory of laches is well discussed and illustrated by *McClellan, J.*, in *Rives v. Morris*, 108 Ala. 527, 18 South. 743.

In *Grier v. Campbell*, 21 Ala. 327, and *Raisin Co. v. McKenna*, 114 Ala. 274, 21 South. 816, where the bills were filed, as here, to vacate judgments rendered without notice to the defendants, it was held that the lapse of two years and eight months in the former and three years in the latter case was no bar to the relief sought.

It is true that in particular cases a long lapse of time may alone generate a presumption of probable injury from the delay to the party complained against; or it may exhibit such flagrant indifference to the complainant's asserted right as to forfeit the protection of a court whose maxims and policy favor the diligent rather than the slothful. Nevertheless, a consideration of the present case neither condemns the delay of the complainant as unexcused, nor indicates any probability of prejudice to the respondent as the result of that delay.

On the face of the amended bill, we think that the complainant is entitled to be rein-

stated as defendant in the original cause, with opportunity to defend against the claim sued on. If there are any special circumstances which render this relief inequitable at this time, they should be presented by way of answer to the bill.

[4] The fact that complainant allowed the suit in the city court to proceed to judgment against him did not, under the circumstances shown, preclude his subsequent resort to a court of chancery for relief by the use of a defense not available to him in the law court. The authorities are collected and fully discussed in *Stevens v. Hertzler*, 114 Ala. 563, 22 South. 121.

It may very well be that, in view of complainant's failure to file his bill before judgment was rendered against him in the city court, he ought in any event to be taxed with the costs there accruing as an incident to that judgment. See *Paulding v. Watson*, 21 Ala. 279.

It results that the demurrers to the bill, whether as first amended or as last amended, should have been overruled; and the decree of the chancery court in that behalf will be reversed, and a decree here rendered in accordance with the foregoing opinion.

Reversed and rendered.

ANDERSON, C. J., and DE GRAFFEN-RIED and GARDNER, JJ., concur.

(190 Ala. 627)

Ex parte ROGERS. (No. 590.)

(Supreme Court of Alabama. Nov. 30, 1914.)

1. INDICTMENT AND INFORMATION \S 137—FORMATION OF GRAND JURY—OBJECTIONS—AVAILABILITY.

The action of the trial court in excusing grand jurors for answering in the negative questions as to whether or not they would indict druggists for selling coca-cola, cigars, etc., on Sunday, related to the formation of the grand jury, within Code 1907, § 7572, prohibiting objections to an indictment based on the drawing or formation of the grand jury, and one indicted by the grand jury could not complain.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 480-487; Dec. Dig. \S 137.]

2. GRAND JURY \S 11—FORMATION—OBJECTIONS—AVAILABILITY.

The action of the court in excusing one who was placed on the grand jury through mistake, and then calling the person intended and excusing him, and then placing on the grand jury the next man on the list, did not render the grand jury illegal, so as to affect the validity of an indictment returned after the third person was placed on the grand jury.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 28, 29; Dec. Dig. \S 11.]

3. MANDAMUS \S 16—EXISTENCE OF RIGHT—CORRECTION OF COURT RECORDS.

Mandamus to correct the record of the court as to the organization of a grand jury will be denied, where the record, when corrected, cannot affect the rights of petitioner indicted by the grand jury.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 48, 59, 60; Dec. Dig. \S 16.]

Mandamus by John Rogers against B. M. Miller, Judge of the Fourth Judicial Circuit, to compel the latter to change or correct the records of the organization of a grand jury. Denied.

The petition shows: That an indictment was returned against John Rogers for murder by the grand jury organized for the circuit court of Dallas county November 23, 1914. That the jurors who answered to their names were called before the court, and the court proceeded to hear all the excuses offered, and the claims of exemptions made by the different members of the venire. Then the court proceeded to examine the members of the venire as to their qualifications, and in doing so the court asked them if they would indict a person for carrying a concealed weapon, and directed all those who would do so to hold up their hand, and he asked them if they would indict druggists for selling soda water, candy, and cigars on Sunday, and that one Wilby and Eagle stated they would not indict for that offense, and they were excused from further service, and their names omitted from the box. That one Anderton, a member of the venire, stated that he would not indict a druggist, nor would he indict persons for playing baseball on Sunday, or for racing horses, and his name was stricken from the venire and duly discharged. That neither of the three jurors offered any excuse or claimed any exemption from jury duty. The balance of the names remaining on venire were written on a separate sheet of paper and placed in the box, and the judge proceeded to draw therefrom 18 names to compose the grand jury, and that the name of J. Fullerton Hooper was drawn as a grand juror, his being the eighteenth name drawn from the hat, and that after the said grand jury had been so drawn and impaneled and charged, and had retired for their deliberations, it was shown to the court, but not by relator or any one on his behalf, that the said J. Fullerton Hooper who was impaneled on said grand jury was not the person drawn and summoned, but that another by the same name was the person drawn and summoned, and the court thereupon discharged the said J. Fullerton Hooper, and selected the name of B. H. Perrin, who had been drawn and sworn as petit juror No. 1, his name being the nineteenth name drawn from the hat, and that said Perrin was serving on the grand jury which returned the indictment. The petition further quotes the minutes of the report showing that upon sufficient excuse the following named persons were excused from jury service, including the names of the three persons named above, but not showing that such persons were excused because of their attitude towards the indicting for the offenses about which they were interrogated by the court, and also reciting that J. Fuller-

ton Hooper, Jr., who had not been drawn and summoned, appeared and answered for J. Fullerton Hooper, who had been drawn and summoned, but did not appear, but failing to recite that J. Fullerton Hooper was excused after being impaneled, but showing simply that Perrin had been drawn and sworn as a grand juror.

Craig & Craig, of Selma, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for appellee.

PER CURIAM. This is an application for mandamus to the judge of the Fourth judicial circuit, to compel him to change or correct the record as to the organization of the grand jury of Dallas county; the petitioner having been indicted by said grand jury.

[1] As to the names of those jurors who were excused by the court for answering in the negative, as to whether or not they would indict druggists for selling coca-cola, cigars, etc., on Sunday, the action in doing so went to the formation of the grand jury; and no objection to the action of the court is available to this petitioner, as section 7572 of the Code of 1907 cuts off the right to object to an indictment as to either the drawing or the formation of the grand jury, except where the jurors were not drawn in the presence of the officers designated by law; and said section 7572 is also contained in section 23 of the Jury Law (Acts Sp. Sess. 1909, p. 315). Therefore the correction sought, if made, could be of no avail to this petitioner, for, if made in accordance with his contention, it could not affect the validity of the indictment against him.

[2] As to the action of the court in excusing young Hooper, who was placed on the grand jury through mistake, and then calling his father, who was the one intended, and then excusing him, and then placing Perrin, the next man on the list, on the grand jury, we may concede that this did not go to the formation of the grand jury as it originally stood, and that the record should state the true facts, and should yet be corrected by the trial court if in session and if not correct; yet, accepting the petitioner's version as to what was done, we are of the opinion that the action of the court, as set up in the motion, did not render the grand jury illegal, so as to affect the validity of indictments returned by it after Perrin was placed on same.

[3] It would therefore be a useless performance to mandamus the trial court and require the correction of a record when, as corrected, it could not affect the validity of the indictment against this petitioner. The application is denied.

Mandamus denied.

ANDERSON, C. J., and McCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

(190 Ala. 554)

LOPER v. DICKEY. (No. 854.)

(Supreme Court of Alabama. Nov. 19, 1914.)

1. PAYMENT \Leftrightarrow 66—MORTGAGE—PRESUMPTION FROM LAPSE OF TIME.

Where a mortgagee permits 20 years to elapse without attempting to collect the debt, or foreclose, or take possession, the law presumes that the mortgage is satisfied.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176-188; Dec. Dig. \Leftrightarrow 66.]

2. PAYMENT \Leftrightarrow 66—MORTGAGE—PRESUMPTION FROM LAPSE OF TIME—REBUTTAL.

Where it was not disputed that there had been an attempted foreclosure of a mortgage by the administrators of the deceased mortgagee within 20 years of the transaction, and also that one Richardson, who purchased from one of the administrators, now claimed to have been purchaser at the foreclosure sale, went into possession in 1902, and held until 1909, within 20 years of the law day of the mortgage, and was then succeeded by defendant, who held under a recorded deed reciting the existence of the mortgage, and that defendant claimed under it, any presumption of payment or satisfaction of the mortgage arising from lapse of time was refuted.

[Ed. Note.—For other cases, see Payment, Cent. Dig. §§ 176-188; Dec. Dig. \Leftrightarrow 66.]

3. EJECTMENT \Leftrightarrow 9—TITLE—IMPERFECT FORECLOSURE OF MORTGAGE.

Plaintiff cannot maintain ejectment, where a mortgage given by his ancestor has never been satisfied, whether or not the mortgage has been regularly foreclosed and a deed made to the purchaser, through whom defendant claims.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. \Leftrightarrow 9.]

Appeal from Circuit Court, Washington County; John T. Lackland, Judge.

Action of ejectment by Robert A. Loper against John R. Dickey. Judgment for defendant, and plaintiff appeals. Affirmed.

Granade & Granade, of Chatom, for appellant. Turner, Wilson & Tucker, of Chatom, for appellee.

ANDERSON, C. J. [1-3] This is an action of ejectment, and the plaintiff and defendant each claim title through a common source, A. Loper. The defendant proved that A. Loper had parted with the title under and by virtue of a certain mortgage to John A. Richardson, Sr., in 1891. Therefore, if this mortgage has never been paid or satisfied, it operates to place the legal title to the land out of the said A. Loper or his heirs, and this plaintiff, as one of his heirs and as the vendee of the others, could not recover.

The plaintiff contends, however, that as the mortgage was over 20 years old, when introduced in evidence, the law presumes that the same was satisfied. There is no doubt of the proposition that, if the mortgagee permits 20 years to elapse without making an attempt to collect the mortgage debt, or to foreclose the mortgage, or get possession of the property, the law presumes that the mortgage was satisfied. *Gay v. Fleming*, 82 South. 523, and cases there cited. But the proof in

this case shows that there was a foreclosure of the mortgage, or at least an attempt to do so, before the expiration of 20 years, and whether the deed as executed in 1913, by the former administrators of the mortgagee, was or was not prima facie evidence of the recited foreclosure, matters not, as there was independent proof of at least an attempted foreclosure of the mortgage within 20 years by the administrator of the deceased mortgagee.

Moreover, J. J. Richardson purchased from one of the administrators, who was also the claimed purchaser at the foreclosure sale, and went into possession of the land shortly after the date of his deed in 1902, and remained in possession until succeeded by the defendant, who went into possession in 1909, within 20 years of the law day of the mortgage, and who held under a recorded deed which recited the existence of the mortgage and that the said defendant was claiming title under and by virtue of said mortgage. These facts were undisputed, and were sufficient to refute a presumption of payment or satisfaction of the mortgage, and as said mortgage had not been satisfied, the plaintiff and those under whom he claimed had no legal title to the land, and could not maintain this suit, whether the mortgage had or had not been regularly foreclosed and a deed made to the purchaser. *Gay v. Fleming*, supra.

The trial court did not err in giving the general charge for the defendant, and the judgment is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(190 Ala. 446)

SHERMAN v. SHERMAN. (No. 832.)

(Supreme Court of Alabama. Nov. 19, 1914.)

1. FRAUDS, STATUTE OF \Leftrightarrow 129—SALE OF LANDS—PART PAYMENT AND CHANGE OF POSSESSION.

To remove a parol agreement for the sale of lands from the operation of the statute of frauds, it is not necessary that putting of the purchaser in possession and his part payment of the price should be simultaneous.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. \Leftrightarrow 129.]

2. SPECIFIC PERFORMANCE \Leftrightarrow 16—SALE OF LANDS—INEQUITABLE CONTRACT.

Where change of possession and part payment under a parol contract for the sale of lands are relied upon to remove the bar of the statute of frauds, the court will exercise a sound discretion, and deny relief if the contract is inequitable.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 29, 35, 36; Dec. Dig. \Leftrightarrow 16.]

3. SPECIFIC PERFORMANCE \Leftrightarrow 117—SALE OF LANDS—PLEADING—VARIANCE.

A slight variance between the allegations of complainant's bill for specific performance and

the evidence as to when a parol agreement for the sale of lands was made is immaterial.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 377-381; Dec. Dig. ☞ 117.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by Lee Sherman against Alice Sherman. Decree for complainant, and respondent appeals. Affirmed.

Rickarby & Austill, of Mobile, for appellant. Gordon & Edington, of Mobile, for appellee.

GARDNER, J. Bill by appellee against appellant to enforce specific performance of a parol contract for sale of 40 acres of land therein described. It is alleged that plaintiff was put in possession, and has paid part of the purchase money.

[1] While it is necessary, of course, when the contract rests in parol, that possession and part payment of the purchase money must concur, yet it is well settled that they need not take place at one and the same time.

"We do not understand that the statutory exception contemplates or requires a payment of purchase money contemporaneous with the letting into possession." *L. & N. R. Co. v. Philyaw*, 94 Ala. 465, 10 South. 84.

That respondent (appellant here) placed the complainant in possession of the land, and which possession has continued, is practically without dispute. The suit is by the son against the mother. Complainant insists that respondent first offered to give him the land, which was wholly unimproved, and afterwards wrote him a letter stating she would sell it to him for \$25, which was agreed to; that he paid \$15, and tendered the balance, which was refused, and paid into court. The insistence of respondent is that she merely offered to let him have the place to live on as a home, and that she made no sale nor offer to sell, and that no purchase money has been paid.

The evidence in the case consists almost entirely of testimony of the members of the family, and presents an unfortunate situation, as it is in irreconcilable conflict. The letters written by respondent to complainant seem to corroborate the insistence of the latter. It appears that the purchase price, though small, was about the amount respondent had paid for the land at a tax sale purchase; and it is evident that neither she nor her children considered it of much value at that time. Complainant was permitted to remain in possession and make improvements thereon. What was in fact its value then is not shown by the record.

The case presents no question of law of general interest, and is largely a question of fact. A discussion of the evidence would be unprofitable, and, in view of the relationship existing between the parties, also un-

pleasant. We are mindful of the degree of proof and strictness required in cases of this character. *Allen v. Young*, 88 Ala. 338, 6 South. 747.

After a most careful consideration of the evidence in this case, the conclusion is reached that the complainant had sufficiently made out his case to entitle him to the relief he seeks. This was the view that prevailed in the court below.

[2] We recognize also the rule that in cases of this character the court exercises a sound judicial discretion, which, however, is controlled by fixed rules and principles, in view of the special features and incidents of each case, and will look at the contract to see if it is unconscionable, oppressive, or inequitable, and, if so, will deny relief. *Homan v. Stewart*, 103 Ala. 644, 16 South. 35. We find nothing in this record, however, that would justify the application of this principle to this case.

[3] The conflict between the parties related to the question as to whether there was, in fact, a contract of sale, and the slight variance complained of, as to the exact time when the agreement was made, was wholly immaterial.

The decree of the chancery court is affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 132)

Ex parte ATLANTIC COAST LINE R. CO.
(No. 100.)

(Supreme Court of Alabama. Nov. 7, 1914.
On Rehearing, Dec. 17, 1914.)

1. CERTIORARI ☞68—FINDINGS OF FACT BY COURT OF APPEALS — CONCLUSIVENESS ON SUPREME COURT.

The findings of fact by the Court of Appeals are final and not reviewable by the Supreme Court on certiorari to the Court of Appeals.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 180-182; Dec. Dig. ☞68.]

2. COMMERCE ☞8—INJURY TO SERVANT—FEDERAL EMPLOYERS' LIABILITY ACT.

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, § 8637]) supersedes state statutes and governs cases of injuries to employes while engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. ☞8.]

3. MASTER AND SERVANT ☞256—INJURY TO SERVANT—STATUTORY LIABILITY.

A railroad employe suing for a personal injury may allege in different counts causes of action under the federal Employers' Liability Act and under the state Employers' Liability Act, but he cannot recover under the state statute, where the injury occurred while engaged in interstate commerce, nor can he recover un-

der the federal statute, where the accident occurred while engaged in intrastate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.]

4. MASTER AND SERVANT § 284—INJURY TO SERVANT—STATUTORY LIABILITY.

Where a railroad employe suing for a personal injury alleged in different counts causes of action under the federal Employers' Liability Act and the state Employers' Liability Act (Code 1907, § 3910), but showed that the accident occurred while in the service of interstate commerce, the court must, as requested, give a general affirmative charge in defendant's favor on the counts founded on the state act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.]

On Rehearing.

5. MASTER AND SERVANT § 256—INJURY TO SERVANT—STATUTORY LIABILITY—PLEADINGS.

An employe suing for a personal injury should allege in his complaint facts to enable the court to determine whether he relies on the federal Employers' Liability Act or the state Employers' Liability Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. § 256.]

Certiorari to Court of Appeals.

Action by Will Jones against the Atlantic Coast Line Railroad Company. There was a judgment of the Court of Appeals (9 Ala. App. 499, 63 South. 693) affirming the judgment for plaintiff, and defendant brings certiorari. Writ granted.

John R. Tyson, of Montgomery, for appellant. William H. & J. R. Thomas, of Montgomery, for appellee.

McCLELLAN, J. This application for writ of certiorari to the Court of Appeals presents for review the action of that court as expressed in its opinion to be found in 9 Ala. App. 499, 63 South. 693, on the appeal thereto of Atlantic Coast Line R. R. Co. v. Jones.

Counts 2 and 3½ of the complaint were drawn to state a cause of action under the state Employers' Liability Act, Code, § 3910. Count 7 was drawn to state a cause of action under the federal Employers' Liability Act.

[1] Upon a review of the evidence, the Court of Appeals concluded that, at the time the injury complained of in the complaint was suffered by the plaintiff, Jones, he was engaged in a service of interstate commerce. As has been settled here by several decisions, this conclusion of fact is final, so far as review in this court is concerned. *Ex parte Steverson*, 177 Ala. 384, 389, 58 South. 992, among others.

[2] The fact being that plaintiff was, when injured, in the service of interstate commerce, the federal Employers' Liability Act afforded the statutory rule for the determination of the liability vel non of the interstate carrier, instead of the state Employers' Liability Act (section 3910), for it has been

finally adjudged by the Supreme Court of the United States that the federal Employers' Liability Act supersedes a state enactment in that field, governing, exclusively, cases falling within its purview. *Seaboard Air Line v. Horton*, 233 U. S. 492, 501, 34 Sup. Ct. 635, 58 L. Ed. 1062; *Second Employers' Liability Cases*, 223 U. S. 1, 55, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44; *Mo., Kan. & Tex. Ry. v. Wulf*, 226 U. S. 570, 575, 576, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134.

[3, 4] It results, necessarily, from the stated conclusion of fact attained by the Court of Appeals, that the plaintiff could not have recovered under the counts declaring as upon a liability in virtue of the local (state) statute. In consequence, the general affirmative charge in defendant's favor upon count 3½ was defendant's due. The Court of Appeals was in error in not so deciding. Accordingly, on that ground alone, the judgment of the Court of Appeals must be reversed.

Upon the considerations made to appear in the opinion of the Court of Appeals, we have no doubt that a plaintiff may join, in distinct counts, in one complaint a sufficiently stated cause of action, arising out of the one transaction, for breach of duty under the state Employers' Liability Act and for breach of duty under the federal Employers' Liability Act; but, as before pronounced, he cannot recover as upon the authority of the local statute in a case governed exclusively by the national statute, nor can he recover as upon the authority of the national statute in a case that does not fall within the national enactment.

For the error indicated, the writ is granted, and the judgment of the Court of Appeals is reversed, and the cause is remanded to the Court of Appeals.

The writ is granted.

On Rehearing.

[5] It is insisted for appellee that counts numbered 2 and 3½ should not be interpreted as declaring as for liability under the state Employers' Liability Statute. These counts, along with count numbered 7, have been reconsidered, and our opinion is that counts 2 and 3½ were drawn to state a cause of action under the state statute. The form and phraseology of each of them leaves no basis for doubt in that respect. Count 7 is plainly drawn to state a cause of action under the federal Employers' Liability Act. It is essential to the certain and orderly administration of the law of master and servant, as these distinct enactments establish it, that the initial pleading, or its amendment, be so drawn that the courts may be able to determine under which of the two enactments, state or federal, the respective counts are intended to assert a claim for liability. The sufficiency vel non of counts under our state

statute necessarily involve questions that will not arise upon the issue of sufficiency vel non of counts seeking to declare upon a liability under the federal statute; and the provisions of the latter enactment forbid matters of defense admissible in an action under the state statute.

Furthermore, the trial of this case at nisi prius was conducted by the parties and the trial court upon the theory that counts 2 and 3½ were drawn to state a cause of action under the state statute, and that count 7 was drawn to state a cause of action under the federal statute.

The application of the appellee (in the Court of Appeals) for rehearing is therefore denied.

Application denied.

(190 Ala. 340)

CAPITAL SECURITY CO. v. GILMER.
(No. 112.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. BUILDING AND LOAN ASSOCIATIONS — SALE OF CONTRACTS—FRAUD.

Where one dealing with an agent to take applications for home purchasing investment contracts signed without reading an application reciting that the applicant relied solely on the terms of the contract and the options set forth on the back of the application and made a part thereof, and retained the contracts without reading them, and the agent made no effort to prevent a reading of the application and of the contracts, nor made any misrepresentations as to the contents of the application, the applicant was not entitled to relief on the ground of fraud based on statements by the agent as to the contents of the contracts.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. § 10; Dec. Dig. ¶8.]

2. BUILDING AND LOAN ASSOCIATIONS — SALE OF CONTRACTS—FRAUD—PLEADINGS—ISSUES.

Where plaintiff, alleging that she was, by fraudulent representations of an agent of defendant, induced to apply for its home purchasing investment contracts and led to pay it money, and that on the discovery of the fraud she seasonably elected to end the agreement and demanded a recovery of the money paid, the issues could be presented by a plea of the general issue.

[Ed. Note.—For other cases, see Building and Loan Associations, Cent. Dig. §§ 81-85; Dec. Dig. ¶41.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Assumpsit by Mrs. H. T. Gilmer against the Capital Security Company. From a judgment for plaintiff, defendant appeals. Transferred from Court of Appeals. Reversed and remanded.

The action was on the common counts. There was quite a number of pleas filed which are not deemed necessary to be here set out, as is indicated by the opinion. The controversy was over certain sums paid to defendant by plaintiff under a home purchasing

investment contract. It appears from the pleading and the evidence that plaintiff made and signed a written application for said contract, and that said written application contained the following provision:

"I make this application expressly and solely upon the terms and conditions of said contract, and the option, provision and requirements set forth on the back of and made a part thereof, and not upon the faith of any statement, undertaking or guaranty on the part of said solicitor or any other person."

Plaintiff set up that she was induced to enter the contract upon a statement of such facts, and under such circumstances as to constitute a fraud at law, in that defendant's agent, one Phillips, while acting within the line and scope of his authority, came to plaintiff and stated that he was selling a certain contract for defendant known as the "home purchasing investment contract." The said Phillips falsely and fraudulently represented, and with the intent to deceive stated, to plaintiff, that said contract contained a provision by the terms of which plaintiff would obtain a loan of \$1,000 at the end of six months, provided plaintiff paid defendant at the rate of \$6 per month for a period of six months, and that not having read said contract or having the same read to her, but relying on the statement of its contents as aforesaid, agreed to purchase six of the aforesaid contracts and signed a paper falsely and fraudulently with intent to deceive represented to her to be an application for the contracts as represented to her, relying on the aforesaid statement as to its contents, and that shortly thereafter six contracts were delivered to plaintiff by defendant which plaintiff retained without reading, relying on the statement of their contents as aforesaid, and made and continued to make her payments as agreed, and defendant failed to make said loan on defendant's demand for same at the expiration of six months, and that plaintiff was told by Phillips while acting within the line and scope of his authority, or within the apparent scope of his authority, falsely and fraudulently, with intent to deceive, that under said contracts plaintiff would get her loan if plaintiff would only make two additional payments of \$6 on each contract, and relying on said promise, and without reading said contracts, plaintiff made the additional payments, etc.

The application contains the following:

I have to-day paid R. A. Phillips, a solicitor whose authority I understand extends only to the sale of home purchasing investment contracts, issued by the company under their printed terms and conditions. * * * I have examined the terms of your company and have read, and am familiar with, all the terms and conditions of its home purchasing investment contract, and also with all the options, provisions and requirements set forth on the back thereof, and made a part of said contract, and I agreed to abide thereby, * * * and I make this application expressly and solely upon the terms and conditions of said contract, and the

options, provisions and requirements set forth on the back, and made a part thereof, and not upon the face of any statement, promise, undertaking or guaranty upon the part of said solicitor or any other person.

Edward S. Watts, of Montgomery, for appellant. Weil, Stakely & Vardaman and Walter S. Richardson, all of Montgomery, for appellee.

DE GRAFFENRIED, J. This is an action upon the common counts and, in some of its aspects, is similar to the cases of *Southern Loan & Trust Co. v. Gissendaner*, 4 Ala. App. 523, 58 South, 737, and *Capital Security Co. v. Holland*, 6 Ala. App. 197, 60 South, 495.

The pleadings in this case we think meet the defects which were pointed out by the Court of Appeals in *Capital Security Co. v. Holland*, supra.

1. In this case there is one material element lacking which was pointed out in the *Gissendaner Case*, supra. In the *Gissendaner Case* the agent of the defendant had been, in childhood, a playmate and schoolmate of Mrs. Gissendaner. They had been friends all of their lives and called each other by Christian name. This agent—there is some evidence tending to show—took advantage of the intimate personal relations which thus existed between him and Mrs. Gissendaner so as to lead her into the belief that he wanted to aid her in buying a home, and under that fraudulent assumption, induced her to sign an application, telling her that it was unnecessary for her to read the application, "that all she had to do was to trust him, and that if she would do so he would see that the loan was made to her by October first." The agent in that case, there was evidence tending to show, took advantage of a relation which years of friendship and intimate association had established between him and Mrs. Gissendaner, to lead her, on behalf of his company, without reading the application, into a contract with his company, by making with her, on behalf of his company, for a fraudulent purpose, a contract which, when it was made, there was no intention to fulfill, and but for which fraudulent agreement Mrs. Gissendaner would not have made the contract.

[1] In this case there was no such relation existing between the plaintiff and the agent of the defendant as existed between Mrs. Gissendaner and the agent with whom she dealt, and there was no legal excuse for the plaintiff in this case to have been lulled into such absolute feeling of repose and trust as some of the evidence in the *Gissendaner Case* tended to show existed in the plaintiff in that case. If the evidence of the plaintiff is to be believed, she might not have applied for these contracts but for the fact that she regarded the agent with whom she dealt as a trustworthy man, and it may be that she would not have signed the application if the

agent had not stated to her that if she signed the application the contracts which would come to her from his company would contain certain stipulations as to a loan, etc. There was, however, no effort on the part of this agent to prevent the plaintiff from reading the application. The application, the plaintiff must have known, was to be forwarded by the agent of his company, and that upon its faith the company would, if the application was satisfactory, issue the contracts.

Under all the evidence in this case, it was the duty of the plaintiff, in the exercise of business precaution, to have read her application. She was dealing with an agent who was authorized to take applications for contracts—not to sell contracts—and just above the plaintiff's signature to the application in this record there is this significant provision.

"I make this application expressly and solely upon the terms and conditions of said contract and the options, provisions and requirements set forth on the back and made a part hereof, and not upon the faith of any statement, promise, undertaking or guaranty on the part of said solicitor or any other person."

Under the evidence in this case there is no legally sufficient reason shown by the plaintiff for her failure to read her application, and we see no reason why, under the evidence in this case, she should be permitted, upon the ground of fraud, to defeat the defendant's recovery. In this case, as already stated, there was no effort on the part of the agent to prevent the plaintiff from reading the application, and there was no misrepresentation as to what the application contained. The best that can be said for the plaintiff is that there is evidence tending to show that there was a statement by the agent as to what the contracts, if issued by the company, would contain. The application, if the plaintiff had exercised the ordinary business precaution to read it before signing it, would have shown her that this statement of the agent in no way bound the company. *Prestwood v. Carlton*, 162 Ala. 327, 60 South, 254.

Under the evidence in this case, defendant was entitled to affirmative instructions in its favor. *Dunham Lumber Co. v. Holt*, 123 Ala. 336, 26 South, 663. Under the law, as applied to the evidence in this case, the plaintiff is charged with knowledge of the contents of her application, and the application shows that the defendant was not bound by any statement or representation of its solicitor.

[2] 2. There was, in this case, much pleading. The proposition of the plaintiff is that she was, by fraudulent representations of an agent of the defendant, who induced her to apply for certain contracts, led to pay the defendant certain sums of money, and that she, upon the discovery of the fraud, seasonably elected to put an end to her agreement, and that she is, *ex æquo et bono*, entitled to recover of the defendant the money so paid. The entire matter of controversy in this case.

therefore, was presented by the plea of the general issue.

Reversed and remanded. All the Justices concur.

(190 Ala. 576)

BUTLER v. HILL. (No. 102.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. ACKNOWLEDGMENT — 56 — CERTIFICATE — CONCLUSIVENESS — "MINISTERIAL ACT" — "JUDICIAL ACT."

The taking of acknowledgments of conveyances by an officer authorized to do so is not a "ministerial act," but an "act judicial" in character, and when such an officer acquires jurisdiction in a particular case, and certifies the facts and acts taking place in the form and as the law prescribes, his certification can only be contradicted or impeached for fraud or duress; and hence parol evidence is only admissible to show an absence of jurisdiction or fraud or duress affecting the process of giving and taking the acknowledgment.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 301, 302, 315; Dec. Dig. —56.]

For other definitions, see Words and Phrases, First and Second Series, Judicial Act; Ministerial Act.]

2. ACKNOWLEDGMENT — 51 — INVALID CERTIFICATE — EFFECT ON VALIDITY OF INSTRUMENT.

While an acknowledgment is, when efficacious, a part of a conveyance, where the conveyance, apart from the acknowledgment, is not affected with any element of invalidity, and can stand as valid and efficacious to pass the title or right it purports to transmit without an acknowledgment, the conveyance can and will stand, notwithstanding the absence of jurisdiction on the part of the officer taking the acknowledgment or fraud or duress avoiding the act and certification of such officer.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. § 268; Dec. Dig. —51.]

3. ACKNOWLEDGMENT — 55 — CERTIFICATE — CONCLUSIVENESS.

Where an alleged grantor was present before a justice of the peace on the occasion when a certificate of acknowledgment recited her voluntary execution of a deed, and the deed was written by the justice at that time, if she went there for the purpose of perfecting the execution and acknowledgment of a conveyance to the grantee or came to entertain that purpose while in the presence of the justice, and thereupon submitted to the justice's exercise of his power to take her acknowledgment, his jurisdiction was complete and conclusive of the facts certified by him, which certification comprehended her execution of the instrument and rendered it valid, unless vitiating fraud induced her execution of the instrument.

[Ed. Note.—For other cases, see Acknowledgment, Cent. Dig. §§ 290-300, 303-314; Dec. Dig. —55.]

4. EJECTMENT — 110 — INSTRUCTIONS — APPLICATION TO EVIDENCE — CERTIFICATE OF ACKNOWLEDGMENT — PRESUMPTIONS.

In ejectment against a person claiming under an alleged deed from plaintiff, where there was evidence tending to show that plaintiff's consent to the execution of a deed to defendant, instead of a will in his favor, was induced by fraudulent misrepresentations, and, under the evidence, the perfection and effectuation of this change was, if affected with fraud, a necessary result of a wrong caused by the concurrence of misconduct of defendant and the justice of

the peace who took plaintiff's acknowledgment of the deed, it being asserted by plaintiff that she neither signed nor authorized the signing of the deed, instructions that the justice's certificate, in the absence of proof of fraud, was sufficient proof of the voluntary execution of the deed and raised a presumption of its validity, it could only be impeached by proof of a fraudulent combination between defendant and the justice, and that it raised a presumption of validity which could only be rebutted by clear proof of fraud, duress, or imposition practiced on plaintiff, in which the justice and defendant participated, were erroneously refused.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-328; Dec. Dig. —110.]

5. TRIAL — 253 — INSTRUCTIONS — CERTIFICATE OF ACKNOWLEDGMENT — PRESUMPTION — IGNORING ISSUE.

In such action, instructions if plaintiff went to the office of the justice of the peace for the purpose of executing some paper which would protect defendant in the possession of the property better than a will previously executed, or if she went before the justice for the purpose of executing a paper which would vest title in defendant, to find for defendant, were properly refused, as they pretermitted the phase of the evidence tending to indicate that, though the acknowledgment was perfect, the instrument was avoided by fraud previous to the acknowledgment.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. —253.]

6. EJECTMENT — 90 — VALIDITY — EVIDENCE — VALUE OF LAND — FRAUD.

In such action the value of the land in question was relevant and admissible on the issue of fraudulent conduct on the part of defendant in inducing plaintiff to execute the deed.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. —90.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Ejectment by Lucy Hill against Adolph Butler. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, Butler v. Hill, 65 South. 1032.

The facts sufficiently appear from the opinion. The following charges were refused defendant:

(2) The certificate of the justice of the peace Tarver, in the absence of proof of fraud, is sufficient proof of the voluntary execution of said deed by plaintiff, and raises a presumption of its validity, which can only be impeached by proof of fraudulent combination between Butler and B. C. Tarver.

(5) I charge you that the certificate of Tarver, justice of the peace, that plaintiff acknowledged before him that she executed a deed in question in this case voluntarily, raises a presumption in favor of the validity of said deed, which can only be rebutted by clear proof of fraud, duress, or imposition, practiced on plaintiff, in which B. C. Tarver and Adolph Butler participated.

(3) I charge you that if you believe from the evidence that plaintiff went to the office of the justice of the peace Tarver for the purpose of executing some paper, which would protect Adolph Butler in the possession of said property better than the will which he had previously executed, you must find for defendant.

(4) I charge you that if you believe from the evidence that plaintiff went before justice of the peace Tarver for the purpose of executing a paper, which would vest title to the property involved in this suit in defendant, you must find for defendant.

The following charges were given for plaintiff:

(A) If the jury believe from the evidence that Lucy Hill did not make her mark to the deed from her to Butler, dated August 9, 1906, and did not acknowledge before Tarver that she knew the contents of said deed and executed the same voluntarily on that date, they must find a verdict for plaintiff.

(B) If the jury believe from the evidence that the execution of the deed from Lucy Hill to Adolph Butler, dated August 9, 1906, was procured by the fraud of said Butler, they must find a verdict for plaintiff for the land sued for.

(C) If the jury believe from the evidence that Adolph Butler requested Lucy Hill to go with him on August 9, 1906, to Tarver's office to have her will completed or corrected, and she went with him to said office at that time, and that she did not know that the paper she is said to have signed that day was a deed and not a will, they must find for plaintiff.

(D) If the jury believe that Lucy Hill could not read or write on August 9, 1906, and that Butler requested her to go to Tarver's office to have her will completed or changed or corrected, and she went there pursuant to that request, and she did not know and was not informed that the paper she is said to have signed and acknowledged was a deed and not her will, then even though she made her mark, and acknowledged that she knew the contents of the paper, and executed it voluntarily, you must find for plaintiff.

(E) If the jury believe from the evidence that Butler induced Lucy Hill to believe, when she was in B. C. Tarver's office on August 9, 1906, that the paper she is said to have signed at that time was something else than a deed, they must find for plaintiff.

(F) If the jury believe from the evidence that Butler induced Lucy Hill to make her mark to the deed to Butler dated August 9, 1906, and acknowledge the execution thereof by making her believe that the paper she was signing or acknowledging was her will, they must find a verdict for plaintiff for the land sued for.

Rushton, Williams & Crenshaw, of Montgomery, for appellant. Ball & Samford, of Montgomery, for appellee.

McCLELLAN, J. Lucy Hill instituted this action in statutory ejectment against Adolph Butler, to recover four acres of land. The land formerly belonged to Lucy, having come to her through her husband, Warren Hill. Butler's reliance for right and title to the land is a deed, purporting to have been executed, by mark, by her to him on August 9, 1906, and attested by B. C. Tarver and H. S. Houghton, and acknowledged according to the form prescribed by law before Tarver, as justice of the peace. Tarver died before the trial below. Lucy asserts that this instrument was and is void, and so on two grounds, as we interpret the contentions from the evidence: (a) That she did not sign the paper—that the acknowledgment is false: (b) and, failing herein, that she was induced by the fraudulent scheming and misrepresentations of Butler to execute the instrument.

[1] In the early case of *Munn v. Lewis*, 2 Port. (Ala.) 24, it was ruled that the act of an officer, so authorized, to take acknowledgment of conveyances, was ministerial, not judicial. This doctrine prevailed in *Halso v. Seawright*, 65 Ala. 431, and *Abney v. De*

Loach, 84 Ala. 393, 399, 4 South. 757. The like doctrine colored, if not more, the rulings in other cases. But this court long since departed from the doctrine, doubtless upon and because of the considerations thus stated in *Grider v. American F. L. M. Co.*, 99 Ala. 281, 290, 12 South. 775, 779 (42 Am. St. Rep. 58):

"We know the absolute and implied faith and trust which, in practice, purchasers of real estate repose, and must of necessity repose, in the formal and regular certificates of authorized officers, authenticating the regular and legal execution of conveyances, and the disastrous consequences which may flow from a rule which would allow those certificates to be questioned and set aside against purchasers who have parted with valuable interests in reliance upon them. * * *"

But, at the same time, this court expressed, with like consummate caution and comprehension of the importance and relation of the inquiry, the hazard and injustice of a rule that would clothe an officer with too great power in the premises, when it said:

"* * * Yet, on the other hand, we perceive the manifest injustice of a rule which would deprive one of his property, without his knowledge or consent, upon the mere baseless fabrication of another."

The departure from the rule of the earlier cases mentioned was fundamental and brought the court to the view that the taking of acknowledgments of conveyances by an officer so authorized was not a ministerial act, but an act judicial in nature. At first the court, upon occasion, characterized the power thus exercised as either judicial or quasi judicial. However, the more recent expressions of this court have deliberately defined the nature of that power as judicial, without qualification. From this premise the necessary result was, as the court had often ruled, to visit upon the act, by an officer so authorized, in taking an acknowledgment, the rules of law usually applicable to the consideration of acts and processes judicial in the ordinary sense in which this power manifests itself in judicial matters. The position of this court, established by deliberate and cautious consideration, appears not to be in accord with the view prevailing in many other jurisdictions—a view that has been affected, if not induced, by the logic of the principles and the considerations stated in 1 Enc. L. & P. pp. 868-870. Whether this court will, when the occasion unavoidably arises, apply to the acts of misfeasance or malfeasance of an officer authorized to take and certify acknowledgments the full principles of the law relating to judicial power in its true legal sense, is a question not to be anticipated.

The nature of the act of taking an acknowledgment of conveyances being judicial, the necessary consequence is that this court has affirmed and enforced the doctrine that where an officer authorized to take and certify acknowledgments acquires jurisdiction in the given case to do so, and certifies the

facts and acts so taking place in the form and as the law prescribes, the certification thus made can only be contradicted or impeached on the ground of fraud or duress. So we have come to the doctrine that may be thus stated in legal formula: Parol evidence is only admissible, in such circumstances, to show: First, the absence of jurisdiction of the officer to take the acknowledgment questioned in the concrete case; and, second, that fraud or duress affected the process of giving and taking the acknowledgment.

[2] While an acknowledgment is, when efficacious, a part of a conveyance, yet in cases where the conveyance (apart from the acknowledgment) is not affected with any element of invalidating circumstance, and could stand as valid and efficacious to pass the title or right it purports to transmit without an acknowledgment, the conveyance could and would stand, notwithstanding the absence of jurisdiction, or the presence of fraud or duress might have avoided the act and certification of the officer assuming to take and certify the acknowledgment. *Wright v. Bentley Lumber Co.*, 65 South. 353. Such is not, of course, possible, where the subject of the conveyance is the homestead, to the alienation of which the wife must assure her consent and express her concurrence by a formal acknowledgment.

Now what are the elements of this jurisdiction, when authoritatively exercised? As the logical, sequential result of the promise afforded by the judicial character of the act of taking and certifying an acknowledgment—a result that by steady, sound progression in well-considered adjudications here has been attained—this concise statement taken from *Orendorff v. Suit*, 167 Ala. 564, 565, 52 South. 744, of established doctrine, as respects jurisdiction to act and certify, is the law with us:

“ * * * When the certifying officer acquires jurisdiction by having the grantor and the instrument to be acknowledged before him, and enters upon the exercise of his jurisdiction, the resulting certificate is conclusive of the truth of all those facts therein stated which the officer is authorized by law to state. * * * The mere casual presence of a putative grantor and the possession of an instrument purporting to have been signed are not sufficient to confer jurisdiction.”

In addition to the decisions noted in the opinion quoted, these, subsequently delivered, are, in principle, in accord: *Byrd v. Bailey*, 169 Ala. 452, 53 South. 773, Ann. Cas. 1912B, 331; *Parrish v. Russell*, 172 Ala. 1, 55 South. 140; *Freeman v. Blount*, 172 Ala. 655, 55 South. 293; *Gilley v. Denman*, 64 South. 97. In the last decision a distinction was taken, whereupon it was affirmed that the regularly certified acknowledgment, before an officer so authorized, did not preclude parol evidence to show that the acknowledgor did not execute the conveyance voluntarily, though such an one did acknowledge before the officer that its execution was voluntary. Evi-

dence to show that the execution was not voluntary is referable to the category that permits parol proof of fraud and duress for the purpose of invalidating the instrument.

[3] It appears without dispute from the evidence that Lucy Hill was present before the justice of the peace on the occasion when the certificate of acknowledgment recites her voluntary execution of the instrument; and that the instrument was written by the officer at that time. There is, however, conflict in the evidence upon the third and, if present, completing jurisdictional element, viz., whether it was the purpose of Lucy Hill, on this occasion, to give an acknowledgment of her execution of the instrument in question. If she went there for the purpose of perfecting the execution and acknowledgment of a conveyance to Butler, or came to entertain that purpose while in the presence of the officer, and thereupon submitted herself to officer's exercise of his power to take her acknowledgment of the execution of the instrument, then the officer's jurisdiction was complete and conclusive of the facts certified by him, which certification, so conclusive, comprehended her execution of the instrument and rendered it valid, unless vitiating fraud affected her induction to execute it.

While, as said in *Gilley v. Denman*, 64 South. 97, upon invitation of the facts there shown, “it is not essential to the impeachment of a certified acknowledgment that the certifying officer should participate in the fraud or duress practiced upon the grantor,” yet, under the evidence here recorded, it was, if the acknowledgment was to be invalidated, inevitable that the officer should have lent himself, as an officer, to the not only false certification of facts, but also that he immediately contributed to the forgery of Lucy Hill's name (mark) to the instrument.

[4] There was evidence before the jury tending to sustain the plaintiff's second contention, viz., of fraudulent misrepresentation inducing the grantor to consent to the execution of a deed to Butler, instead of a will in his favor, which it was thought necessary, in order to comply with the terms of the original devise of the property to her, to effect the investment of Butler with title to the land. Under the evidence, the perfection and effectuation of this change was, if affected with vitiating fraud, a necessary result of a wrong wrought by the concurrence of misconduct of both the officer, Tarver, and Butler; it being asserted by plaintiff that she did not sign by her mark, or otherwise authorize the signation of the instrument of August 9, 1906. So, under the evidence in this case, charges numbered 2 and 5, refused to defendant, should have been given. Their refusal was error.

[5] It was not error to refuse charge 3, requested by defendant, for that it pretermitted in hypothesis the phase of the evidence wherefrom the jury might have concluded

that the purpose entertained by Lucy Hill when she gave, if so, the acknowledgment before the officer was predicated of fraudulent misrepresentation affecting the previous (to the acknowledgment) judgment of Lucy Hill. In other words, the acknowledgment of the execution of the instrument may have been perfect, yet back of that there may have intervened such fraudulent conduct by Butler in the premises as to avoid the instrument. Charge 4, requested by defendant, was, for like reason, well refused. Charge 6, refused to defendant, appears to have been sufficiently covered by charge 5, given to the jury at defendant's request.

Under the evidence tending to support the two before stated theories pressed for the defendant, we can see no fault in any of the charges given for plaintiff, viz., those lettered A, B, C, D, E, and F.

[8] The value of the land in question was relevant and admissible on the issue of fraudulent conduct on the part of Butler in his asserted induction of plaintiff to execute a deed, in lieu of the supposed ineffectual testamentary instrument wherein he was the beneficiary.

For the errors indicated, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

(190 Ala. 327)

MUTUAL LIFE INS. CO. OF NEW YORK
v. WITTE. (No. 508.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. INSURANCE §640—ACTIONS ON POLICIES
—PLEAS—MISREPRESENTATIONS.

Pleas alleging that the insured represented that his health had been good from infancy, when in fact it was not always good, and that he was in failing health due to a disease unknown to the insurer, and pleas otherwise failing to show with certainty wherein the alleged representations were false, are demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. §640.]

2. INSURANCE §640—ACTIONS ON POLICIES
—PLEAS—MISREPRESENTATIONS.

A plea alleging that the insured represented that his health was good, when in fact he was suffering from a disease unknown to the insurer, which increased the risk, is self-contradictory, since, if the jury did not know the nature of the disease, it could not know that it increased the risk.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1609-1612, 1614-1624; Dec. Dig. §640.]

3. PLEADING §18—REQUISITES—CERTAINTY.

All matter pleaded ought to be clearly and distinctly stated, so that it may be fully understood by the adverse party, and by the jury, and the judges.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 39, 64; Dec. Dig. §18.]

4. APPEAL AND ERROR §1040—HARMLESS
ERROR—DEMURRERS TO PLEAS.

Error in sustaining demurrers to some of defendant's pleas is harmless, where other pleas set up the same defense, and under them defendant could introduce all the evidence which would be admissible under those held bad.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. §1040.]

5. TRIAL §251—INSTRUCTIONS—REFERENCE
TO PLEA.

A charge requested by the defendant that, if it proved any one of its pleas, plaintiff could not recover, was properly refused, especially where demurrers had been sustained to some of the pleas.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. §251.]

6. EVIDENCE §314—HEARSAY.

Hearsay evidence that the mother of insured had died of tuberculosis is inadmissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1188-1173; Dec. Dig. §314.]

7. INSURANCE §655—MISREPRESENTATIONS
—ADMISSIBILITY OF EVIDENCE.

Where the defense to recovery on a life insurance policy was misrepresentations by insured, it was not error to exclude evidence of the poor condition of his health, of the fact that he was engaged in an occupation exposing him to tuberculosis, or was in a weak condition after the policy was issued, where there was no offer to show that the conditions existed at the time the application was made.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1685; Dec. Dig. §655.]

8. INSURANCE §645—ADMISSIBILITY OF
EVIDENCE—COLLATERAL ISSUES.

Where the defense to recovery on a life insurance policy was fraudulent misrepresentations, evidence that insured had written a letter claiming indemnity on the ground of illness under an accident insurance policy, and that on such application a physician would have been consulted, was inadmissible as raising collateral issues, where it was not conceded that insured had such a policy, or made a claim thereunder.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1554, 1632-1644; Dec. Dig. §645.]

9. APPEAL AND ERROR §500—QUESTIONS
PRESENTED FOR REVIEW—SUFFICIENCY OF
RECORD.

Where the record, which showed that a notice of claim on an accident policy had been received by the witness, but witness did not know that it was sent by the insured, was followed by the statement that the clerk would set out the claim in full, and a showing by the clerk that it had never been filed with him, error in the rulings as to the claim for indemnity cannot be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. §500.]

10. EVIDENCE §564—COMPARISON OF HAND-
WRITING—DISPUTED STANDARD.

An expert witness cannot testify as to the similarity or identity of the handwritings in two documents, where the signature of neither was admitted, conceded, or proven without dispute.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2385-2389; Dec. Dig. §564.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Action by Marie Witte against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Tillman, Bradley & Morrow, of Birmingham, and B. G. Farmer, of Dothan, for appellant. W. L. Lee, of Columbia, for appellee.

MAYFIELD, J. The action is on a life insurance policy. The insurance company interposed 18 pleas—the general issue and 17 special pleas. The special pleas were of two classes; one class setting up false and fraudulent representations by the insured, made with the intent to deceive, in obtaining the policy, and the second class setting up false representations by the insured in obtaining the policy sued on, which representations, being false, increased the risk.

The pleas were thus confessedly framed under each of the two alternatives contained in section 4572 of the Code, which section reads as follows:

"No written or oral misrepresentation, or warranty therein made, in the negotiation of a contract or policy of life insurance, or in the application therefor or proof of loss thereunder, shall defeat or void the policy, or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter misrepresented increase the risk of loss."

A great number of pleas, similar to the ones in question, were construed with reference to this and other sections of the Code in the cases of *Insurance Co. v. Allen*, 174 Ala. 517, 56 South. 568, and *Insurance Co. v. Gee*, 171 Ala. 435, 55 South. 166. It is therefore unnecessary to restate the rules as to the sufficiency of such pleas in cases like this; it being both apparent and conceded that the pleas were proved with special reference to the pleas and the opinions and decisions in those two cases.

The trial court sustained demurrers to pleas 2, 6, 10, 12, and 14, and overruled demurrers to pleas 3, 4, 5, 7, 8, 9, 11, 13, 15, 17, and 18.

[1, 2] There was no error in sustaining demurrer to any one of the pleas. They were each defective under the rules declared in *Allen's Case*, supra, and *Gee's Case*, supra. Each was bad for one or more of the following reasons: Being too indefinite and uncertain in averment to show wherein the alleged representations were false. No definite and material issue of fact could be taken thereon. For example, some alleged that the insured represented that his health was good from infancy, when in fact it was not always good, and he was in failing health due to a disease unknown to the defendant; and others, after this, alleging that insured had a disease which was unknown, yet averring that the unknown disease increased the risk. Such pleas, of course, were self-contradictory. If a disease was unknown, how could it be known to be one which increased the risk?

How was it possible for the plaintiff to disprove this plea, except to prove that the insured never, in his lifetime, had any disease known to the nomenclature of medical science? Courts will not enter upon such inquiries.

[3] An important requisite in all pleading is certainty. The matter pleaded ought to be clearly and distinctly stated, so that it may be fully understood by the adverse party, by counsel, and by the jury and the judges.

[4] There was no error in sustaining demurrer to any of the other pleas, which did not contain the defect as to uncertainty. They were each bad under the rules declared in *Allen's* and *Gee's Cases*, supra. Moreover, if there could be said to be any technical error in any one of the rulings on these pleas, it is made to appear beyond doubt that no possible injury did or could result from such ruling, for the reason that the other pleas, as to which the demurrers were overruled, set up the identical defense attempted to be set up in these pleas. All the legitimate proof which could have been offered under any one of these pleas, as to which demurrers were sustained, could have been offered under one or another of the numerous pleas as to which demurrers were overruled.

There was no error in refusing the general affirmative charge to the defendant, upon the whole case, or as to any one of the many pleas. The mere fact that insured died of consumption did not prove that he had the disease when he was insured. The evidence falls far short of showing that he did have such disease, or any other disease, when he made the application for insurance. The proof as to any one of the pleas was clearly a question for the jury.

[5] There was no error in refusing charge 21, to the effect that, if the jury believed from the evidence that the defendant had proved any one of its pleas, their verdict should be for the defendant. A litigant has no right to require a jury to go through all the pleadings in a case like this, and to sort out those as to which demurrers were sustained, and those as to which they were overruled, and to say whether this one or that one was proved. For example, in this case, there were in the file some pleas as to which demurrers were sustained, and hence no issue was found as to these pleas; yet this charge would have authorized, if it did not require, the jury to find for the defendant, if they believed that plea 2, 6, 10, 12, or 14 was proven. This charge, in the case, might have misled the jury, if it had not been otherwise bad.

[6] It was not error to refuse to allow proof, by hearsay testimony, as to whether or not the insured's mother died of pulmonary tuberculosis.

[7] There was no error in declining to allow proof that insured was engaged in work which was conducive to tuberculosis, nor that he was subject or liable to contract such

a disease, nor that he was in a weak and debilitated condition after the policy was issued, unless it had been shown, or offered to be shown, that he was in such condition when the application for insurance was made, and that it had continued. It must be expected, in all life insurance policies or contracts, that the insured will thereafter get weak, feeble, and debilitated, and indeed the contract itself provides for his death thereafter.

[8, 9] There was no error in declining to allow the defendant to prove by the witness Stringfellow that insured wrote him a letter stating that he was ill and desired to apply for indemnity in consequence thereof, under an accident insurance policy which the insured had with another company. This was *res inter alios acta*. It might have opened up a flood of evidence as to whether or not insured had such a policy, whether or not he wrote the letter in question, and whether the statements therein were true or false. The trial court properly declined to go into these inquiries. If the insured had testified as a witness, this proof might have been admissible, after proper predicates, to contradict or discredit his evidence; but he was not a witness, and could not affirm, deny, or explain the transactions with this accident company. If it had been conceded that insured had such a policy, and wrote such letter, and thereafter made out a claim, on the ground of illness, for compensation under such accident policy, the question would be before us as to the admission of the letter and the application for compensation. But it is not now before us. As to these matters the transcript contains the following recitals:

"The defendant then asked the witness this question, 'Did Mr. Witte make any claim of you under that policy?' The plaintiff objected to this question, and it was not passed on by the court. The witness testified that the claim was in writing, and the defendant showed the witness a paper, and the witness said it was a notice of claim, but he did not know himself that Witte did or did not sign the paper; that he received it in the due course of mail at his place of business in Montgomery; that it was in an envelope. The defendant asked the witness, 'Was it postmarked at Lockhart?' Plaintiff objected to the question. The court sustained the objection, and defendant excepted. The said claim or notice was in words and figures as follows: (The clerk will set out said claim in full.) No such paper was ever in my possession and is not now in the file; hence not set out."

In this state of the record we cannot say that there was any error in the rulings as to the letter or as to the claim for indemnity under the accident insurance policy, or any error in declining to allow the defendant to prove by the witness Stringfellow whether or not physicians were consulted when applications reached the medical department of the insurance company in New York, and that the medical examiner would in time write the physicians shown to have been consulted. This was *res inter alios acta*.

[10] There was no error in declining to allow the expert witness to testify as to the similarity, or the identity, of the handwritings of the application for life insurance and of the letter addressed to the witness Stringfellow. It was not sufficiently shown or admitted that the insured signed either one. The genuineness of neither was admitted or conceded or proven without dispute. Consequently comparison was not admissible, even by an expert on the subject.

We find no error and the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and DE GRAFFENRIED, JJ., concur.

(190 Ala. 157)

LOUISVILLE & N. R. CO. v. BOUCHARD.
(No. 829.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 21, 1915.)

1. RAILROADS \Leftrightarrow 484—FIRES—NEGLECT—EVIDENCE—QUESTION FOR JURY.

Evidence, in an action against a railroad company for damages from fire, held to authorize submitting to the jury whether the fire was started by sparks from defendant's locomotive, and whether there was negligence in the handling or equipment of the locomotive.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. \Leftrightarrow 484.]

2. EVIDENCE \Leftrightarrow 194—DEMONSTRATIVE EVIDENCE—CINDERS.

Where, in an action for the destruction of buildings, their contents, and a wagon, from a fire started by a locomotive, a witness testified that, after the train passed and set fire to the grass in her field, she picked up some cinders which had fallen in the grass, the cinders, when produced by her, were properly admitted in evidence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 679; Dec. Dig. \Leftrightarrow 194.]

3. RAILROADS \Leftrightarrow 481—FIRES—EVIDENCE.

In an action for damages from a fire started by a locomotive, plaintiff's testimony, as to the direction in which the wind was blowing when he awoke about 50 minutes after passage of defendant's train, was properly admitted.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1717-1729; Dec. Dig. \Leftrightarrow 481.]

4. RAILROADS \Leftrightarrow 484—FIRES—INSTRUCTIONS—EVIDENCE.

In an action for damages from a fire started by a locomotive, the fact that the distance which witnesses estimated sparks to have been carried by the wind was found by a close calculation to be less than the distance required in order that the fire in question might have been started by like sparks did not demand an instruction, the effect of which would have been to require a verdict for defendant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1740-1746; Dec. Dig. \Leftrightarrow 484.]

5. RAILROADS \Leftrightarrow 485—FIRES—INSTRUCTIONS—DIRECTION OF WIND.

In an action for damages from fire started by sparks from a locomotive, a requested instruction to find for defendant if the wind was blowing in the same direction when the train passed the place where the fire started, as when it passed the witness' house, was misleading, in that it might be construed as referring to the

"exact direction" of the wind, and omitted any consideration of velocity or variations in either direction or velocity.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1747-1756; Dec. Dig. ¶485.]

6. TRIAL ¶237—INSTRUCTIONS—DEGREE OF PROOF REQUIRED.

In an action for damages from a fire started by sparks from a locomotive, a requested instruction to find for defendant if the evidence left the mind of the jurors "in doubt, confusion, and uncertainty," as to a certain fact, was properly refused, since it required plaintiff to prove his case beyond the slightest doubt.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 542, 548-551; Dec. Dig. ¶237.]

7. APPEAL AND ERROR ¶1046 — HARMLESS ERROR—STATEMENT BY COURT—INSTRUCTIONS.

A statement by the court, disclosing that he had previously refused instructions given at defendant's request, did not require a reversal, where the jury may have understood therefrom that on reflection the court was persuaded that such instructions were correct.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4128-4131, 4134; Dec. Dig. ¶1046.]

8. APPEAL AND ERROR ¶900—PRESENTATION FOR REVIEW—PRESUMPTION.

Error will not be presumed on appeal, but must be made to affirmatively appear.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3667-3669; Dec. Dig. ¶900.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Robert E. Bouchard against the Louisville & Nashville Railroad Company for damages for setting out fire. Judgment for plaintiff, and defendant appeals. Affirmed.

The facts sufficiently appear from the opinion of the court. The following charges were requested by, and refused to, defendant:

(2) The court charges the jury that, if they believe from the evidence that the wind was blowing in the same direction when train No. 2 passed St. Elmo, that it was blowing when Mrs. Sailor and her daughter saw it pass Mrs. Sailor's place, they ought to find a verdict for defendant.

(7) The court charges the jury that, if the evidence leaves their minds in doubt, confusion, and uncertainty as to whether, at the time train No. 2 passed St. Elmo, the wind was or was not blowing in the same direction that it was blowing when the train passed the residence of Mrs. Sailor, they ought to find for defendant.

Charge 8, same as 7 in effect, though varying somewhat in language.

Gregory L. & H. T. Smith and Joel W. Goldsby, all of Mobile, for appellant. Gordon & Edington and Webb & McAlpine, all of Mobile, for appellee.

GARDNER, J. Suit was brought by appellee against appellant to recover damages for setting fire to his residence, barn, and storeroom with contents, and also one wagon. Upon the trial the issues of fact were presented to the jury and resulted in a judgment for the plaintiff, from which this appeal is prosecuted.

[1] The first question to be considered is sufficiency of the evidence to justify a reasonable inference by the jury that the fire was in fact caused by one of the defendant's locomotives. Plaintiff testified in part as follows:

"That on and prior to the 29th day of May, 1913, he owned property situated at St. Elmo in the county of Mobile, 230 feet south of the center of the defendant's railroad, which runs at that point practically due east and west—a little northeast. That his property consisted of a barroom, a store, a residence, and a barn, and their contents. That the barroom was west of and adjoining the store, and the store was west of and adjoining the residence, and the barn southwest of the store. That defendant's depot was a little to the west of his buildings—northwest. That the west side of the depot was about 300 feet from his property. That the barroom was covered with tarred paper, which was old and had become fuzzy and inflammable. That about 2 o'clock a. m. plaintiff was awakened by the rapid blowing of the whistle of an approaching north-bound train, and put on his trousers and went out and found that the top of the barroom was on fire. That there was a strong wind blowing from the north—a little to the east—across the railroad track and towards his property. That the wind was blowing very nearly like it was blowing on the day on which the witness was testifying. That the weather was dry, and that there was no dew that night. That he did all that he could to save his property. That at the time that he got up the fire covered only a space two or three yards in diameter, and was reaching towards the roof of the store, but that there was no fire between the roof and the ground. That, after the fire was out, he went to the depot, and it was then between 2 and 3 o'clock. That he went all around the property, and that there was no fire on the outside of any of the buildings. That the buildings were all closed and securely fastened, and the fire was on top. That there had been a fire in the residence that night, but none in the store or barroom. That the store and dwelling were hardly two feet from the ground, and the barroom was right down on the ground. That there was never any fire in the barroom or wareroom that caught fire."

He was then asked the following question:

"Was there any fire in your particular neighborhood there from which this blaze caught? No, sir; it was too far off; there was no fire."

The witness further testified:

"That his property that was destroyed by fire was worth about \$16,000, and he listed the property item by item, giving the value or loss by burning of each item; that the property figured over \$15,000."

On further examination he stated that defendant's north-bound passenger train passed St. Elmo at 9 minutes after 1 o'clock in the morning; that the fire spread to the roof of the store and then to the residence; that the wind was blowing 10 or 15 miles an hour, and there was no fire at all between the ground and the roof; that the fire went straight on up the roof of the main store, and then over to the roof of the dwelling, and caught all the other buildings and burned them; that an engine threw sparks straight up, and the drift of the sparks is due to the wind; that he had seen sparks go up and fall a hundred feet from the train with

an ordinary breeze of four or five miles an hour.

It was shown by testimony of Mrs. Sailor and her daughter Hazel Sailor: That they were both up when passenger train No. 2 of defendant passed their house on the morning of May 29, 1913, going north towards St. Elmo, and they learned of the fire that destroyed plaintiff's property the next morning after it occurred. That the train passed the house at 7 minutes after 1 o'clock according to Mrs. Sailor, and 9 minutes after 1 o'clock according to Miss Sailor, and was running from 35 to 40 miles an hour. Their house was on same side of the track as plaintiff's store (south), and was one mile (as stated in one part of her testimony) from St. Elmo, or one and a half miles as stated in another part. Mrs. Sailor stated she had frequently observed trains passing, her house being about 140 yards from the track. Her testimony shows that train No. 2 was a fast passenger train, and that she saw this train pass her house "that night," going towards St. Elmo, and indicated it was up-grade that direction. That it passed very rapidly, and was throwing sparks from the locomotive smokestack in larger quantities than usual. That train frequently threw out sparks in passing, but she had never seen a train throw them out in as large quantities, and that they looked to be from two to three inches in diameter. That some of the sparks thrown from the engine were carried 235 feet by the wind back on her place and set the grass on fire, and she picked up some cinders that had fallen in the grass "right where the fire started," and she produced these cinders, which were offered in evidence. That the weather was perfectly dry, and there was no dew, and "there was a pretty good wind blowing." That the sparks continued to fly from the engine as far as she could see them. There was a strip of timber between her place and St. Elmo, and, after the train passed this strip, she could see the sparks going up above the timber and could see them for a distance of about three-fourths of a mile. On cross-examination, she stated that the wind was strong and was blowing from the northeast, and the sparks were thrown 50 or 60 feet in the air and were blown back by the wind in a southeasterly direction into her field; that she measured from the spot where the locomotive was when it threw out the sparks to the place where the field caught, and it was 235 feet, but measured at right angles from the track it was 190 feet.

The witness Miss Hazel Sailor testified, in substance, as did her mother. She further stated that the "wind was blowing pretty nearly a gale—a heavy blow—from the northeast." Her testimony would rather indicate that the measurement made to ascertain the distance the sparks fell was at right

angles and showed 235 feet, though we do not deem this at all of controlling importance.

Plaintiff also offered testimony of one Chesson, who testified: That "on the night plaintiff's property was burned he was 50 yards from defendant's track and about a mile west of St. Elmo." That he saw train No. 2 go by, and was running "pretty fast." "That she was throwing out a lot of sparks, more like a man with a shovel lifting them up and throwing them out of the smokestack. * * * That after the train passed his house going towards St. Elmo, he could see her throwing sparks for about half a mile. That about half an hour after the train passed, he saw a fire at St. Elmo about as big as a barrel."

Plaintiff, it is therefore seen, offered testimony to show the passage of fast passenger train No. 2, about 50 minutes before discovery of the fire; that the fire when discovered was on top of the shedroom or barroom adjoining the store, which was covered with tar paper that was old and had become fuzzy and inflammable; that there was no fire between the roof and the ground, no open doors, no probability of any cause for the fire in the surroundings; that it was perfectly dry and no dew and a strong wind, "pretty nearly a gale," as stated by a witness, from the north as shown by some of the witnesses, and a little northeast by others, but blowing in the direction from the track towards the property of plaintiff, and the emission from the engine of sparks of unusual size and in unusual quantities seen by some to a distance of within about one-fourth of a mile from St. Elmo, according to one part of the testimony of Mrs. Sailor.

As said in *Deason v. A. G. S. R. R. Co.*, 65 South. 172:

"It is a matter of common knowledge that a strong wind may carry such sparks to a considerable distance, and that they may readily set fire to any dry and inflammable materials upon which they happen to fall."

And in the instant case there was evidence tending to show that sparks from the engine of train No. 2 were carried by the wind a distance of 235 feet and set fire to grass in the adjoining field, just one mile west of St. Elmo. As said in *Deason v. A. G. S. R. R. Co.*, supra:

"We think that the imputation of the fire to sparks from the locomotive is fairly removed from the realm of mere speculation, and is brought fairly within the realm of legitimate and permissible inference."

We are well convinced that the evidence in this case was sufficient for a submission of this question to the jury. *Deason v. A. G. S. R. R. Co.*, supra.

In *Coffman v. L. & N. R. R. Co.*, 63 South. 527, it was said:

"While we are on this subject, we may as well say that when, in a case like the present, there is evidence that a locomotive on a particular occasion emitted live sparks of unusual size, or

that it emitted live-sparks in unusual numbers, or that it threw live sparks to an unusual distance, then it is a question for the jury, and for the jury alone, to say whether the locomotive was or was not, at the particular time, properly and skillfully handled, or whether or not it was properly constructed, or properly equipped."

The evidence to which we have above referred shows that the engine emitted live sparks of unusual size and in unusual quantity, and, notwithstanding proof by defendant of proper equipment and proper handling of the train and locomotive, this, under our authorities, was sufficient to carry the question of negligence to the jury. *Coffman v. L. & N. R. R. Co.*, supra; *L. & N. R. R. Co. v. Stanley*, 65 South. 39.

It is insisted by appellant, however, that, in addition to proof of proper equipment and handling of the locomotive, defendant proved by the engineer and the conductor of the train that when the train reached within a quarter of a mile of St. Elmo steam was shut off, and they "rolled by St. Elmo," and therefore no sparks could have been emitted from the engine with steam shut off. The testimony of these witnesses discloses that this was done in order to slow up; that is, "kill time," and to prevent reaching the station ahead of schedule time. As previously shown, evidence of witnesses for the plaintiff would tend to show the train was running fast, 35 or 40 miles an hour, when within a mile of St. Elmo, and that it was due there 9 minutes after 1 o'clock. Mrs. Sailor testified it passed her house (at least a mile away) at 7 minutes after, and Miss Sailor stated at 9 minutes after, 1 o'clock. This testimony would indicate the train was not ahead of schedule time, and hence no necessity to slow up and "kill time," as testified. From all the evidence in the case we are of the opinion it was for the jury to determine whether or not sparks from the locomotive of the defendant set fire to the property, and whether or not, also, there was negligence either in the handling of the locomotive or as to its proper equipment.

[2] Without regard to the rule as to the shifting of the burden of proof (*Tombigbee Valley R. R. Co. v. Howard*, 64 South. 338), plaintiff offered testimony to establish both the origin of the fire and negligence at the outset, which was, of course, entirely permissible. The above questions are presented for review by several assignments of error which we have not deemed necessary to treat separately. Some of them attempt to present the question by motion to exclude the evidence because plaintiff failed to make out his case, etc. We merely call attention to the fact that this practice has been recently condemned by this court. *McCray v. Sharpe*, 66 South. 441. See, also, *Scales v. Central Iron & Coal Co.*, 173 Ala. 646, 55 South. 821. The testimony of Mrs. Sailor shows that, the morning after the train passed and set fire to the grass in her field, she picked up some

cinders that had fallen in the grass "right where the fire started," and these cinders offered in evidence, produced by her, were clearly admissible.

[3] Nor was there any error in overruling motion of defendant to exclude testimony of plaintiff as to direction in which the wind was blowing at the time he awoke. This was about 50 minutes after the passage of the train, and, in connection with all the other evidence, was clearly relevant.

[4, 5] Charge No. 2 was properly refused. The argument seems to be based upon arithmetical calculation of counsel as to distance the sparks were carried by the wind as testified to by Mrs. Sailor, measured at right angles from the track, as 190 feet, and that therefore, the argument proceeds, for the sparks to have set fire to property of plaintiff the sparks would have to be carried 274½ feet, as such property was situated 230 feet from the track measured at right angles. The argument cannot be accepted so as to justify the charge. In drawing reasonable inferences from the facts adduced, the jury are not to be confined to such fine calculations. There was evidence that sparks from this engine were carried by the wind a distance of 235 feet. The charge is misleading, in that, it might be construed as referring to the exact direction of the wind at the time the train passed Mrs. Sailor's house, and omits any consideration whatever as to its velocity, and takes no account of any variations as to either. While both the direction and the velocity of the wind may remain the same in a general sense for some time, yet it is common knowledge that there are at least slight variations from moment to moment as to both direction and velocity. Indeed, counsel for appellant so state in brief as follows:

"It is common knowledge that the direction and force of the wind is not only not continuous in its nature, but varies from second to second, both in force and direction."

Without regard as to whether the charge is otherwise faulty, it was clearly misleading and properly refused.

[6] Charges 7 and 8, stating to the jury "if the evidence leaves their minds in doubt, confusion, and uncertainty," etc., were properly refused. *A. G. S. R. R. Co. v. Robinson*, 62 South. 813; *Monarch Livery Co. v. Luck*, 63 South. 656.

[7] The twelfth assignment of error is in part as follows:

"The court erred in stating, in the hearing of the jury, as follows: 'I give charges 3, 4, 5, and 9 requested by the defendant, which I had refused, because plaintiff's attorneys request it.' The exception upon which this assignment of error is based reads as follows: 'The defendant had, in writing, requested the court to give a number of charges, and the court had indorsed upon charges 3, 4, 5, and 9 the word, "Refused," and signed his name thereto. Such charges were as follows: (The charges are here omitted.)' After so marking such charges, they were, in accordance with the custom of the

court to submit written charges to opposing counsel for their suggestion, handed to the plaintiff's attorneys without the knowledge of the jury, and, after inspecting such charges, the plaintiff's attorneys suggested to the court, but not in the hearing of the jury, that the charges should be given. A little later, in the course of the trial, the court, in the presence and hearing of the jury, made this remark: 'I give charges 3, 4, 5, and 9 requested by the defendant, which I had marked "Refused," because the plaintiff's attorneys request it.' The defendant's counsel, then and there, in the presence of the jury, reserved an exception in the following language: 'We except to your honor's giving those charges and announcing in the hearing of the jury that they had previously been refused.' This is the court's reply: 'And which said charges had not been read to the jury.' The court had, in the meantime, erased the word, 'Refused,' from such charges, and had written on each of them the word, 'Given,' and signed his name upon each of them after the word, 'Given.' Thereafter, the defendant's counsel, in the course of his argument to the jury, read every one of the written charges given to the jury at the request of the defendant, including said charges 3, 4, 5, and 9, and stated to the jury that those charges constituted the law of the case as requested by the defendant and charged by the court."

[8] It is the general rule that all intentions and presumptions will be here indulged in support of the action of the court below. Error will not be presumed on appeal; it must be made to affirmatively appear. We must consider and treat the exception as we find it, and the exception relates, not to the entire statement of the court, but only to the announcement in the hearing of the jury that the charges had "previously been refused." If inferences favorable or unfavorable may be drawn from language used as on this occasion, we should lean to the favorable inference, rather than the unfavorable in recognition of the general rule just stated. It can be said of this language, following the exception taken, that, while the court was first of opinion the charges were incorrect, yet upon reflection, and it may be even consultation with counsel, he was persuaded that they were correct and properly stated the law in the case. Clearly the language is susceptible of such construction as presented here by this record. Such being the case, and indulging in presumption in favor of the action of the court below, we are of the opinion that no error to reversal is shown; nor do we intend to indicate, in what is here said as to this assignment and the exception taken as appears in the record, that any error would appear had the exception embraced all the language used by the court; but we, of course, here treat the exception as it was taken. As the charges were given, it is, of course, unnecessary to consider them.

We have reviewed the questions presented by the record and argued by counsel, and, finding no error, the judgment of the court below is, accordingly, affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 144)

**MONTGOMERY LIGHT & TRACTION CO.
v. BAKER. (No. 95.)**

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

**1. STREET RAILROADS ⚡81—LIABILITY FOR
INJURIES—HEADLIGHTS.**

It is negligence, as a matter of law, for a street car company to run a car in the nighttime with a headlight not having sufficient capacity to cast a light upon the track, so that the motorman may perceive objects for the distance within which the car can be stopped, or for a motorman to run his car at such a rate of speed as to be unable to stop the car with the aid of appliances which he has within the distance in which, by the aid of the headlight, he can see a man prone upon the track.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 172-177; Dec. Dig. ⚡81.]

**2. STREET RAILROADS ⚡103—LIABILITY FOR
INJURIES—ACTS OF MOTORMAN IN EMERGENCY.**

Ordinary care on the part of a motorman requires that, when an emergency to prevent an injury arises, he shall act with that high degree of diligence with which a reasonably prudent man in the possession of all his faculties and knowing what to do would be expected to act under similar circumstances, and, if the emergency requires that he quickly stop the car, he must use such of the appliances at hand as a reasonably prudent man skilled as an engineer would, under similar circumstances, be expected to use, and must do so with the same degree of celerity that a reasonably prudent man skilled in such business would, under similar circumstances, be expected to display.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⚡103.]

**3. STREET RAILROADS ⚡103—LIABILITY FOR
INJURIES—DISCOVERED PERIL.**

A man who is drunk or in any way disabled on a street car track may recover for damages inflicted upon him by a street car if the motorman saw him on the track in time to prevent the injury and negligently failed to use the precautions which a reasonably prudent man skilled as a motorman would have been expected to use to prevent the injury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. ⚡103.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by M. G. Baker against the Montgomery Light & Traction Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Rushton, Williams & Crenshaw, of Montgomery, for appellant. Riddle & Ellis, of Columbiana, and Weil, Stakely & Vardaman, of Montgomery, for appellee.

DE GRAFFENRIED, J. The plaintiff, a stranger to Montgomery, was injured by a street car of appellant, and brought this suit to recover damages for the injuries which he thus received.

It appears from the plaintiff's evidence that in the city of Birmingham street cars are boarded from the right side; that the plaintiff knew that fact; but that he did not know from which side a street car is boarded in Montgomery.

The plaintiff testified that he came into Montgomery during the afternoon; that his brother-in-law lived in Montgomery, but that he did not know the place of his residence; and that he finally ascertained that he lived out near the end of the street car line on Court street, which is one of the principal residence streets of Montgomery. Continuing his testimony, the plaintiff said:

"I was on the corner waiting to catch a car back to town, and had been sitting there some little time. I had decided to catch the first car that came along, as none seemed to be going my way. I was about one block from the end of the car line, and thought the rules in Montgomery were like those in Birmingham; that is, that you had to be on the right-hand side of the car before they would notice you at all. I went across the track, and in doing so my left foot hung in the rail and threw me down. I made several hard lunges to get my foot out, but the car was coming so fast that I decided right quickly that I had rather have my leg cut off than to be killed, so I crawled back on the same side my foot was hung on, and just as I got my body over the rail I pulled out and raised up against the rail to pull myself on up and get out of the way. I got my arm over except a part of my hand, and at that time the car struck me. Two of my fingers were cut off, and another was mangled so that it is of no service. I was scarred over the nose, my chin fractured, and my head bruised so that it has no feeling in it at all on this side, and I was bruised considerably. I don't know what happened after the car struck me. When I next realized the car had struck me I was in St. Margaret's Hospital, something like two weeks after the accident. * * * When I started across the track the car was about two blocks from me—down near the curve. I was on South Court street, where the car goes to the end of the line, and on the right-hand side of the car if it had been going to town; in other words, on the left side of the street, or the east side of the street. The car was about two blocks away, and I started to cross to the right-hand side. I fell headlong when I struck the first rail, the rail on the east side. One of my feet was free when I fell, but the other was hung in the rail. When the car came in sight I was counting my change to see how much I had, and was sitting on the curbing on the street. My change was in my hat. I was looking at the car—had the hat and change in my hand looking at the car and flagging the car. When I fell I first tried to get my foot out, but couldn't do so, but before the car hit me I got all my body and limbs outside the track except my hand, and my body lay along and outside of the rail, facing the car. From the way I could judge the car was coming about 15 miles an hour, uphill, from the time I saw it until it struck me. The track was straight for about two blocks. The car was coming around the curve when I first saw it. The blocks were about the average city blocks. There were electric lights around where I was struck—one on the corner down below, the next street, and one—I don't think I was further than 30 feet from the nearest electric light, and there was no obstruction between me and the street car, and when struck I was on a public street in the city of Montgomery. * * * I had been in town just a short time, having arrived on the morning of the accident, I think. I arrived in the city on the evening of the accident. I came to Montgomery from Selma. I don't know exactly what time I got here. I don't remember exactly whether it was morning, evening, afternoon, middle of the day, or when. I don't know the exact time when I left Selma. I was not on a spree. I left Selma about 10 o'clock in the day. I don't remem-

ber; I can't say when I left Selma; I had no watch. It was some time in the morning when I left there. I had been in Selma something like an hour, having come to Selma from my home at Shelby Springs. I don't remember what time I arrived at Selma. I was hurt on the 26th of March, and left home on that morning. I don't know exactly what time it was. I took the train at Shelby Springs, in Shelby county, a few miles east of Calera, for Selma, in the early part of the morning. I went to Selma looking for a job, and stayed in Selma about an hour. While in Selma I went to the Southern offices. I got to Montgomery about 3 o'clock in the afternoon. I got off at Union Depot and tried to locate the trainmaster of the Louisville & Nashville. In trying to locate the trainmaster I went to the hotel the first place. Up to that time I had not had any drinks; that is, until after I saw the trainmaster. Between that time and the time of the accident I had two drinks, all by myself. I saw the trainmaster about 3 o'clock. I left Selma about 10 o'clock. I got on a through freight at Shelby Springs and went to Selma. It was about 65 miles from Shelby Springs to Selma. I worked on the Southern two years. I started out to find my brother-in-law about 7 or 7:30 o'clock, and got hurt about 9 o'clock. * * * The car was about two blocks away when I started across the track, and in crossing I got my foot under the rail and fell headlong across the track. I made several hard lunges to get out and jerked my left foot. I saw that I could not get loose that way, and decided to crawl back over on the side that my foot was hung on and let it cut my leg off rather than kill me. At that time my foot was under the track. I crawled back and got my body off of the rail. My leg twisted out just before I got my body over the rail. When I was struck by the car I was laying up and down the rail having just crawled across the rail. The car was coming fast at the time I started across the track. At that time the car was about two blocks away and I fell when I started to cross the track. The street light was at the crossing, I reckon about 30 feet away. I was this side of the crossing next to the car. I don't know where my brother-in-law worked, and made no attempt to find him until 7 or 7:30 o'clock. I also inquired for him at the Exchange Hotel. He married my sister. My sister at that time was at my home. I don't know how old he is. He has been here but a few months. From 3:30 o'clock until 7 I was walking around the street. The hotel clerk told me where my brother-in-law was. While waiting on Court street for the car, I decided to take the first one that came along, regardless of which way it might be going, because I knew that it would eventually bring me back to town. That is why I started to take an outgoing car."

The motorman in charge of the car which struck the plaintiff testified for the defendant, in substance as follows:

"The car had a strong headlight on it. The company at that time did not have two kinds of headlights. I am working for the street car company now, and have been with them since the accident. The car was in good condition that night, and was equipped with reverse lever and brakes, both of which were in good condition, but I cannot say first-class condition, and I was keeping a lookout all the time. It was upgrade. The night was dark. The reverse lever was in perfect condition. The headlight did not shine very far, but you could see the rail, but could not see the ground. It was not a very good light, but I could see the rails. The light did not shine like an arc light, but did shine like those on street cars and was as good a light as the street car company had. I knew what kind of light it was and how far I could see ahead of the car. I don't suppose

the car was going over 8 or 10 miles an hour. Going up that grade I don't know the exact distance I could stop the car within 8 miles an hour. Going up that grade I probably might or might not, by the use of the reverse, be able to stop it within half a car's length. As soon as I saw the plaintiff I shut the power off and put on the brakes as quick as I could. I did not have time to reverse the car. I had my hand on the brakes all the time. There is not much difference in time that it takes to apply the brakes or the reverse. The car was probably 30 feet long. Going 15 miles an hour up that grade, I could stop the car as soon as anybody could, but I do not know what would be the shortest distance in which it could be stopped. I suppose 2 or 2½ car lengths, and that was about the distance that I ran after the car struck him. The light from the car did not shine very far ahead of the car—probably about 12 feet. With all the stopping facilities that I had on the car and that I used, the car ran 2½ lengths past where the plaintiff was. The light did not shine away ahead of the car. It shines downward, and some of the lights are better than others. This light was like the others, and shone as well as any of them, so far as I know. It had a reflector; probably threw light 16 feet. The reflector was made of tin, and was of oval shape. I was not thinking about whether I could stop as we were going uphill, and was not paying attention as to how fast I was running, but I was looking ahead all the time, and knew that I could see about 12 feet ahead. I could hardly have stopped within 12 feet, no matter what was on the track; that depends on whether or not one has the presence of mind to reverse as soon as he discovers some object on the track. I stopped the car as quickly as I could, and that was in about 2½ car lengths. That was as quick as I could stop it with the brakes. I did not reverse it. The plaintiff was sitting flat on the ground, and the top of the rail is 2 to 3 inches higher. There are no cross-ties. There was an arc light on the street above the place where the accident happened. The accident happened about the middleways between two arc lights—between two streets. The streets are probably 150 yards apart, and there is a shade tree opposite where the man was sitting. When I first saw the plaintiff he was kinder humped up. He seemed to be piled up like a drunk man. If the car had been going 30 miles an hour, I could have stopped it somewhere at the end of the line, over a block away. I don't know how quickly I could have stopped it if it had been going 20 miles an hour; probably 20 or 30 steps—60 or 90 feet. The reverse is more effective if the car is not going too fast, and going 8 miles an hour the reverse should stop it quicker than the brakes, and the same if it were going at 10 miles an hour. So far as I know, the reverse was in good condition that night. I took hold of the man and straightened him out, and smelled whisky on him. He was laying up and down the track, within 2 feet of the track. He had his fingers cut off, and there was a gash on his head. I undertook to stop the car when about 12 feet away, when I could see whether it was a man or not, but I ran 12 or 15 feet from the time I saw him until I saw he was a man. As soon as I discovered that it was a man, I did everything I could to stop before I ever struck him, and did everything I could to keep from killing him. I had not done anything to stop the car until I saw him. When I first saw him, he was probably 12 or 15 feet away, and I ran a few feet before I could decide that he was a man. I tried to stop the car as quickly as I saw him near the track. I could not tell that he was a man until I was right close to him. I put on my brakes as soon as I discovered something on the track. The headlight shines more if it is cleaned up. It did not look as if it had been

cleaned up. The glass in front of the light was dirty. The lights on the Pickett Springs line are not made to the car. They are set on there. You can change them from one to the other. The smaller lights are made on the car, and the company runs big lights only on the Pickett Springs line. When I saw the plaintiff he looked as if he had been knocked on the head and laid on the track. The blood was still clotted. He was not on the track, but by the side of the track, and close enough to be struck. I thought he had been knocked on the head, because the blood had clotted on his face—not dry, but clotted on his hands and shirt. The conductor and I and another man saw this. At first I thought the step hit him, but I did not think the blood could have clotted in less than 30 or 60 seconds. The blood was dry. There was fresh blood on his face, and he was unconscious. I did not hit the man on purpose, and the car did not have air brakes on it. Air brakes stop the car quicker than the brakes I had. We have air brakes only on the double-truck cars, and this car was a single-truck. The man was not on the track, but was probably a foot or more from it."

The above testimony gives, substantially, the facts upon which the case was tried, and upon which facts the verdict of the jury was for the plaintiff.

[1] 1. The rule that the motorman of a street car or the engineer in charge of a train must so operate his car or engine as to be able to stop it within the range of the headlight is a rule of safety which conserves the traveling public—the people in a street car or upon a railroad train—and protects them, as well as the property and the lives of human beings not on such car or train, from a possible source of danger. For this reason the law has adopted the above rule, and declared that it is per se negligence, as matter of law, for a railroad company to run its train, or a street car company to run its car, in the nighttime, with a headlight not having sufficient capacity to cast a light upon the track so that the engineer or motorman may perceive objects for the distance within which the train or car can be stopped. *Western Railway of Alabama v. Mitchell*, 148 Ala. 35, 41 South. 427. The demand of the traveling public is for speed. The demand of the law is that speed shall be so reasonably regulated and controlled as that property and life shall not thereby be needlessly endangered or destroyed.

The reason which underlies the rule which requires an engineer in charge of a locomotive and the motorman in charge of a street car to keep a lookout for obstructions on the track is the same reason which underlies the above rule with reference to headlights, for, to use the language of counsel for appellee in their brief, "in the nighttime the headlight with its rays must of necessity become the eyes of the engineer or motorman, and thus enable him to keep the lookout which his eyes give him the power to do in the daytime."

In the case of *Southern Railway Co. v. Stewart*, 179 Ala. 304, 60 South. 927, this court, in speaking of the duty of a motorman

in charge of a street car upon a track which forms a part of the street, said:

"On such a track it was the duty of the motorman to keep a lookout for all persons liable to be run over, no matter how they got on the track, and no matter what they were doing there."

In the case of *Birmingham Railway, Light & Power Co. v. Fuqua*, 174 Ala. 631, 56 South. 578, this court held that, when a car track forms a part of the street, "the law recognizes no distinction between keeping a lookout for one prone, and one erect, on the track. The duty of keeping a lookout is the same in either case." The rule requiring a lookout for persons prone upon a track is, however, limited in this state, in so far as the rights of the person prone upon the track are concerned, to tracks running along and forming parts of public streets. *Southern Railway Co. v. Stewart*, 179 Ala. 304, 60 South. 927.

In the instant case, therefore, it was the duty of the motorman of the defendant, not only to the public, but also to the plaintiff, to so regulate and control the speed of his car, which he was running on a track which formed a part of this public street, as to be able to stop the car, with the aid of the appliances which he had upon the car, within the distance in which, by the aid of the headlight which was used upon the car, he could see a man prone upon such track. The law exacted this duty of the motorman, and if he failed to observe that duty he was guilty of negligence. *Southern Railway Co. v. Stewart*, supra; *B. R., L. & P. Co. v. Fuqua*, supra; *Western Railway Co. v. Mitchell*, supra; *Sheffield Co. v. Harris*, 61 South. 88; *Birmingham Ry., Light & Power Co. v. Jones*, 153 Ala. 157, 45 South. 177. While a motorman running a car over a track which forms a part of a street may not be required to provide against what he has no legal ground to believe will happen (*Schneider v. Mobile & C. R. R. Co.*, 146 Ala. 344, 40 South. 761), he is required to so regulate the speed of his car as to be able to stop it within the distance that he can see so large an object as a man prone upon the track, by the aid of his headlight, in the nighttime, and, if he fails to do this, he fails to exercise those precautions which a reasonably prudent man would be expected to exercise in respect to such a car run under the same conditions. *Southern Railway Co. v. Stewart*, supra; *B. R., L. & P. Co. v. Fuqua*, supra.

[2] 2. Ordinary care, when applied to an engineer in charge of a locomotive or to a motorman in charge of a street car, implies that, when the emergency to act quickly in prevention of an injury arises, he must act with that high degree of intelligent diligence with which a reasonably prudent man, in the possession of all his faculties and knowing what to do, would be expected to act under similar circumstances. If the emergency requires that he quickly stop his train or car,

then he must use such of the appliances at hand for that purpose as a reasonably prudent man, skilled as an engineer, would, under similar circumstances, be expected to use to quickly stop such train or car, and he must do so with that same degree of celerity or quickness that a reasonably prudent man, skilled in such business, would, under similar circumstances, be expected to display. *Birmingham Ry., Light & Power Co. v. Ryan*, 148 Ala. 69, 41 South. 616.

[3] 3. In the case of *Anniston Electric Co. v. Rosen*, 159 Ala. 195, 48 South. 798, 133 Am. St. Rep. 32, this court said:

"Whether one is or is not a trespasser, the condition to the application of the principle of the negligent breach of duty after peril is discovered is the same. The duty to avert injury to one imperiled is the same, whether his relation to the dangerous agency theretofore was wrongful or not, whether his situation of peril was the result of right or wrong conduct; provided, of course, the operative knew of the peril to which the injured party was subjected. Whenever the knowledge stated is brought to the operative, his duty is to employ all means known to one skilled in his place to avert injury."

Whether a motorman, after discovering the peril of a trespasser who shows that he is either ignorant, or apparently is regardless, of his peril, is guilty of negligence if he fails to employ all means known to a person skilled as a motorman to avert injury to such a trespasser, has not been an open question in this state, certainly since the rendition of the above decision. A man who is drunk or in any way disabled, on a street car track, is entitled to a recovery for damages inflicted upon him by a street car if the motorman saw him on the track in time to prevent the injury, and then negligently failed to use the precautions which a reasonably prudent man skilled as a motorman would have been expected to use to prevent the injury. *Randle v. Birmingham Ry., Light & Power Co.*, 158 Ala. 532, 48 South. 114; *Birmingham Ry., Light & Power Co. v. Ryan*, 148 Ala. 69, 41 South. 616; *Birmingham Ry., Light & Power Co. v. Morris*, 163 Ala. 190, 50 South. 198.

4. This case has been carefully and ably briefed by counsel on both sides. A careful examination of this record convinces us that, when the oral charge of the court is considered in its entirety, it is free from reversible error. One or two of the sentences used by the trial judge may possibly have had a misleading tendency, but the jury were hardly misled thereby.

The court refused some of the written charges which were requested by the defendant, but the refused charges were either covered by written charges which were given to the jury at the request of the defendant, or they were elliptical or misleading. The case has not only been well presented here, but it was evidently well tried in the court below. We will not stop to consider the question as to whether, under all the facts, the appellee was entitled to affirmative instructions in his

favor. If so, he suffered no injury of which he can complain, as he recovered a verdict and judgment in the trial court, and which judgment, under the law, must here be affirmed.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 485)

MYRICK v. WILLIAMSON et al. (No. 842.)
(Supreme Court of Alabama. Nov. 19, 1914.)

1. WILLS §441—CONSTRUCTION—INTENT.

In ascertaining testator's intent, the whole will, and the surroundings of testator and the objects of his bounty, are to be considered.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 958; Dec. Dig. §441.]

2. WILLS §478—GIFT BY IMPLICATION.

The implication from a will which will raise a gift must be a necessary one; and if the words, in their ordinary sense, make a valid will, there is no room for implication.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 999, 1300; Dec. Dig. §478.]

3. WILLS §681 — CONSTRUCTION — AUTHORITY TO "CONTROL."

Authority in a will to testator's wife to take full "control" of testator's property gives no beneficial interest in the estate, but merely full management.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1599-1601, 1612, 1613; Dec. Dig. §681.]

For other definitions, see Words and Phrases, First and Second Series, Control.]

4. WILLS §681—INTEREST GIVEN—TRUST ESTATE.

No beneficial interest, but merely an executorial interest, or that of a trustee, is given testator's wife by his will, authorizing her to collect all claims, to take full control of all his property, and to sell or buy property, with full power to make title, relieving her from giving bond or making settlement to any court, directing that his grandson be given a good education and authorizing her to pay therefor from the estate, and directing that at her death certain legacies be paid, and the remainder of his estate be distributed in a certain proportion to certain persons, and that an administrator be then appointed to carry out said provisions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1599-1601, 1612, 1613; Dec. Dig. §681.]

5. TRUSTS §191—POWER TO "SELL"—GIFT.

Power given by a will to testator's wife, in effect made trustee, to "sell" the property, does not authorize her to give it away.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. §191.]

For other definitions, see Words and Phrases, First and Second Series, Sell.]

6. TRUSTS §204—SALES—SUIT TO ASIDE—PLAINTIFFS.

Persons to whom by provision of a will shares of the estate are to be distributed, on death of testator's wife, in effect made trustee by the will, may maintain a suit to set aside, as in violation of the trust, a deed made by her.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 277-279; Dec. Dig. §204.]

7. TRUSTS §204—SALES—SUIT TO SET ASIDE—NECESSARY PARTIES.

To a suit by persons to whom, on death of testator's wife, given powers of executrix and trustee, shares of the estate are to be distributed, to set aside her deed, as in violation of her trust under the will, she is a necessary party.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 277-279; Dec. Dig. §204.]

Appeal from Law and Equity Court, Monroe County; W. G. McCorvey, Judge.

Bill by Susan Williamson and others against L. Bernard Myrick. Decree for complainants on demurrer, and respondent appeals. Reversed and remanded.

The following is the will referred to in the opinion:

"In the name of God—Amen:

"I, Thomas P. Buffington of Monroe county and state of Alabama, being of sound and disposing mind and memory, do make publish and declare this my last will and testament, hereby revoking all former wills made by me.

"And first, I desire to acknowledge with gratitude my obligations to Almighty God for His constant blessings upon my life and labors; attributing whatever success I have had to His kind Providential care.

"Second. It is my will and desire that my wife, Martha E. Buffington, shall pay all my debts, if I leave any, as soon after my death as practicable.

"Third. I hereby authorize my beloved wife Martha E. Buffington to collect all claims which I may leave outstanding at my death, to take full control of all my property real and personal and mixed in her own name, to sell or buy property with full power to make title just as I would if living.

"Fourth. In taking possession of my estate I direct that my wife shall not be required to give bond or make any settlement or return to the Probate Court or to other courts.

"Fifth. I hereby will and direct that my grandson Bernard Myrick shall have a right good education, and authorize my wife to pay for same out of my estate.

"Sixth. At the death of my wife, or if she should die first, at my death, I will and direct that my grandson Bernard Myrick shall have five hundred dollars, and my granddaughter Mattie Mims shall have two hundred dollars; and then I desire that the remainder of my estate be divided into four equal parts and one part given to my daughter Susan Williamson and one part given to my granddaughter Mattie Mims, and one part given to my grandson Bernard Myrick, and the other and last part to be equally divided between the seven other grandchildren, the children of my daughter Mary L. Myrick.

"Seventh. At my wife's death, or if she should die first, at my death, I desire that my administrator shall be appointed according to the regular forms of law, that he be placed under proper and sufficient bond and that he execute and carry out the aforesaid provisions of this my last will. Given under my hand and seal this the 17th day of May A. D. 1902.

"T. P. Buffington. [Seal.]

"Witness:

"J. B. Coleman.

"W. D. Feagin."

J. D. Ratcliffe, of Monroeville, for appellant. F. W. Hare, of Monroeville, for appellees.

GARDNER, J. Appellees (complainants in the court below), legatees under the will of T. P. Buffington, deceased, filed this bill for

the purpose of cancellation of two certain deeds executed by Martha E. Buffington, widow of said T. P. Buffington, to appellant, L. Bernard Myrick, bearing date July 3, 1914, copies of which constitute Exhibits C and D to the bill; or, in the event it should be held said deeds conveyed a life estate to the grantee, that they be so limited by decree of the court. This is the sole purpose of this suit, and the grantee, L. Bernard Myrick, is sole respondent.

Demurrer to the bill being overruled, this appeal is brought, and the question of first importance relates to the construction of the will of said T. P. Buffington. This will the reporter will set out in the report of the case.

It is insisted by counsel for appellant that by the will Martha E. Buffington, the widow, was given the absolute fee to the entire estate, or, failing in that contention, that she was given by the will a life estate unaccompanied by any trust, with absolute power of disposition, and that therefore the effect was to give her the fee-simple title.

[1] "It is a legal truism that the cardinal rule—the one above all other rules—for the construction of a will is to ascertain the intention of the testator and give it effect. * * * When the judicial mind is brought to its construction, the effort is to ascertain from the language employed the surroundings of the testator and the objects of his bounty, what his intentions were in the disposition he has made of his property, * * * and give effect to that intention, if it is not inconsistent with the law." *Wolffe v. Loeb*, 98 Ala. 426, 13 South. 744.

"This intent must be gathered * * * from the language used in the will, and by this is meant that such intention shall be gathered from the four corners of the instrument; that is to say, from the whole will, the whole frame of the will, the whole scheme of the testator manifested by the will, taking into consideration, and giving due weight to, every word used in the will." *Ball v. Phelan*, 94 Miss. 293, 49 South. 956.

[2] It must needs be conceded that the will contains no apt words of devise or bequest to the wife, Martha E. Buffington. If, therefore, the will is to be construed as effectuating a gift of the estate to the wife, it must be by necessary implication.

The rule with respect to estates by implication was clearly stated by this court in *Wolffe v. Loeb*, supra. It was there said:

"All estates by implication are founded on the intent of the testator, or ascertained from the words of the will, and, where implications are allowed, they must be necessary in order to effectuate this intention. A construction in favor of a devise or bequest by implication should be so strong, as that a contrary intention to that imported cannot be supposed to have existed in the mind of the testator."

The implication, as we have said in *Sherrod v. Sherrod*, 38 Ala. 543, must not rest on conjecture; it must be necessary, and so

plain as to be irresistible to the mind. "If the words of the will, as written, construed in their ordinary sense, will make a valid will, then there can be no room for implication."

The case of *Ball v. Phelan*, 94 Miss. 293, 49 South. 956, reviews many authorities concerning this rule, and is of much interest in this connection.

[3] Counsel for appellant, in his brief, leans heavily upon the language of the third paragraph of the will. Nothing is there devised to the wife. There is no gift or language subject to such construction when the entire will is looked to. The wife is "authorized to collect all claims," and "to take full control" of his property. In this respect the language bears much similarity to that of the will construed in *Wolffe v. Loeb*, supra, where the words, "I make my wife sole controller just the same as if I was alive," were construed as meaning to give full management and authority over the estate, but gave no beneficial interest therein. As said in that case:

"'Control' means to check, restrain, govern, have under command, and authority over."

And the opinion proceeds with the following language applicable to the instant case:

"The testator, we must presume, understood the meaning of the words 'give, grant, devise or bestow,' as well as he did that of 'control,' and, if he had desired to devise or bequeath his wife anything, he would have employed some apt word to effect that intent."

[4] In the fourth paragraph the testator directs that "in taking possession" of his estate his wife be exempt from bond and from making any settlement in any court. The bill shows that testator and his wife had but two children, complainant Susan Williamson and Mrs. Myrick, the mother of respondent, L. Bernard Myrick, who died at his birth, whereupon respondent was taken to the home of the testator and raised by him and his wife. The respondent was about the age of ten years when the will was written, in May, 1902. It was but natural, therefore, that the welfare of respondent, then a boy, nurtured and cared for since his birth under the roof of testator, should be considered in the execution of his will, and, in response to this natural affection and concern for the future of the boy, that the testator, in paragraph fifth of the will, should say: "I hereby will and direct that my grandson, Bernard Myrick, shall have a right good education, and authorize my wife to pay for same out of my estate." It was equally natural that he left to his wife the control of his estate, one not of great value, and intrusted her with the education of the grandson whom they had raised; and yet he "directs" that he have "a right good education."

In the succeeding paragraph the testator directs that, after the death of his wife, certain legacies be paid, one of \$500, to the respondent, and \$200 to his granddaughter, Mattie Mims, and that the remainder of his

estate to be divided into four equal parts, making disposition thereof to his daughter, Susan Williamson, and to his grandchildren, respondent receiving a one-fourth. In the concluding paragraph the testator directs that upon the death of his wife an administrator be appointed according to law, that he make bond and carry out the aforesaid provisions of his will. There is no word of gift or devise to the wife. In order to hold that she takes a beneficial interest, it must result from necessary implication. It must not rest on conjecture, but must be so plain as to be irresistible to the judicial mind. "If the words of the will, as written, construed in their ordinary sense, will make a valid will, then there can be no room for implication."

Applying this well-recognized rule to the instant case, we are of opinion that the wife did not take a beneficial interest. The words of the will, as written, construed in their ordinary sense, make a valid will, and therefore there is no room for implication. It is clear that the wife is charged with a trust to see to the education of the grandson whom they had raised. The proper care, education, and future welfare of this boy was doubtless uppermost in the mind of the testator. His estate was not large, but was, in fact, very modest. If it were to be of effective service, it was necessary that it be kept more or less intact. Long years of wedded life had doubtless inspired perfect confidence in his wife, evidenced by his giving her full control of his estate, with authority to "sell or buy property," and power to make title. He gives her power not only to sell, but to buy property, and if any meaning is to be given the word buy, in this connection, it must be that he meant buy for his estate; otherwise it would be well-nigh without any sensible meaning.

In reference to the education of his grandson, he authorizes his wife to pay for same out of "my [his] estate," and throughout the will reference is made to "my estate." He directs the payment of certain legacies, and makes disposition of his estate after the death of his wife, and directs that an administrator carry out the provisions of his will. He recognizes the trust relation of his wife wherein he directs that she be required to give no bond in taking possession of his estate. He postpones the division of his estate until her death, and, as doubtless intended for her full protection in the management of his estate, exempts her from making any settlement to any court. *Burch v. Gaston*, 62 South. 508. Giving to the language used its ordinary meaning, and looking at the will as a whole, it is entirely consistent therewith to hold that the wife was given full control of the estate with power to sell, for the purpose of managing the same, carrying out the wishes of the testator as to the education of respondent, and holding the estate

together for distribution at her death, and that her interest was what might be termed "executorial," or that of a trustee relieved of any bond or of the duty of making any settlement. 28 Am. & Eng. Ency. Law (2d Ed.) 902. We so conclude, and that she took no beneficial interest.

[5] The bill shows that the two deeds, cancellation of which is here sought, were executed without consideration to respondent, and were, in effect, a gift of the bulk of the estate to the respondent. The power to sell was, in our opinion, accompanied with a trust, and for certain purposes. There is nothing in the will which can be construed as giving to the wife a right to give away the estate. It is, we think, too plain for argument that the power to sell did not authorize such a disposition of the estate as is alleged in the bill was made by the execution of these two deeds.

[6] The enjoyment of the estate devised to complainants is postponed until the death of the widow, and it is quite clear that they were within their rights in filing the bill. *Nabors v. Woolsey*, 174 Ala. 289, 56 South. 533.

The cases cited by counsel of *Wells v. Amer. Mortgage Co.*, 109 Ala. 430, 20 South. 136, *Cain v. Cain*, 127 Ala. 440, 29 South. 846, *Young v. Sheldon*, 139 Ala. 444, 36 South. 27, 101 Am. St. Rep. 44, and *Hood v. Bramlett*, 105 Ala. 660, 17 South. 105, have no application to the instant case, as the wills there construed were entirely different, and in each an interest in the estate was expressly given. Here, we conclude, there was no beneficial interest given the wife.

[7] The sole purpose of the bill is to cancel the two deeds referred to, and this question only has received consideration here. Their cancellation is sought upon the theory that they were executed by the widow in violation of her trust duties; and the widow, the grantor, is not made a party to the bill. An assignment of demurrer takes the point that she is a necessary party. We think this clear, and that it was therefore error to overrule the same, and that this ground of demurrer should have been sustained.

For this sole error the decree must be reversed.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 311)

MERTINS v. HUBBELL PUB. CO. (No. 123.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. CONTRACTS ⇐340—PLEADING—WANT OF CONSIDERATION—GENERAL DENIAL.

Where a complaint contained two of the common counts based on expressed and implied promises to pay money in consideration of a precedent and existing debt, and the other counts

showed a case of mutual promises which furnished a sufficient consideration to support an action on the other, a plea that the original contracts were void for want of consideration did no more than deny plaintiff's cause of action, and, this having been properly done elsewhere, a demurrer to such plea was properly sustained.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1713-1715; Dec. Dig. ¶340.]

2. CONTRACTS ¶328—CONSIDERATION.

Where defendant contracted to pay a specified sum for an advertising card in plaintiff's legal directory, the card having been published, it was no defense to an action for the price that it was of no value to defendant.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1571-1584; Dec. Dig. ¶328.]

3. CORPORATIONS ¶642—FOREIGN CORPORATIONS—"DOING BUSINESS."

Where a foreign corporation, not authorized to do business in Alabama, solicited and obtained from defendant a contract to pay a specified sum for insertion of defendant's advertising card in plaintiff's legal directory, such transaction did not constitute "doing business" within the state, within the Constitution and statutes requiring foreign corporations doing any business in the state to have a known place of business, and an authorized agent therein, etc.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. ¶642.]

For other definitions, see *Words and Phrases*, First and Second Series, *Doing Business*.]

4. CORPORATIONS ¶642—FOREIGN CORPORATIONS—BUSINESS IN ALABAMA.

Where a foreign corporation obtained defendant's contract for the publication of his business card in the corporation's legal directory, which contract was enforceable, though the corporation had not been authorized to do business in Alabama, the fact that it might have done other business of a sort to necessitate compliance with constitutional and statutory provisions relating to that subject, without having complied therewith, did not prohibit the contract in question, nor prevent the corporation from suing thereon.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2520-2527; Dec. Dig. ¶642.]

5. CONTRACTS ¶94—VALIDITY—FALSE REPRESENTATIONS.

Where defendant contracted for a card in plaintiff's legal directory, plaintiff's mere representations concerning the value of the contract to defendant were immaterial in the absence of an averment that they were intended as warranties or were with intent to deceive and defraud.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 420-430, 1160, 1164, 1165; Dec. Dig. ¶94.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Assumpsit by the Hubbell Publishing Company against Gustave F. Mertins. Judgment for plaintiff and defendant appeals. Transferred from Court of Appeals. Affirmed.

For former appeal in this case, see 4 Ala. App. 500, 58 South. 679, where the facts are set out.

G. F. Mertins and Hill, Hill, Whiting & Stern, all of Montgomery, for appellant. Ball & Samford, of Montgomery, for appellee.

SAYRE, J. [1, 2] Demurrer to plea 3 was sustained. The plea was that the original contracts sued upon were void for want of consideration. The complaint contained two of the common counts. These were based upon express or implied promises to pay money in consideration of a precedent and existing debt, and showed therefore an executed consideration. The other counts showed a case of mutual promises, each furnishing a sufficient consideration to support an action upon the other. So, at best, this plea did no more than deny plaintiff's cause of action, which was elsewhere done in proper form, and upon the issue thus made up the case was tried. Plaintiff's proof of its case was furnished in evidence, tending to show that it published a legal directory in which appeared, according to contract, a card advertising defendant's business. These facts were not denied, and on them, without more, plaintiff was entitled to judgment for the contract price. Evidence that the advertisement was of no value to defendant, brought him no business so far as he knew, did not at all tend to impeach the legal sufficiency of the consideration for his original promise to pay. That consideration was plaintiff's promise to print and defendant's legal right to an enforcement of that promise. "The question of the ultimate financial loss or gain is foreign to the doctrine of consideration, if the parties each have received what they have agreed upon." 1 Page, Conts. § 274. If by this plea defendant sought to open the way for proof that the contract was forbidden by statute in certain existing conditions, or was unenforceable because procured by fraud (matters defendant sought to set up in other pleas to which demurrers were sustained) evidence along those lines would not have tended to prove that defendant's promise was wholly without consideration in that plaintiff had given or promised nothing at all (a defense for the statement of which the plea in question may have been sufficient under the authority of *Milligan v. Pollard*, 112 Ala. 465, 20 South. 620), nor that plaintiff's promise was wholly void because morally bad or prohibited by law under all circumstances whatever. Such evidence would have tended only to prove that under special circumstances, not ordinarily to be presumed, plaintiff's promise had no legal sanction, and hence constituted no valuable consideration for the promise sued upon. *B. R. & L. & P. Co. v. Pratt & McCurdy*, 65 South. 533. The plea, in our opinion, if intended to set up the facts defendant attempted to prove, or other defense of like character, as against the special counts, should have alleged the facts upon which defendant relied, as the demurrer asserted, or, if intended to answer the common counts, and if apt at all as an answer to those counts, they served no better pur-

pose than the general issue of which defendant had full benefit.

[3, 4] The demurrers to those special pleas, which undertook to set up by way of defense that plaintiff, being a foreign corporation, had not complied with the statutes of this state made and provided for cases in which such corporations do business in this state, were properly sustained. Nothing is alleged which would make the contract sued upon or the transaction out of which plaintiff's demand arose the doing of business in this state within the purview of the Constitution and statutes requiring foreign corporations doing any business in this state to have a known place of business and an authorized agent herein, and to file a certified copy of their articles of incorporation with the Secretary of State. *Beard's Case*, 71 Ala. 60; *American Amusement Co. v. East Lake Chutes Co.*, 174 Ala. 526, 56 South. 961. If plaintiff did other business of a sort to necessitate compliance with these constitutional and statutory provisions without having complied, that fact could not operate to prohibit the contract in question, since to so deny plaintiff's right was beyond the power of the Legislature.

[5] Pleas averring plaintiff's mere representations concerning the value of the contract to defendant were insufficient, in the absence of averment that they were intended, in fact, as warranties, or were made with intent to deceive and defraud defendant.

Those interrogatories to which the court refused to require an answer by plaintiff were designed to elicit evidence in support only of a defense properly held by the court to be unavailable, and were apt to that purpose only. There was therefore no error in the court's ruling as to that.

Affirmed.

MCCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 443)

ZIMMERN v. WILLIAMS et al. (No. 823.)
(Supreme Court of Alabama, Dec. 17, 1914.)

1. SPECIFIC PERFORMANCE §114—PLEADING
—SUFFICIENCY OF BILL.

A bill alleging that complainants executed a mortgage on land to secure an indebtedness, that the mortgage was transferred to defendant, that as a part of the same transaction complainants conveyed the land to defendant by a warranty deed, and defendant entered into a written contract to reconvey upon repayment within two years of the amount due, with interest and cost of conveyances, and granted permission to complainants to remain in possession, that they had remained in possession, that they had made an effort to find out the exact amount due, but were unable to obtain such amount, and that they had made such tender as they deemed right in a specific sum, which was declined, stated a cause of action for specific performance of the contract to reconvey.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. §114.]

2. SPECIFIC PERFORMANCE §129—RELIEF
AWARDED—RECOVERY OF DAMAGES.

While, upon a decree for specific performance, a court of equity having acquired jurisdiction over the parties, will as an incident to the remedy award the complainant, in order to do complete equity, damages which have been sustained by him by reason of defendant's failure to comply with the terms of the contract, in a suit for specific performance the court cannot render a decree in favor of either party for the amount paid out by him for counsel fees, nor for the damages sustained by complainants from the loss of a sale of the land on account of defendant's failure to convey as agreed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 420-423; Dec. Dig. §129.]

3. SPECIFIC PERFORMANCE §114—PLEADING
—SUFFICIENCY OF BILL.

A bill stating a cause of action for specific performance of a contract to convey land was not rendered demurrable by the inclusion of a claim for damages which could not be allowed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-370, 372; Dec. Dig. §114.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by Lucinda Williams and another against Samuel Zimmern for specific performance and damages. From a decree overruling demurrers to the bill, respondent appeals. Affirmed.

The facts made by the bill are that complainants were in the actual possession of certain lands described, and in February, 1912, became indebted to Webb & McAlpine, and in order to secure said indebtedness of \$500 they executed a mortgage upon the property described; that in September, 1912, the indebtedness had been reduced to the sum of \$225, and that at that time Webb & McAlpine transferred the mortgage and the indebtedness to Samuel Zimmern, which transfer was written on the original mortgage and recorded; and that orators as a part of the same transaction executed a warranty deed, conveying the property to Samuel Zimmern for a recited consideration of \$10, and as a part of the same transaction Zimmern entered into a written contract with orators, the substance of which was that upon the repayment within two years of the amount due, with interest and cost of conveyances, he would reconvey to orators said property, and also granted permission to orators to remain in possession of said property for two years, and they have remained in possession ever since. It is then set up that they made effort to find out the exact amount due, and were unable to obtain same, and made such tender as they deemed right, in the sum of \$257.76, which was declined, whereupon they filed their bill.

Jesse F. Hogan, of Mobile, for appellant.
L. H. & E. W. Faith, of Mobile, for appellees.

DE GRAFFENRIED, J. In this case the complainants filed a bill against the defend-

ant, praying for the specific enforcement of a contract for the conveyance of land. This was the true purpose of the bill, but in the bill complainants prayed that they also be decreed damages against the defendant, which they allege they sustained by reason of his refusal, upon their seasonable demand, to make them a deed to the land in accordance with the written agreement. There was a demurrer to the whole bill, upon the ground that it was wanting in equity, and also a demurrer to so much of the bill as sought a decree for damages. The chancellor overruled the demurrer, and the defendant appeals.

[1] 1. Without going into a detailed discussion of the facts set up in the bill, and upon which facts complainants based their prayer for a specific performance of the contract, we say broadly that, if the facts set up in the bill are true, then the complainants are entitled to a specific performance of the contract. The facts set up in the bill call strongly for this particular equitable relief. The rules which govern courts of equity, in so far as the specific enforcement of contracts of the character of the one under consideration is concerned, have been frequently declared by this court, and are so well known that we need not here repeat them.

[2] 2. If the facts set up in the bill are true, and if, upon a final hearing, the chancellor finds that the parties to the contract are so situated that he can render a decree specifically enforcing the contract, then certainly the complainants will not be entitled to a decree for the damages claimed by them in their bill. We know of no rule which authorizes a court of equity, upon a bill filed for specific performance, to render a decree in favor of either of the parties to such bill for the amount paid out by him for the counsel fees paid by him on account of the litigation; neither do we know of any rule which authorizes such a court to enforce the specific performance of a contract for the sale of land, and at the same time award the complainant damages because of a loss of a sale of the land on account of the failure of the defendant to make a conveyance of the land in accordance with his agreement. In some cases, upon a decree for specific performance, a court of equity, having acquired jurisdiction over the parties, will, as an incident to the remedy, award the complainant, in order that complete equity may be done him, damages which have been sustained by him by reason of the failure of the defendant to comply with the terms of the contract. *Hooper v. Savannah, etc., R. Co.*, 69 Ala. 529. But the damages sought in this bill do not belong to that character of damages which are awarded in such cases. The case of *Hooper v. Savannah, etc., R. Co.*, supra, indicates the character of the dam-

ages which may be awarded in such cases, and gives the reasons why they are awarded.

[3] 3. The bill of complaint, as already stated, contains equity. The mere fact that in the bill there is a claim for damages which cannot be allowed does not render the bill demurrable. "A bill, stating equities which entitle the complainant to relief and praying for proper relief, is not demurrable for the reason that a prayer for further, but unwarranted, relief is conjoined." *Walshe v. Dwight Mfg. Co.*, 178 Ala. 310, 59 South. 630; *Rosenau v. Powell*, 173 Ala. 123, 55 South. 789; *Sims' Chancery Prac.* §§ 430, 431.

The decree of the court below is affirmed. Affirmed.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(100 Ala. 216)

MOBILE LIGHT & R. CO. v. HUGHES.
(No. 794.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. CARRIERS ⇨297 — CARRIAGE OF PASSENGERS—DUTIES OF CONDUCTOR—NEGLIGENCE.

The conductor of a street car, being in control of the movements of the vehicle, is negligent if he allows the motorman to proceed at so excessive a rate of speed as to endanger passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1204; Dec. Dig. ⇨297.]

2. CARRIERS ⇨297 — CARRIAGE OF PASSENGERS—DUTIES OF MOTORMAN—NEGLIGENCE.

Where a motorman propels his vehicle at so excessive a rate of speed as to endanger passengers, he is guilty of negligence.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1204; Dec. Dig. ⇨297.]

3. CARRIERS ⇨296 — CARRIAGE OF PASSENGERS—DUTY OF CARRIER.

When a street car company permits passengers to ride on the steps and platform of its vehicles, it must exercise care proportionate to the risk occasioned by the overcrowding.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1200-1203; Dec. Dig. ⇨296.]

4. WITNESSES ⇨248 — EXAMINATION — RESPONSIVE ANSWERS.

A witness, in a suit by a passenger who had been thrown from the steps of a moving car, stated, in reply to a question as to where the conductor was, that he was up in front and could not see the passenger. *Held*, that the last portion of the answer was not responsive to the question, and was properly excluded.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 861-863; Dec. Dig. ⇨248.]

5. CARRIERS ⇨243 — CARRIAGE OF PASSENGERS—WHO ARE "PASSENGERS."

One riding on the steps or platform of an overcrowded street car is a "passenger," where he expects to and is able to pay the usual fare; the street car company customarily receiving and accepting fares from such passengers.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 981-983, 1109; Dec. Dig. ⇨243.]

For other definitions, see *Words and Phrases*, First and Second Series, Passenger.]

6. CARRIERS ⇐280 — CARRIAGE OF PASSENGERS—DUTY OF CARRIER.

It is the duty of those in charge of a street car to exercise the highest degree of care known to careful persons engaged in the same business, to avoid injury to passengers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1085-1092, 1098-1103, 1106, 1106, 1109, 1117; Dec. Dig. ⇐280.]

7. TRIAL ⇐256 — INSTRUCTIONS — GENERAL TERMS.

A charge that plaintiff, if not guilty of contributory negligence, was entitled to recover, if injured in the manner alleged in the complaint, as a proximate consequence of defendant's negligence, was not defective, in the absence of a request for an explanatory charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. ⇐256.]

8. CARRIERS ⇐321 — INSTRUCTIONS.

Where the evidence showed that a street car company customarily received passengers greatly in excess of the seating capacity of its cars, an instruction, in an action by a passenger who fell from the steps on which he was riding, that, if passengers were riding on the steps because of the crowded condition of the car and platform, it was the duty of the motorman and conductor to exercise skill and care to avoid injuring them, is warranted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1247, 1326-1336, 1343; Dec. Dig. ⇐321.]

9. TRIAL ⇐256 — INSTRUCTIONS — DUTY TO REQUEST.

Where a charge requested by plaintiff might have been misleading, under the circumstances, defendant, who asked no appropriate countercharge, cannot complain.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. ⇐256.]

10. CARRIERS ⇐347 — CARRIAGE OF PASSENGERS—NEGLIGENCE.

It is not contributory negligence, as a matter of law, for a passenger on a crowded street car to ride on the steps, where the company countenanced the practice.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. ⇐347.]

11. TRIAL ⇐194 — INSTRUCTIONS—CONSTRUCTION.

In a personal injury action, a charge directing the jury, if satisfied that plaintiff was entitled to recover, to consider whether he suffered mental and physical pain on account of the injury, and if satisfied from the evidence that, as a proximate result of an injury to his leg, he did suffer mental and physical pain, to find for plaintiff, and to render such verdict as should be sufficient to compensate him, is not, when taken as a whole and considered with other instructions submitting the question of recovery, bad as directing a verdict for plaintiff.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ⇐194.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by Edward Hughes, Jr., against the Mobile Light & Railroad Company, for damages to him as a passenger. Judgment for plaintiff, and defendant appeals. Affirmed.

The ninth count is as follows:

Plaintiff, Edward Hughes, Jr., * * * claims of defendant * * * the sum of * * *, as damages for that heretofore, to wit, on November 16, 1912, while defendant was engaged in

the operation and control of electrically propelled street cars along and upon the public streets of the city of Mobile and suburbs thereof, including Spring Hill Road, and while plaintiff was a passenger upon one of said cars on said Spring Hill Road, * * * an employé of defendant, to wit, the conductor in charge of said car, negligently caused plaintiff to be injured in this: That the said conductor then and there observed that the said car upon which plaintiff was as a passenger was so crowded with passengers that it became necessary for some of the passengers to crowd upon the platform and steps of said car, and that the said passengers upon the steps of said car, or some of them, would be in danger of being thrown from the platform or steps thereof, if said car was operated at a rapid rate of speed, but that the said conductor nevertheless negligently permitted the said car to be operated at a rate of speed which was dangerous and too rapid under the said circumstances then known to him, and as a proximate result thereof, of the said negligence of the said conductor, the plaintiff, who was then and there unable to get inside said car or upon the platform thereof, because of the crowded condition thereof, and was standing on the steps of said car, was jostled, knocked, or thrown from said steps, and, in falling, one of his legs was crushed and mangled, so it became necessary to amputate it, and as a result thereof plaintiff suffered * * * and was rendered a cripple for life, and was permanently rendered less able to earn a livelihood.

The tenth count is exactly like the ninth, except that the word "motorman" is substituted for the word "conductor," where it is used in the ninth count. The demurrer to the ninth count points out that this count contains no allegation that the conductor had any control over the motorman of the car, or that he had any supervision or control over the rate of speed at which the car was operated, and that the count contains no allegation that the rate of speed at which the car was operated was at all excessive, under the circumstances. The question raised by demurrer to the tenth count was whether, when a passenger voluntarily assumes a place of danger upon a car or train upon which he is riding, does it thereby become the duty of the engineer or motorman to so operate the train or car as to make it safe for the passenger to ride in the improper position which he has voluntarily assumed, or does the passenger thereby assume the extra risk which he has imposed upon himself by voluntarily undertaking to ride in such dangerous position while the train is being operated in an ordinary manner and at an ordinary speed?

The charges given for plaintiff are sufficiently set out in the opinion, except charge A, which is as follows:

The court charges the jury that it is not negligence, as a matter of law, for a person to ride on the step of a street car.

Gregory L. & H. T. Smith, of Mobile, for appellant. Webb & McAlpine and Shelton Sims, all of Mobile, for appellee.

DE GRAFFENRIED, J. This case was tried upon the fifth, seventh, eighth, ninth, and tenth counts of the complaint. The trial

court overruled the defendant's demurrers to the ninth and tenth counts of the complaint, and the action of the trial court in so ruling is here appropriately assigned and pressed upon us as error. The reporter will therefore set out the ninth and tenth counts of the complaint.

[1-3] 1. It is necessary, in the practical operation of every business, that there shall be a head to that business. From the largest ocean liner to the smallest ferryboat there must be some one who is the master of the boat and whose word, when spoken in the line of his duty, shall be the law of that boat. A railroad train must be run on schedule time, and the conductor of that train (as well as the engineer) is a person who, in the eyes of the law, is responsible for the maintenance of a proper rate of speed upon that train. An engineer in charge of a locomotive may commit an act of negligence in running his train at an excessive rate of speed, and the conductor of that train may, at the same time, be guilty of an act of negligence in permitting the engineer to do so. The conductor of a street car is the master of his car, just as a conductor of an ordinary passenger train is the master of his train, and the conductor of a street car occupies the same relation to his motorman as the conductor of an ordinary railroad train occupies to his engineer. While it is actionable negligence (in case of injury proximately therefrom) for an engineer in charge of an ordinary railroad train, or a motorman in charge of a street car, to run his train or car at an excessive rate of speed, we think it can be safely affirmed that it is also negligence for the conductor of a train or street car to permit his engineer or motorman to run his train or car at an excessive rate of speed. *A. G. S. R. R. Co. v. Gilbert*, 6 Ala. App. 372, 60 South. 542; *Birmingham Railway, Light & Power Co. v. Jung*, 161 Ala. 461, 49 South. 434, 18 Ann. Cas. 557.

It is not uncommon, when open cars are used by street car companies, and large crowds are being handled, to see the interior of a street car crowded with passengers, and to also see passengers standing upon the foot boards and steps of the cars. Such conditions, when they are permitted to exist, impose upon those in charge of such a street car a duty of care with reference to their passengers, proportioned to the risk which is caused to the passengers by such overcrowding. *A. G. S. R. R. Co. v. Gilbert*, supra.

The ninth and tenth counts of the complaint were not subject to the defendant's demurrer.

2. While testifying as a witness on behalf of the defendant, the conductor of the car, from which the plaintiff fell and received his injuries, testified as follows:

"I had complete control of the management and operation of the car. * * * It was the duty of the motorman to stop when I rang the

bell, to start when I told him to start, and to slow down or go fast as I instructed him."

In addition to the above testimony of the conductor as to his authority over the car, the jury, out of the conflicting evidence, had the right to find (and we presume did in fact find) that the plaintiff, at the time he received his injuries, was a passenger upon a street car which was largely overcrowded, and that the car was, to use the language of one of the witnesses, traveling as fast as electricity could carry it. This condition of the testimony illustrates the necessity for, and the wisdom of, the rules which we have above announced with reference to the duties of conductors of street cars in connection with the speed of overcrowded cars and the care which the law requires of them with reference to their passengers when they see proper to permit their cars to become overcrowded. *A. G. S. R. R. Co. v. Gilbert*, supra. In this connection, however, it may not be out of place to call attention to the fact that passengers, when they voluntarily assume exposed positions on overcrowded trains or street cars, assume some risks which do not attach to passengers who are not so exposed. This particular assumption of risk was discussed in *A. G. S. R. R. Co. v. Gilbert*, supra.

[4] 3. During the examination of a witness (John Montgomery), the defendant asked him, "Where was the conductor at that time?" The witness replied, "He was up in front of the car. *He did not see him at all.*" The witness, by the sentence italicized by us, told the jury that the conductor did not see the plaintiff. The trial court, on motion of the plaintiff, excluded from the jury the said statement, "He did not see him at all." In doing this the trial court was free from error. The contention of the appellant is that the above statement of the witness was the statement of a collective fact, and in support of its contention the appellant cites us to numerous cases in which, in holding certain statements of witnesses to be admissible in evidence as statements of collective facts, this court has indicated a liberal policy in upholding trial courts in their efforts to unfetter (so far as the limits of propriety will admit) the examination of witnesses. It has, however, been the rule of this court to uphold trial courts in excluding from juries, upon appropriate motions, statements of witnesses which were not responsive to questions propounded to them, but which were (whether with innocent or bad motives) volunteered by them in answer to legitimate questions propounded to them. The sentence which we have above italicized was a mere volunteer statement of the witness, and an examination of the question to which it was given as an answer will show that this statement was not only not called for by the question, but that it was plainly and palpably a mere volunteer statement of an opinion of the witness. The action of the trial court in excluding this

statement from the jury is sustainable upon this ground alone. *Sloss-Sheffield Steel & Iron Co. v. Sharp*, 156 Ala. 284, 47 South. 279; *Shrimpton & Sons v. Brice & Donehoo*, 109 Ala. 641, 20 South. 10.

[5] 4. The following part of the oral charge of the court to the jury is pressed upon us as having been erroneous:

"Now, as to who is a passenger: if you are reasonably satisfied from the evidence that the plaintiff, when he got on this car, did so with the bona fide intention of becoming a passenger and paying his fare when demanded by the conductor, and had the money to pay his fare, then he was a passenger, in contemplation of law."

This portion of the oral charge of the court must be read in connection with the following other portion of that charge which immediately succeeds it:

"If you are reasonably satisfied from the evidence that, at and before the time the plaintiff claims to have been injured, it was the established general usage and practice of the defendant, in the operation of its cars, to carry large numbers of passengers on its cars in excess of their seating capacity, and permitted persons to ride on the platform and steps of its cars, without objection, and demanded and collected fares from them, and that such was the usage and practice with reference to this particular car, then the fact, if it be a fact, that plaintiff, at the time he claims to have been injured, was riding on the steps of the car, would not alone prevent his being a passenger, if he was there with the bona fide intention of becoming a passenger, and intending to pay his fare when it was demanded of him, and had the money to pay it."

When the oral charge of the court, which we have above quoted, is read in connection with all of the undisputed evidence in this case, we think that it correctly states the law. In fact, we take it, from a careful examination of this record, that the plaintiff was, at the time of his injury, a passenger, unless he was, in accordance with the theory of the defendant, simply stealing a ride for a few blocks. It seems from the evidence in this case that it was the custom of the defendant to collect fares, not when passengers boarded its cars, but at the convenience of the conductors, after they had been boarded by the passengers. It also appears that but little, if any, attention was paid by the defendant, in the matter of handling its passengers, to the mere seating capacity of its cars. The conductor of this particular car testified that on the named occasion he had about 75 passengers on the car; that the car would carry 125 or 130 passengers at a time; that he had carried that many at times; and that the car would *seat only forty-eight people*. There was evidence, contradictory of that of the conductor, tending to show that on this occasion the car had on it all of the people who could get upon it; that it was bringing a crowd from a baseball game; and we think that undoubtedly, if the plaintiff boarded that car with the intention of paying his fare and of becoming a passenger, instead of merely stealing a short ride, then he was, at the time of his injuries, a passenger. All the evidence shows that the plaintiff boarded the

car at a point where those intending to become passengers had a right to get upon defendant's cars, and where the plaintiff had a right to assume that, if he boarded the car, he would in fact become a passenger.

[6] 5. The court, at the written request of the plaintiff, gave to the jury the following written charge:

"The court charges the jury that, if they are reasonably satisfied from the evidence in this case that the plaintiff was a passenger upon the street car of the defendant at the time of his injuries, then it was the duty of the employees of the defendant, then in control of said car, to exercise the highest degree of care, skill, and diligence known to very careful, skillful, and diligent persons engaged in like business, to avoid injury to plaintiff; and it is for the jury to determine, under the evidence, whether or not such care, skill, and diligence was exercised by the employees then in control of the said car."

Under the authority of *Louisville & Nashville Railroad Co. v. Glasgow*, 179 Ala. 251, 60 South. 103, and *Birmingham Railway, Light & Power Co. v. Barrett*, 179 Ala. 274, 60 South. 263, and *Southern Railway Co. v. Cunningham*, 152 Ala. 147, 44 South. 658, the above charge states a correct proposition of law.

[7] 6. The trial court, at the written request of the plaintiff, charged the jury as follows:

"If the jury are reasonably satisfied from the evidence that the plaintiff was injured in the manner and form alleged in the complaint, as a proximate consequence of defendant's negligence, as alleged therein, and that he was not guilty of contributory negligence, then you must find a verdict for the plaintiff."

Referring to a charge in substantially the same language as that of the above charge, this court, in *Birmingham Railway, Light & Power Co. v. Barrett*, *supra*, said:

"The second written charge given for plaintiff required a verdict for her if the jury found that 'the material averments' of the first count were true, and that she was not guilty of contributory negligence. If this charge had any tendency to mislead the jury as to the proof of plaintiff's case, the defendant should have requested an explanatory charge."

An examination of the case of *Birmingham Railway, Light & Power Co. v. Barrett*, *supra*, will show that the questions determined in that case received, in the original opinion and in the opinion which was written in response to the application for a rehearing, the most careful consideration of all of the members of this court. Upon the authority of that case, the trial court in this case cannot be put in error for giving the above-quoted charge to the jury.

[8] 7. The trial court, at the written request of the plaintiff, gave to the jury the following charge:

"The court charges the jury that if they are reasonably satisfied from the evidence in this case that it was the defendant's general custom, at and before the time of plaintiff's injury, to permit passengers to ride on the steps of its street cars, and to collect fares from such passengers, at times when such cars and their platforms were so crowded with passengers as to

make it impossible for any more passengers to ride inside of the cars or on the platform, and if the jury are further reasonably satisfied from the evidence that such custom was then known to the motorman and conductor who were engaged in the operation of the car from which plaintiff claims to have fallen, then it was the duty of the motorman and conductor to know whether or not their said car was so crowded as to require any passengers to ride on the steps of the car, and, if any passengers were riding on a step or steps because of the crowded condition of the car and platform, it was the duty of the motorman and conductor to exercise skill and care in operating the car to avoid injury to such passengers."

There was evidence tending to show that the general custom of the defendant *was* as the above charge hypothesizes it to have been, and that this custom was known to the conductor and the motorman in charge of this particular car. We do not see how it is possible for a motorman in charge of a street car, which is so crowded with passengers as to require some of the passengers to stand upon the steps of the car, not to be apprised of that fact; and, when a car is in such condition, it is the duty of both the conductor and the motorman to so operate the car as to meet the increased responsibilities which are thus placed upon them. *A. G. S. R. Co. v. Gilbert, supra; B. R., L. & P. Co. v. Jung, supra.*

The trial court committed no error in giving the above charge to the jury. It correctly states the law as applicable to some of the tendencies of the evidence in this case.

[9] 8. The trial court, at the request of the plaintiff, gave to the jury the following other written charge:

"Gentlemen of the jury, if you are reasonably satisfied, from the evidence in this case, that there was, to the knowledge of the motorman and conductor in charge of the car upon which the plaintiff was riding, a general custom of defendant, at and before the time of plaintiff's injury, to permit passengers to ride upon the steps of its street cars when the cars and platforms were so crowded as to prevent passengers from getting within the car or on the platforms, and if you are further reasonably satisfied from the evidence that the car upon which plaintiff was riding, and its platforms, were so crowded that plaintiff could not get upon the platforms or within the car, and that plaintiff was a passenger upon said car, then it was the duty of the motorman and conductor to exercise skill, care, and caution in the operation and management of the car, so as to avoid injury to plaintiff, and this was their duty, whether or not they actually saw that there was a passenger upon the steps, for, under such circumstances, the law charged them with the duty of knowing the situation of their passengers."

The above charge may have possessed a misleading tendency in that it might have been construed as meaning that the defendant company was under the duty, under the facts hypothesized in the charge, of preventing injury to passengers under any and all circumstances. If so, this misleading tendency could have been avoided by a countercharge, which the defendant does not appear to have asked. The court cannot be put in error for having given it. *A. G. S. R.*

R. Co. v. Gilbert, supra; B. R., L. & P. Co. v. Jung, supra.

[10] 9. Whether it is or is not negligence, as matter of law, for a passenger to ride upon the steps of a street car, depends upon the circumstances of each particular case. Under some of the tendencies of the evidence in this case, it was not negligence, as matter of law, for a passenger to stand upon the steps of the car at the time the plaintiff received his injuries. If this car was so crowded that the plaintiff had to stand upon the steps, and if the plaintiff was then a passenger, and if it was the custom (as some of the evidence tended to show) for the defendant to permit passengers to stand upon the steps of its cars when the platforms and interior parts of its cars were crowded with passengers, then the question of negligence vel non of the plaintiff in assuming a position upon the steps was a question for the jury. *A. G. S. R. Co. v. Gilbert, supra.*

The trial court cannot be put in error for giving charge A to the jury, at the written request of the plaintiff. If it possessed a misleading tendency, that tendency could have, if the defendant had requested it, been corrected by a countercharge.

[11] 10. The trial court, at the written request of the plaintiff, gave to the jury the following other written charge:

"The court charges the jury that, if they are reasonably satisfied from the evidence in this case that the plaintiff is entitled to recover, then, in arriving at a verdict, it is the duty of the jury to consider whether or not the plaintiff suffered mental and physical pain on account of injury to his leg, and whether or not he was rendered a cripple for life; and if the jury are reasonably satisfied from the evidence that, as the proximate result of his injury to his leg, he did suffer mental and physical pain, and was rendered a cripple for life, it is the duty of the jury to find for the plaintiff, and to render such a verdict as the jury find to be sufficient to compensate the plaintiff for pain and suffering and his crippled condition, but, of course, your verdict could in no event be greater than the amount claimed in the complaint."

This charge must, of course, be considered as a whole. If the italicized part of it was considered alone, manifestly it would, under the evidence, have amounted to the general affirmative charge in favor of the plaintiff. No such purpose was entertained by the court, as the entire proceedings on the trial demonstrate. When, as must be done, the italicized part of the charge is considered in connection with the other, especially preceding, parts of it, clearly the meaning of the court could not have been mistaken. There was no error in giving said charge.

11. In the above opinion we have discussed those questions which, after a careful examination of the record, seem to deserve attention at our hands. To some of the questions discussed in briefs of counsel we have not referred, but we have carefully considered all of them, and we find that the trial court committed, as to them, no reversible error. This case was, under the pleadings

and the evidence, one for the jury. The jury determined the issues in favor of the plaintiff; and, as we find no reversible error in the record, the judgment of the trial court must be affirmed.

Affirmed.

MCCLELLAN, SAYRE, and SOMERVILLE, JJ., concur.

(190 Ala. 379)

DOZIER v. WOODS. (No. 181.)

(Supreme Court of Alabama. Nov. 7, 1914.

Rehearing Denied Dec. 17, 1914.)

1. HIGHWAYS — 172 — USE OF HIGHWAY — DUE CARE.

Travelers on a public highway must conduct themselves reasonably to avoid injuring other travelers.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 459, 460; Dec. Dig. —172.]

2. HIGHWAYS — 184 — INJURIES BY AUTOMOBILE TO PERSONS ON FOOT — COMPLAINT — SUFFICIENCY.

A complaint is not demurrable, where it alleges facts that show defendant owed plaintiff a duty as being both in use of a public highway, defendant in his automobile and plaintiff on foot, and further alleges negligent performance or neglect of the duty owed plaintiff by defendant under such facts.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

3. HIGHWAYS — 176 — INJURIES BY AUTOMOBILE — CONTRIBUTORY NEGLIGENCE.

Where plaintiff was driving a cow and calf along a country road, she owed no duty to look and listen for the approach of defendant's automobile from the rear, when defendant saw her first at a distance of 75 yards, being in her rear, knew that she did not hear his horn, and kept on until he struck her, and therefore she was entitled to affirmative instructions in her behalf as to his plea of contributory negligence.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 465; Dec. Dig. —176.]

4. HIGHWAYS — 184 — WANTON OR RECKLESS USE OF AUTOMOBILE — QUESTION FOR JURY.

Evidence held sufficient to go to the jury as to whether defendant in operating an automobile showed such reckless indifference to the plaintiff's rights as to amount to wantonness.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 471-474; Dec. Dig. —184.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Lula Woods against George Dozier for damages for being struck by an automobile. Judgment for plaintiff in the sum of \$150, and defendant appeals. Transferred from Court of Appeals. Affirmed.

The first count states that defendant was in charge of an automobile, and did negligently run said automobile upon or against plaintiff, who was then and there on the Mt. Meigs Road, a public road or highway in said county, and by reason of said negligence, and as a proximate consequence thereof, plaintiff received personal injuries, which are set out in extenso. Count 2 states that defendant was engaged in operating an automobile in the county of Montgomery and

state of Alabama, and, while so operating said automobile upon or along the Mt. Meigs Road in said county, defendant was so negligently operating said automobile that by reason thereof, and as a proximate consequence thereof, said automobile collided with plaintiff, who was then and there upon said Mt. Meigs Road, a public road in said county, and by reason thereof plaintiff received the following personal injuries, which are set out. Count 8 states the same facts as count 1, but with the averment that defendant did wantonly or willfully run said automobile upon or against plaintiff. The demurrers raise the question discussed in the opinion.

L. A. Sanderson, of Montgomery, for appellant. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

DE GRAFFENRIED, J. [1] Travelers upon a public highway owe a duty to others traveling upon such highway, and that duty requires them to so reasonably conduct themselves in the use of the highway as that they will not injure others who are also traveling upon such highway.

[2] In this case each simple negligence count shows that the defendant was traveling in an automobile upon a public highway, and that the plaintiff was lawfully walking along such highway. The law therefore cast the duty on the defendant to drive his automobile in such a reasonable way as not to injure the defendant. Each simple negligence count of the complaint shows therefore that, at the time the plaintiff was injured, the defendant owed the plaintiff a duty, and, this being true, the general allegation in the counts showing that the defendant negligently performed the duty, or performed it in a negligent manner, and that the plaintiff was thereby injured, was sufficient. These counts—the first and second—were not subject to the defendant's demurrer. *Sloss-Sheffield Steel & Iron Co. v. Weir*, 179 Ala. 227, 60 South. 851; *Terrill v. Walker*, 5 Ala. App. 535, 59 South. 775; *Adler v. Martin*, 179 Ala. 97, 59 South. 597.

1. The evidence in this case all shows that the plaintiff was oblivious of the approach of the automobile until the moment she received her injuries. She was on a highway—not in a town or city—driving a cow and calf. Her attention was directed to the cow and calf, and this the defendant knew, and he also knew that she was ignorant of his approach. He says that he sounded his horn, but he also says that he knew that she did not hear him. The defendant approached the plaintiff from the rear, and he shows by his testimony that when he first saw her she was 75 yards ahead of him, with her back to him, and that she continued walking along the road with her back to him until the moment of the injury.

Under the circumstances shown, the plain-

tiff owed the defendant no duty to look or listen for the approach of his automobile. *Adler v. Martin*, supra; *Terrill v. Walker*, supra.

[3] The plaintiff was entitled to affirmative instructions in her behalf as to the plea of contributory negligence.

2. We are inclined to think from the size of the plaintiff's verdict that the jury gave her nothing under the wanton (third) count. There were circumstances shown by some of the testimony, from which the jury, if they believed that testimony, had the right to infer that at the time of the injury the defendant was traveling at a much greater rate of speed than four or five miles per hour. The defendant testified that he stopped his automobile at the point where the plaintiff received her injuries. In other words, that he stopped his automobile instantly, a thing which he could, of course, have done if he was then traveling at the rate of only four or five miles per hour. On the other hand, a woman, Pinkey Jenkins, testified, in one part of her testimony, that "the automobile had gone a little piece beyond her." In another place, she said, "The automobile was standing right close to where she was on the ground."

[4] We think that the testimony not only contradicts the testimony of the defendant as to the speed of the automobile, but that, taking into consideration the situation of the plaintiff—she was driving a cow with a rope and belaboring the cow with the rope at the time of the accident—and that the defendant knew of the situation of the plaintiff, and that she was oblivious of his approach, the jury might have inferred that the defendant, on the occasion and under the circumstances named, drove his automobile in such a way and at such speed as to indicate that reckless indifference to the rights of the plaintiff as amounted to wantonness. The defendant himself testifies that the plaintiff, when, or just after, she was struck, "was on the fender of the car," and that she "stayed on it possibly a second." The defendant, it is true, testified that the plaintiff, being startled by the automobile, jumped on the fender and then fell off. The plaintiff, however, testified that "the automobile ran in and picked her up and threw her out into the road and knocked her unconscious." Here, then, is a direct conflict as to the manner of the injury, and also, we think, a conflict as to the speed of the automobile. An automobile going four or five miles an hour, and which was stopped instantly, could hardly have run into the plaintiff and then "picked her up and thrown her out into the road and knocked her unconscious."

Under all the evidence, the trial judge was not authorized to take the question of wantonness vel non from the jury. *Bates v. Harte*, 124 Ala. 427, 26 South. 898, 82 Am.

St. Rep. 186; 2 Mayf. Dig. p. 562, subd. 18.

The judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 589)

HARRIS v. HILL. (No. 63.)

(Supreme Court of Alabama. Nov. 7, 1914.

Rehearing Denied Dec. 17, 1914.)

1. LANDLORD AND TENANT ⇨283—STATUTORY EJECTMENT—NOTICE.

In a landlord's statutory action in the nature of ejectment, triable in a court of record, the ten days' written notice required by Code 1907, § 4263, in summary actions in unlawful detainer brought and tried before a justice of the peace is not necessary, but a notice to quit is necessary to terminate the tenancy, and, where the tenancy is from month to month, a month's notice is necessary, but such notice need not be in writing.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1189-1192; Dec. Dig. ⇨283.]

2. LANDLORD AND TENANT ⇨285—STATUTORY EJECTMENT—EVIDENCE—TENANCY.

Evidence in such action held to authorize a finding that the contract between the landlord and tenant contemplated and created a tenancy from month to month.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1187, 1193-1197, 1199-1204; Dec. Dig. ⇨285.]

3. LANDLORD AND TENANT ⇨285—STATUTORY EJECTMENT—EVIDENCE—VERBAL NOTICE TO QUIT.

In such action evidence held to authorize a finding of a verbal notice to quit given by the landlord more than 30 days before the suit brought.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1187, 1193-1197, 1199-1204; Dec. Dig. ⇨285.]

4. LANDLORD AND TENANT ⇨285—STATUTORY EJECTMENT—RECOVERY.

A landlord showing title in himself, and who, having given the notice necessary to terminate the tenancy, had a right to the possession at the commencement of his suit, was entitled to a judgment for the land.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1187, 1193-1197, 1199-1204; Dec. Dig. ⇨285.]

Appeal from Circuit Court, Montgomery County; Armstead Brown, Judge.

Ejectment by William Hill against Kincheon Harris. Judgment for plaintiff, and defendant appeals. Affirmed.

Evans & Parrish, of Montgomery, for appellant. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

DE GRAFFENRIED, J. Under the evidence in this case the trial judge was authorized to find that more than two years before the suit was brought William Hill rented the lands sued for to Kincheon Harris, by the month, at a rental, to be paid at the end of each month, of \$10 per month. He was also authorized to find that for a period Kin-

cheon Harris paid William Hill the rent monthly, but that, finally he became negligent about the matter, paid his landlord some money as his convenience suited him, and then, at last, quit paying any rent at all. He was authorized to find that for at least six months before the suit was brought the tenant not only refused to pay the landlord any rent, but that he also refused, upon demand made before this suit was brought, and more than 30 days before the suit was brought, to vacate the premises and deliver possession of them to his landlord. The landlord testified as a witness in the case, and the following excerpt from his testimony will illustrate the situation which confronted the trial judge when he, upon the evidence, rendered a judgment in favor of the landlord:

"The trade was to rent. My wife said, 'The place is worth \$10 per month,' and I said, 'Yes; the place is worth \$10 per month,' and Kincheon Harris said he would take it. He rented it by the month. When I tried to get possession he had been renting it about a year, I think, or a year and two or three months. He got in possession of it and wouldn't pay me no rent. Just stayed in it. I tried to get him out, and he would not get out. * * * The last rent I collected from Kincheon, I think, was in March or April, 1912. He paid me \$1.80 on May 4, 1912. He made no payment after that time. * * * Before bringing this suit I made demand on him to get out, and he refused to get out."

This suit—a statutory action in the nature of ejectment—was brought on November 4, 1912. The evidence does not show that there was a written demand by the landlord upon the tenant to vacate, and we presume that the demand was a verbal demand.

[1, 2] 1. The 10 days' written notice which is required in actions of unlawful detainer (see section 4263 of the Code of 1907, in which an "unlawful detainer" is defined) has no applicability to this case. This is an action of ejectment, and not an action of unlawful detainer, and the above subdivision of the Code reference to 10 days' written notice applies, not to an action of ejectment which is triable in a court of record and by a jury, but to an action of unlawful detainer, a summary action which may be brought before and tried by a justice of the peace. This is shown, not only by the language of the above section and its kindred sections, but also by the construction which was placed upon the above section by this court in *McDevitt v. Lambert*, 80 Ala. 536, 2 South. 438. In that case this court, through Stone, C. J., said:

"The present action, it will be remembered, is for unlawful detainer—a statutory action—which must be prosecuted, in the first instance, before a justice of the peace. 'An unlawful detainer is where one who has lawfully entered into possession of lands or tenements, after the termination of his possessory interest, refuses, on demand in writing, to deliver the possession thereof to any one lawfully entitled thereto, his agent, or attorney.' Code 1876, § 3697. The notice here referred to is not the notice to terminate a lease, which we have been considering. The notice to terminate can, in the nature of things,

be necessary or proper, only while the tenant is in possession under a lease, express or implied. If he is a mere intruder or trespasser, he is not entitled to notice to quit. Forcible entry and detainer is the proper remedy for evicting such trespasser. When, however, as in this case, the entry is lawful, and the tenancy continues by the terms of the contract until properly terminated by notice to quit, that notice, in the very nature of things, must be given before the lease expires, and while the defendant has the lawful right to retain possession; this because in a tenancy from month to month the tenant has the lawful right to retain possession, and his lease does not expire until it is terminated by a proper notice to quit, as we have stated above. The notice for which section 3697 makes provision is an entirely distinct proceeding, but is nevertheless, a necessary constituent of our statutory unlawful detainer. The one notice has for its object the termination of an existing lease, which, in the absence of such notice, will sanction and justify the tenant's continued possession. This can only be necessary when, in its absence, the tenant has the lawful right to retain possession. The other can be given only after the termination of the possessory interest; and in all cases where there has been a previous lawful possessory interest, and the wrong consists in holding over without authority, this notice is none of the necessary constituents of the statutory tort known as 'unlawful detainer.' Code, § 3697. Without such notice, the summary jurisdiction of a justice of the peace does not attach. So, in cases like this, it would seem two notices are necessary." *McDevitt v. Lambert*, 80 Ala. 540, 2 South. 438.

The section referred to in the above quotation as section 3697 of the Code of 1876 is now section 4263 of the Code of 1907, and to which section we have above referred.

In the situation of the plaintiff, if this had been an action of unlawful detainer, instead of an action of ejectment, the tenant would have been entitled to his notice to quit for the purpose of terminating his tenancy, and then to the 10 days' notice in writing, in order that he might have a convenient time within which to actually vacate the premises. In this action of ejectment the notice to quit was necessary to put an end to the tenancy, but the 10 days' written notice to vacate was not necessary. An action in ejectment is not so quick as that of an action of unlawful detainer and the reasons for the 10 days' written notice required in action of unlawful detainer do not exist. *McDevitt v. Lambert*, *supra*.

2. The evidence, we think, authorized the trial judge to find that the contract between this landlord and tenant contemplated a rental by the month so long as it suited the mutual wishes of the landlord and the tenant to continue their relations as landlord and tenant. The tenant was, therefore, in lawful possession of the lands, as a tenant from month to month. The landlord could, without reason, put an end to this tenancy, but, to do so, the law required him to give the tenant a month's notice to quit. The tenant was therefore, before this action could lawfully be brought, entitled to a month's notice to quit. This notice to quit, however, is not required by the law to be in writing. Ten days' written notice must

be given to terminate a tenancy at will (section 4732 of the Code of 1907), but there is no requirement of any of our statutes that a notice to quit to other than a tenant at will shall be in writing. Our legislators have been content to leave that matter to the rules of the common law, and at common law a verbal notice to quit, unless there was some special agreement of the parties to the contrary, was sufficient, and a verbal notice to quit is, in this state, except as to tenancies at will, sufficient. 24 Cyc. 1332, subd. 4, and authorities there cited in notes 30 and 31.

[3] 3. In our opinion, there was evidence from which the trial judge was authorized to find that a verbal notice to quit was given this tenant by his landlord more than 30 days before this suit was brought. The evidence, indeed, might have been made more specific on the subject, but the following excerpts from the testimony of the landlord, when given a reasonable construction—and in construing a notice to quit the courts will look to the intent of the parties, and will uphold it if it be “so certain as that the tenant cannot misunderstand it” (24 Cyc. pp. 1332 and 1333, subd. 4)—will, we think, indicate that the notice was given more than 30 days before the suit was brought:

“Before bringing this suit I made demand on him to get out, and he refused to get out. * * * When I tried to get possession he had been renting it about a year, I think, or a year and two or three months. He got in possession of it and wouldn't pay me no rent. I tried to get him out, and he would not get out. * * * He came around to my house one night and rented it from me, and that has been 2 or 2½ years ago.”

There was, therefore, abundant evidence in the case to justify the trial judge in finding that the notice to quit was given more than a month before the suit was brought.

[4] This being true, the landlord had a right to the possession of the land at the commencement of the suit. He not only showed this, but he also showed title in himself. He was, therefore, entitled to a judgment for his land. *Bush v. Fuller*, 173 Ala. 511, 55 South. 1000; *McDevitt v. Lambert*, supra.

There is no error in the record, and the judgment is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(190 Ala. 409)

STATE for Use of ALABAMA INSANE HOSPITAL, v. MOBILE & O. R. CO. (No. 737.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

PUBLIC LANDS ⇨61—CONVEYANCE—EVIDENCE.

Act of April 4, 1911 (Acts 1911, p. 192), authorizing the introduction in evidence of documents executed prior to 1879 by the Governor

or his secretary purporting to convey state lands, but ineffective as such conveyance, giving such documents a prima facie evidential effect, is not in violation of the federal or state Constitution.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 192-213; Dec. Dig. ⇨61.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Bill by the State of Alabama, for the use of the trustees of the Alabama Insane Hospital, to settle title to land, and for an accounting for all the lumber cut and manufactured from said lands, and the turpentine and rosin obtained from the same. Decree for respondent, and complainant appeals. Affirmed.

W. A. Gunter, of Montgomery, and S. W. John, of Birmingham, for appellant. S. R. Prince and F. J. Yerger, both of Mobile, for appellee.

ANDERSON, C. J. The legal questions involved in this appeal have been fully discussed and considered by this court, and decided adversely to the contention of the appellant, and we do not feel disposed to depart from said holding. *Jordan v. McClure Lumber Co.*, 170 Ala. 289, 54 South. 415; *Turner v. Davis*, 64 South. 958; *Brannan v. Henry*, 175 Ala. 454, 57 South. 967.

In the last case supra the constitutionality of the act of 1911 (page 192) was considered, and the same was declared to be constitutional, and we repeat that the said act is not repugnant to the federal or state Constitution. This act is unlike the one condemned in the case of *Bailey v. Alabama*, 219 U. S. 219, 31 Sup. Ct. 145, 55 L. Ed. 191.

The decree of the chancery court is affirmed.

Affirmed.

McCLELLAN, MAYFIELD, and SOMERVILLE, JJ., concur.

(190 Ala. 574)

MT. VERNON LUMBER CO. v. SHEPARD et al. (No. 850.)

(Supreme Court of Alabama. Nov. 19, 1914.)

EJECTMENT ⇨9—RIGHT TO MAINTAIN.

Though ejectment is a proper remedy for recovery of possession of standing timber, plaintiff cannot maintain it; the time limited by its contract of purchase for removal thereof having expired, so that it has no legal right to enter on the land, and would be a trespasser if it did so.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. ⇨9.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Ejectment by the Mt. Vernon Lumber Company against Kate T. Shepard and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Ervin & McAleer, of Mobile, for appellant.
Gregory L. & H. T. Smith, of Mobile, for appellees.

ANDERSON, C. J. It was admitted upon the trial that the legal title to the land was in Kate Shepard, and this being true, the plaintiff could not recover the same, which was covered by the first count.

The second count, however, sought a recovery of the timber, and not the land, and we think the finding of the trial court in favor of the defendants as to this count was also free from error. It is needless for us to determine the character or nature of the timber that was conveyed by the contract, for the reason that, whatever timber may have been thereby conveyed, the contract expressly limited the time of removal to five years, which said time had expired before bringing this action of ejectment. Under the previous decisions of this court, the owner of the timber had no legal right to enter upon the land after the expiration of the time limited, and would be a trespasser if he did so. *Zimmerman v. Daffin*, 149 Ala. 380, 42 South. 858, 9 L. R. A. (N. S.) 663, 123 Am. St. Rep. 58; *Goodson v. Stewart*, 154 Ala. 660, 46 South. 239; *Mt. Vernon Co. v. Shepard*, 180 Ala. 148, 60 South. 825. If, therefore, the plaintiff had no legal right to enter upon the land, and would be a trespasser if he did so, notwithstanding he may have been the owner of the timber, he could not maintain an action of ejectment, either for the land, or the timber as separable from the land. *Ward v. Moore*, 180 Ala. 403, 61 South. 303.

This case has been before this court in different form, and is reported in 180 Ala. 148, 60 South. 825, and we do not understand the opinion there as holding or stating that this plaintiff could maintain an action of ejectment for the timber in question against this defendant. It is true the opinion lays down the broad proposition that standing timber is a part of the realty, and that ejectment is an appropriate remedy to recover its possession; but we did not hold that the action could be maintained by this plaintiff, or any other person who had lost his right to go upon the land, and who would be a trespasser if he did so. Indeed, the fourth paragraph of the opinion as set out on page 155 in 180 Ala. and on page 828 in 60 South. reiterates the doctrine that if the grantee under a timber sale delays going upon the land beyond the expiration of the time limit fixed by the contract, or beyond a reasonable time when no limit is fixed by the contract, he is guilty of trespass in entering upon the land.

The case of *Harrell v. Mason*, 170 Ala. 282, 54 South. 105, Ann. Cas. 1912D, 585, was not an action of ejectment, and there is nothing in the opinion that could indicate that this plaintiff or the owner of the timber there could maintain ejectment for the timber after

the expiration of the time limit for going upon the land. Nor are the cases of *Smith Lumber Co. v. Jernigan*, 64 South. 300, and *Inglis v. Freeman*, 137 Ala. 298, 34 South. 394, in conflict with the present holding. They simply hold that a plaintiff claiming the timber can test his right and title to the trees in an action at law. They do not hold that a claimant of the timber can maintain ejectment for same after he has lost his right to go upon the land, and, indeed, neither of these cases took account of whether or not the claimants therein had or had not lost their right of entry upon the land.

The judgment of the law and equity court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(190 Ala. 572)

DE YAMPERT et al. v. DUNCAN.
(No. 536.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ⇐1099—SUBSEQUENT APPEAL—FORMER DECISION AS LAW OF CASE.

The construction of an item of a will in the opinion on a former appeal will be adhered to on a subsequent appeal, where the argument is not persuasive of error in the former opinion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. ⇐1099.]

2. WILLS ⇐590—CONSTRUCTION—PRESUMPTION—INTENDED GIFT.

A will devising land to testator's son to be held during his natural life, and at his death to be equally divided between the heirs of his body, and, should he die without leaving a child or children, the right to dispose of the land "herein devised to him and the heirs of his body" as he should see fit, justified the assumption that testator intended to make a gift of the property by the will, rather than to recite past transactions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1293-1297; Dec. Dig. ⇐590.]

Appeal from Circuit Court, Perry County;
B. M. Miller, Judge.

Action by F. P. Duncan against L. P. De Yampert and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. B. Evins, of Greensboro, and Clifton O. Johnston, of Marion, for appellants. George D. Motley, of Gadsden, for appellee.

GARDNER, J. This is the second appeal in this cause. See *Duncan v. De Yampert*, 62 South. 673, where a sufficient statement of the case may be found.

[1] While there are several assignments of error, the only assignments argued by counsel relate to the construction of item 5 of the will of L. Q. C. De Yampert, which was construed by this court in the opinion on the former appeal. Upon the retrial of the cause

the court below followed the construction there given, which resulted in a judgment for the appellee here. As we take it, this appeal seeks a review of the former opinion, which, however, if adhered to, must result in an affirmance of the judgment. We have carefully reconsidered the questions decided on the former appeal, and this in the light of brief of counsel. The argument, however, is not persuasive of error in the former opinion, and we therefore conclude to adhere thereto.

[2] It is insisted, however, that in the former opinion it was assumed that the testator, in item 5 of the will, intended to make a gift of the property *by the will*, while the language used did not justify the assumption, but that, in fact, the language was rather a mere narrative of past transactions. We have given to this question also careful consideration, and we are of the opinion that the assumption of an intended gift *by the will* was fully justified by the language used by the testator.

We do not deem it necessary to enter again into a discussion of the questions here urged at this time, but content ourselves with a reference to the opinion on the former appeal, above cited, as authority for the affirmance of the judgment of the court below. Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 135)

CREAGH v. BASS. (No. 853.)

(Supreme Court of Alabama. Dec. 17, 1914.)

LOGS AND LOGGING §35—CONVERSION OF TIMBER.

Where timber rights have been conveyed separate from the land by constructive severance, the possession of the land is not the adverse possession of the timber, and the owner of the timber rights, though not in possession of the land, may recover for the conversion of his property.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 113-115; Dec. Dig. §35.]

Appeal from Circuit Court, Washington County; John T. Lackland, Judge.

Action by W. T. Creagh against Harry Bass, begun in justice court, and appealed to circuit court. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Granade & Granade, of Chatom, for appellant. R. P. Roach, of Mobile, for appellee.

MAYFIELD, J. This action is to recover damages for timber taken from certain lands described in the record. There had been a severance of the timber and timber rights from the surface or freehold estate before either of the parties to this suit claimed any

right to the timber in question. Neither of the parties claims any right to the land, other than to the timber thereon. The defendant claims title to the timber as purchaser from one Everett, who is conceded to own the land, but who, the plaintiff claims, did not own the timber or timber rights—contending that such title and rights had passed to himself (plaintiff), and that, consequently, Everett had no title to the timber, and no rights to convey to the defendant.

This action originated in a justice court, where plaintiff recovered a judgment; and on appeal to the circuit court the trial court gave the affirmative charge for the defendant, on the theory that the plaintiff was not in the possession of the land at the time the timber was cut and removed, but that the possession was then in one Everett, from whom the defendant purchased the timber. If the title to the timber in question had depended upon the title to the land—that is, if there had never been a conveyance of the timber and timber rights, thus constructively severing them from the freehold—the ruling of the trial court would be correct. *Aldrich Co. v. Pearce*, 64 South. 321, and authorities cited. But where, as here, there has been a constructive severance of the timber and timber rights from the remaining estate in the land, by a separate conveyance of the timber, then the possession of the land may not be adverse possession of the timber, but be subject to the right of the owner of the timber to remove it, if exercised within the time and according to the terms of the conveyance or sale by which the timber was so constructively severed from the land.

While it is true that the owner of the land claimed to own the timber also, and he sold or attempted to sell to the defendant, yet there was evidence to the effect that he did not own the timber, and did not even claim to own it as against this plaintiff. There was sufficient evidence in this case (if the jury believed it) that the plaintiff owned the timber in question, and that neither the defendant nor Everett had such adverse possession of the land or of the timber as would prevent a recovery in this case. It was not at all necessary, in this case, to determine the title to the land, in order for the plaintiff to recover, nor was it conclusively shown that the defendant or Everett was in such adverse possession of the land as would preclude the plaintiff from recovering the timber thereon, or damages for its destruction or conversion.

The trial court, therefore, erred in giving the affirmative charge for the defendant.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 423)

DALLAS COMPRESS CO. et al. v. SMITH.
(No. 566.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. HUSBAND AND WIFE — 31—ANTENUPTIAL AGREEMENT—POWER OF SALE—CONSTRUCTION.

An antenuptial agreement providing that the future wife was "empowered to sell [the property settled on her] or exchange the same or any part thereof and to invest the same in other real estate or securities, and when so sold or invested in securities the real estate so received or investments made with approval of" the intended husband, makes the husband's approval a condition precedent, not only to reinvestment of proceeds after a sale or exchange, but also to the sale or exchange itself.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig. —31.]

2. DEEDS — 127—WILLS — 607—ESTATES CREATED—ESTATE TAIL.

A devise or deed to a man and his children, he being childless at the time the devise or conveyance takes effect, passes an estate tail, converted by statute into an unqualified fee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 358, 359; Dec. Dig. —127; Wills, Cent. Dig. §§ 1368-1371; Dec. Dig. —607.]

3. HUSBAND AND WIFE — 31—ANTENUPTIAL AGREEMENT AS CONVEYANCE TO CHILD—CONSTRUCTION.

Where a marriage settlement deeds land to a future wife for the maintenance and support of any child she may have, with remainder over, and with a limitation contingent upon failure of children, the donor did not intend to give an unqualified fee to the wife, but only a life estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 178-195, 883, 884; Dec. Dig. —31.]

4. HUSBAND AND WIFE — 35—ANTENUPTIAL AGREEMENT—UNAUTHORIZED EXECUTION OF POWER OF SALE—LACHES OF BENEFICIARY.

Where complainant's mother held lands for life under a marriage settlement for her own use and his support, and sold such lands in a manner unauthorized by her power of sale under the settlement, although under the settlement a trust was to be implied for complainant's support and maintenance, coextensive in duration with his mother's life estate, he cannot enforce such an equitable charge against the lands in the hands of defendants who purchased and held them for 30 years; complainant, having been of age for 10 years of the 30 and not having asserted his alleged equitable right, being barred by laches.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 209-217; Dec. Dig. —35.]

5. LIFE ESTATES — 23—TITLE OF REMAINDERMAN—EFFECT OF CONVEYANCE BY LIFE TENANT.

The title of a remainderman cannot be destroyed by any act of the life tenant, and an attempted conveyance by the latter of a fee passes only his life estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 112-131; Dec. Dig. —23.]

6. LIFE ESTATES — 8—REMAINDERS — 17—ADVERSE POSSESSION AS AGAINST REMAINDERMAN.

Neither the statute of limitations nor the prescriptive period of 20 years giving title by adverse possession runs against a remainderman

until he has a right to sue at the termination of the particular estate.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. § 26; Dec. Dig. —8; Remainders, Cent. Dig. §§ 12-17; Dec. Dig. —17.]

7. REMAINDERS — 17—DUTY OF REMAINDERMAN TO SUE TO PROTECT REMAINDER.

In equity, a remainderman need not sue until his interest falls into possession, unless the alleged wrong is presently efficient, according to the valid limitations of the title under which he claims, to cut off his interest in the remainder.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. —17.]

8. REMAINDERS — 17—PURCHASER FROM LIFE TENANT—LACHES OF REMAINDERMAN.

Where the tenant for life has purporting to convey a fee, the remainderman may maintain a bill as to remove a cloud on his legal title without affecting the legitimate interest of the life tenant, but it is not laches for him to fail to do so; a defect in the purchaser's title being apparent under the facts, for where there is no assent to or acquiescence in possession in fact adverse there is no laches.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. §§ 12-17; Dec. Dig. —17.]

9. VENDOR AND PURCHASER — 230 — BONA FIDE PURCHASERS—NOTICE—CHAIN OF TITLE.

Where complainant's mother, holding under the conveyance of a life estate in lands with remainder over to him, conveyed to defendants' grantor in violation of her power of sale, since the complainant's title was by purchase, and the lack of power being apparent from the face of the muniments of title under which defendants claim, they are conclusively charged with notice thereof from the time of their purchase.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 502-512; Dec. Dig. —230.]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Bill to quiet title and for an accounting by James Q. Smith against the Dallas Compress Company and others. Decree for complainant, and respondents appeal; complainant filing cross-appeal. Affirmed on both appeals.

Complainant alleges that:

He is the son and only child of James Q. Smith, Sr., and was at the time of the death of said James Q. Smith, Sr., his only heir at law; that in July, 1879, said Smith, Sr., owned the following described real estate in the city of Selma (here follows the description of a number of lots); and that on July 27, 1879, said James Q. Smith, and Marie Louise Fair, both then residing in the city of Montgomery, Ala., were engaged to be married to each other, and in contemplation of such marriage, and in consideration thereof, and for other valuable consideration, the said James Q. Smith duly executed and delivered to the said Marie Louise Fair a deed, wherein and whereby he bargained, sold, and conveyed to the said Marie Louise Fair the said lots above described, for the purposes therein stated, which deed was duly filed for record in the office of the probate judge of Dallas county, where said land was situated, on June 16, 1882, and recorded on said date—the following being a copy thereof:

"This antenuptial contract and marriage settlement made and entered into this the 22d day of July in the year 1879, by and between James Q. Smith of the first part, and Marie Louise Fair of the second part, all of the city and coun-

ty of Montgomery, and state of Alabama, witnesseth:

"That whereas a marriage is about to be solemnized between the parties of the first part and second part, and it being desirable that the party of the first part should make provisions for the maintenance and support of the party of the second part and for the maintenance and support of any child or children she may have of said marriage.

"Now, therefore, in consideration of the said marriage, and in the further consideration of twenty dollars, the receipt of which sum is hereby acknowledged, the party of the first part has this day bargained, sold and conveyed and by these presents doth bargain, sell and convey unto the party of the second part for her maintenance and support, and for the maintenance and support of any child or children she may have of such marriage, the following described lots of land situate, lying and being in the city of Selma, county of Dallas, in the state of Alabama, and known as: (Here follows description of the same lots described in the bill.)

"To have and to hold the same unto the said party of the second part for the purposes before stated and to the sole and separate use and benefit of the party of the second part free from all debts, liabilities, and engagements of the party of the first part, and from all claim or claims of persons who set up any right, title or interest therein through the party of the first part; the party of the second part is expressly empowered to sell the same or exchange the same or any part thereof and to invest the same in other real estate or securities and when so sold or invested in securities the real estate so received or investments made with the approval of the party of the first part in the possession of the party of the second part in like manner to be free from all debts, liabilities and engagements of the party of the first part, and from all claim or claims set up by any person who derived any right, title or interest thereto through the party of the first part it is provided that if the said property herein conveyed, or its representative in the possession of the party of the second part, should not be disposed of before her death, to any child or children of her said marriage in equal proportions, and if there should be no child or children of said marriage, then the party of the second part may dispose of the same by will, and if there be no will, then to the next of kin to the party of the first part. As witnesseth my hand and seal this the day and date above stated."

Orator is advised by counsel, and charges that under said deed the said Marie L. Smith had no power to sell or dispose of the land in said deed conveyed except for the purpose of reinvesting the proceeds thereof in other property, and that she had no power to sell or dispose of said land for any purpose without the consent of said J. Q. Smith, Sr., and orator is further advised that, under said deed, your orator, the only child and heir of his father, became entitled in equity to a maintenance and support out of the rents, income, and profits of said land, and also became entitled to said land in remainder at the death of his mother, in the event the said lands were not disposed of under the power contained in the deed. It is further alleged: That the lands had not been disposed of at the time of the death of James Q. Smith, Sr., but remained in the possession and control of the mother of orator at the time of J. Q. Smith's death, which occurred in March, 1882. That about June 14, 1882, and after the death of J. Q. Smith, the wife of J. Q. Smith, and the mother of orator, conveyed all of the property above described except lots 4 and 5, to one Edward Ikelheimer, and that all the parties respondent claim an interest in all of said lands except lots 4 and 5, through the said Ikelheimer, his heirs or assigns, or through mesne convey-

ances from him, or some of his heirs, assigns, or executors.

The bill then proceeds to set out the various persons who claim the various lots, and then alleges that any interest said parties may have to the land is subject and subordinate and inferior to the rights of your orator under the deed of his father hereinbefore set out. Certain interrogatories are then propounded to each of respondents, with prayer as above set out. The chancellor sustained demurrer to lot 20 because not included in the deed, but decreed all the other lands, except the land claimed by one Goins, were subject to the claim of complainant as remainderman under the deed, but denied relief as to an accounting. The appellants assign as error the overruling of demurrer to the bill as a whole, and also the overruling of demurrer to that part of the bill of complaint which seeks to have complainant's estate in the lands described in said bill declared and protected; also, for overruling demurrer to that part of the bill which seeks discovery. The cross-complainant assigned errors because the court sustained demurrers to that part of the bill which seeks an accounting for rents and profits, and also for sustaining demurrer to that part of the bill which seeks an accounting for maintenance and support and a recovery thereon.

Pitts & Leva, Partridge & Hobbs, and Keith & Wilkinson, all of Selma, for appellants. Horace C. Wilkinson, of Birmingham, for appellee.

SAYRE, J. [1] Appellants in this case appear to have acquired their claim to the property in controversy in reliance upon a construction of the marriage settlement which would give appellee's mother, the widow of the settlor, the right under the terms of the settlement to dispose absolutely of the property after the settlor's death. We consider this question to have been determined against appellants in the case of Smith v. Turpin, 109 Ala. 689, 19 South. 914. The argument of this contention in the present case depends, as it did in the case cited, upon a strict grammatical construction of the terms of the settlement. If we were permitted to look beyond the record in this cause to the report of the cited case, and so to discover the identity of the parties to the two settlements, we might be tempted to cast about for the reasons for two separate settlements between the same parties on the same day. Nothing appears to account for the fact, unless the circumstance that the two settlements dispose of different landed estates situate in different counties may be accepted as a sufficient explanation. However that may be, we have at last nothing but the difference in the language of the two settlements upon which to base a conclusion that the restrictions upon the power of the first grantee to

dispose of the gift were intended to operate differently. Looking to that difference, we are strongly impressed, as was the chancellor, that whatever difference there may be in the two settlements, construed strictly according to their grammatical structure, to which appellants appeal, makes against, rather than in favor of, appellants' contention that the necessity for the settlor's approval of any such disposition in the present case is limited merely to reinvestment after a sale or exchange of the property which, as the argument goes, might be made without that approval. As the court held in *Smith v. Turpin*, and the argument for the conclusion there reached applies with full force here, to so limit the necessity for the grantor's approval would hold for naught his purpose, evident upon the whole instrument, to preserve the remainder in the entire fee he was careful to provide for the issue of his marriage with the first taker.

It is urged in the next place that, even though Mrs. Smith had no power or right to dispose of the corpus of the estate granted, appellee's claim is barred by laches, prescription, and staleness, since more than 30 years have elapsed since her execution of the deed by which she undertook to convey an unlimited fee to Ikelheimer through whom appellants claim. We think this insistence is based in part upon a misconception of the character of the estate vested by the settlement in appellee. We are referred to *Chandler v. Jost*, 81 Ala. 411, 2 South. 82, followed under similar circumstances in *Kidd v. Borum*, 181 Ala. 144, 61 South. 100, *Berry v. Hubbard*, 30 Ala. 191, and *Nimmo v. Stewart*, 21 Ala. 682, as sustaining the proposition that the deed of settlement conveyed to Marie Louise Fair, with whom the settlor James Q. Smith, Sr., was about to contract marriage, and to appellee, the after-born child of that marriage, an estate in common for her life with remainder in fee to appellee. Of the remainder there is no question or doubt. But was appellee seised of an estate in common for the life of Mrs. Smith?

[2, 3] *Berry v. Hubbard* is without point. The deed there was to the wife "during her natural life," and to named children. The ruling was that the children took a present and immediate right of property and were not postponed until the death of the wife. In *Chandler v. Jost* it was held that by the husband's postnuptial conveyance of property, to the wife to have and to hold to her for the joint use of herself and named children and such other children as should be born to her, the wife took only a partial interest in the property as tenant in common with her children. In *Nimmo v. Stewart*, where the bill, as the court noted at the outset of its argument sustaining a plea of adverse possession, asserted a present interest in the subject of controversy, and was not one to protect a future interest or remainder, there was a bequest of slaves to trustees for the

benefit of testator's daughter and her children, during her natural life, with remainder to the heirs of her body. The court, reciting the general rule that, if a devise be to one and his children, and he has children at the death of the testator, parent and children take immediately and jointly under the will, held that it applied in that case. It has been very generally held since *Coke's* time that a will or deed to a man and his children, he having none at the time of the devise or deed, gives him an estate tail, now by our statute converted into an unqualified fee. *Shuttle & Weaver Land & Imp. Co. v. Barker*, 178 Ala. 366, 60 South. 157. Plainly, however, the donor in the case at bar did not intend to give an unqualified fee, for he provided the remainder over, and still another limitation contingent upon the failure of children of the marriage.

[4] We have thus far considered the status of the legal title created by the deed of settlement. From the further language of the gift a trust is to be implied for the support and maintenance of children of the marriage coextensive in duration with the life estate of the first taker, a charge upon the life estate the administration of which during the minority of appellee, to say the least, was in the nature of such things committed largely to the discretion of the first taker, and complainant—who takes an appeal from the chancellor's adverse ruling on this point—prays that a sum be set apart and taxed pro rata against defendants for his support and maintenance. Conceding that complainant might in his present circumstances fix a charge upon the land if it were still held by his mother, which seems doubtful (1 *Perry on Trusts*, § 118), still he has lost that right by the adverse holding of defendants. The right of support and maintenance out of the rents and profits of the life estate which complainant now asserts has been neglected from the time of the purchase by defendants more than 30 years before the filing of this bill and for more than 10 years of this time complainant has been of age. The purchase by defendants, their entry, and their adverse holding during this period was notice to the world of their repudiation of complainant's right, and he is now barred. Code, §§ 3091, 4846; *Nimmo v. Stewart*, supra; *Abercrombie v. Baldwin*, 15 Ala. 363; *Fowler v. Ala. I. & S. Co.*, 164 Ala. 414, 51 South. 393.

The life tenant being still in life, complainant seeks protection for his legal estate in remainder by a decree avoiding the life tenant's deed so far as it purports to affect the remainder, and the equity of his bill in this regard has been sustained in the court below. Appellants, defendants below, complain of this feature of the decree and ask us to consider, as a sufficient reason why this relief should have been denied on the face of the bill, that complainant's right of action accrued upon the execution of the deed, since which time they have been in adverse pos-

session of the property. They say, in effect, that complainant took by the deed of settlement two rights, one of present enjoyment, the other of future enjoyment, both which were alike invaded by the conveyance to Ikelheimer; that the conveyance was as much an interference with complainant's future right as with his right in present; and that complainant has all along been under equal duty to assert both rights because unquestionably he might have enforced his right to support and maintenance, and, they say, the doctrine that rights in remainder need not be asserted until the particular estate is determined is applicable only where no present interest exists. Such is substantially the language employed at one point in *McCoy v. Poor*, 56 Md. 197, cited by them. They cite, also, *McQueen v. Logan*, 80 Ala. 304; *Robinson v. Pierce*, 118 Ala. 273, 24 South. 984, 45 L. R. A. 66, 72 Am. St. Rep. 160; *McCoy v. Poor*, supra; *Maus v. Maus*, 80 Pa. 194; and *McCullough v. Seitz*, 28 Pa. Super. Ct. 458.

In *McQueen v. Logan*, plaintiffs in an action of ejectment claimed as remaindermen after the falling in of an alleged life estate by virtue of a limitation over to heirs. The court held they had no title for the quite sufficient reason that the deed had vested in them no estate in remainder; the absolute fee having vested in the first taker under the terms of the deed according to the rule in *Shelley's Case* of force in this state at the time the estates in controversy had been created. This was a complete answer to plaintiffs' claim, disposed of every question in the case, and the court does not appear to have entertained any doubt of the correctness of its conclusion. The court added, however, that on the hypothesis that the plaintiffs took jointly with their mother, the first taker as they would have it, they still could not recover, because they had been ousted when their mother conveyed and delivered possession to defendant, their right of action then accrued and had long been barred by the statute—this, however, still on the theory that there was no estate in remainder.

We need not stop to state an analysis of *McCoy v. Poor*, or *Maus v. Maus*, for an examination of these cases has shown that they involved identical principles and proceeded upon the same line as our case of *Robinson v. Pierce*, supra, though their doctrine is nowhere so clearly stated as in the last-named case.

[5-8] We do not consider *Robinson v. Pierce* to be an authority against the chancellor's decree. The title of a remainderman cannot be destroyed by any act of the tenant for life, and hence a conveyance by the life tenant, purporting to convey the fee, passes only the life estate, and it is perfectly well established in this state, and everywhere so far as we are informed, that neither the statute of limitations, nor the prescriptive period of 20 years, begins to run

against a remainderman until he has a right to sue; that is, until the termination of the estate for life. *Bass v. Bass*, 88 Ala. 408, 7 South. 243; *Hall v. Condon*, 164 Ala. 393, 51 South. 20; *Blakeney v. Du Bose*, 167 Ala. 627, 52 South. 746; *Kidd v. Borum*, 181 Ala. 144, 61 South. 100. Nor is a party required in equity to sue until his interest falls into possession, unless the wrong complained of is presently efficient, according to the valid limitations of the title under which he claims, to cut off his title in remainder, as in *Robinson v. Pierce*; for length of time, where it does not operate as a positive bar by way of limitation, operates simply as evidence of assent to, or acquiescence in, an adverse status. *Keeble v. Jones*, 65 South. 385; *Life Ass'n of Scotland v. Siddall*, 3 De G., F. & J. 72; 2 *Perry on Trusts*, § 850. But the possession of land by a tenant for life cannot be adverse to the remainderman; and, if he conveys to a third person by words purporting to pass the absolute property, the possession of the purchaser is not, and cannot be during the continuance of the life estate, adverse to the remainderman. *Pickett v. Pope*, 74 Ala. 122. A remainderman may, however, for the establishment of his ultimate rights, maintain a bill in equity, if he choose, to remove a cloud from his title in remainder pending the particular estate, without in anywise drawing into question or affecting the interest of the life tenant. *Lansden v. Bone*, 90 Ala. 446, 8 South. 65. But he is under no duty to assert what is apparent on the face of defendant's title, and, where there is no acquiescence in or assent to a possession that is in law and fact adverse, there is no laches. *Winters v. Powell*, 180 Ala. 425, 61 South. 96. In *Robinson v. Pierce*, a trustee, having the entire estate in trust to preserve an equitable separate estate for life with power to sell the fee, and hence with power to bar the remainder limited over by the deed of trust, by deed executed in fraud of the trust conveyed full legal title; his grantee thereby acceding to the entire legal estate in fee. It was held that the remaindermen had immediately an equitable cause of action which their duty to the grantee required them to assert within a reasonable time. The court said:

"Here, in the case before us, after the trustee executed the trust, the remaindermen had no title and no possibility of becoming invested with one, except by suing in equity to acquire it, based upon the independent cause of relief conferred by the breach of trust. It is to this equitable proceeding to acquire a title that staleness of demand is pleaded, and to disallow the defense would be to overrule that great and invaluable principle of equity which has stood for centuries requiring the suitor to be diligent. What conceivable reason can there be for exempting a person from this rule of diligence who sues in equity to acquire an estate in remainder or reversion, any more than one suing in equity to acquire an estate in possession? His decree, when obtained, establishes perpetually his title, entitling him to maintain his action for possession whenever the event entitling him to possession transpires; and no lapse of time

after recovery of the decree, and before the possessory right accrues, could affect his right to recover possession upon the happening of the latter event"—all this because defendant had by the trustee's deed taken the entire legal estate.

[9] In the present case the grantor back to whom appellants trace their claim to the estate had no fee, nor, after the death of the settlor, any power of disposition whatever. Appellee's right in remainder is entirely different from appellants' acquired right to the life estate, as the donor plainly intended it should be; nor do we perceive how, for the purposes of this case, they are to be confused or the doctrine of merger applied, for they have never met in the same owner. Nor does appellee's right depend upon a finding of fraud actual or constructive in the deed to Ikelheimer, nor does he claim under Ikelheimer's grantor. His title, derived through the deed of settlement, was a title by purchase, was apparent upon the face of the muniments by which appellants claim, and they as well as Ikelheimer are conclusively held to notice of what that title was when they purchased. Nor has appellee ever in his own right been entitled to the possession of the property. Nor is he seeking in equity to acquire an estate in remainder as against a conveyance which may have operated to cut off that estate, as was the case in *Robinson v. Pierce*. His estate in remainder is established by the muniment under which defendants claim, and he is merely seeking to have his title cleared up as against a claim which may embarrass him in the future. His right to maintain the bill immediately upon the execution of the deed to Ikelheimer was clear, and according to cases to which we have referred, and the concessions in *Robinson v. Pierce*, has not been lost by reason of delay.

McCullough v. Seitz: In that case plaintiff sued to recover damages for injuries done his farm by the diversion and discharge upon it of water through a drain upon defendant's land. Plaintiff deraigned title under a deed of trust which vested the legal estate in fee in the trustee. The deed provided expressly for an application of the rents, issues, and profits at fixed times to the maintenance and support of the wife of donor's son and her children—plaintiff was a child—during the life of the husband and at his death to the maintenance and support of the widow and children, with remainder over in fee simple to surviving children. Defendant claimed an easement by prescription running from the time of the trustee. The court, holding that the statute commenced to run against the equitable title of the plaintiff in the life of the husband and continued to run as against plaintiff's estate in remainder which had vested in him by the grant upon which the whole estate depended, noted that the deed vested the equitable

life estate in the wife and child living at the date of the grant, as in *Chandler v. Jost*, opening to let in after-born children, and that:

"The grant of the equitable estate was not to the wife for the support of herself and children, nor was it to her for life, with remainder to her children, and the estate which the children acquired under the terms of this grant was essentially different from those considered in *Wolford v. Morganthal*, 91 Pa. 30; *White v. Williamson*, 2 Grant, Cas. 249, and *Hague v. Hague*, 161 Pa. 643 [29 Atl. 261, 41 Am. St. Rep. 900]."

These last cases, from which the court thus sought to differentiate *McCullough v. Seitz*, have been considered, and, as we read them, sustain our opinion that appellee here has not lost his estate by lapse of time.

We think the opinion and decree of the learned judge below should be affirmed on both original and cross appeals.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(190 Ala. 468)

H. C. & W. B. REYNOLDS CO. v. REYNOLDS et al. (No. 564.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Jan. 14, 1915.)

1. TRUSTS §84—RESULTING TRUST—CONSIDERATION FOR CONVEYANCE TO CORPORATE OFFICER.

Where property was bought by the treasurer of a corporation with the money of the corporation, and title thereto was taken in his own name, the property was the property of the corporation, and after the treasurer's death his personal representatives and heirs were the holders of the legal title for its benefit.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 125-127; Dec. Dig. §84.]

2. TRUSTS §371—ESTABLISHMENT—CROSS-BILL.

In a bill by a corporation against the personal representatives and heirs of its deceased treasurer to have property purchased with its money, the legal title to which was taken in the treasurer's name, declared to be held for the corporation's benefit, a trust company which, in reliance on the treasurer's apparent ownership, had advanced money to third parties on his credit, was properly allowed to file a bill in the nature of a cross-bill to establish its rights as against the corporation.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 588-599; Dec. Dig. §371.]

3. EQUITY §201—CROSS-BILL—REFERENCE TO MATTERS IN ORIGINAL BILL.

In such suit, the cross-bill might properly refer to matters of description in the original bill and adopt them as a part of the cross-bill, and, while a party is not required to plead any matters set up in the original bill, he may shorten his cross-bill by referring to the pleadings already on file.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 466, 468; Dec. Dig. §201.]

4. EQUITY §195—"CROSS-BILL"—"ORIGINAL BILL IN NATURE OF A CROSS-BILL."

A cross-bill is allowed to enable one, not a party to the original suit, to come into the cause and, by appropriate averments, show his right to

be heard therein, and by appropriate process in his matter bring before the court those parties who claim interests adverse to him; the distinction between an original bill in the nature of a cross-bill and a mere cross-bill being that a "cross-bill" is filed in a cause by a party thereto and seeks the enforcement of an equity germane to or springing out of the subject-matter of the original bill, while an "original bill in the nature of a cross-bill" is a pleading filed by leave of the chancellor by a person not a party to the original suit, and between whom and the complainant there is no privity.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. § 195.]

For other definitions, see Words and Phrases, First and Second Series, Cross-Bill.]

5. TRUSTS § 371 — PROPERTY PURCHASED WITH MONEY OF CORPORATION—BILL TO ESTABLISH RESULTING TRUST—PLEADING—INSOLVENCY.

In a suit by a corporation against the personal representatives and heirs of its deceased treasurer to establish a trust in property purchased by the treasurer with the money of the corporation, an original bill in the nature of a cross-bill, denying that the purchase money had been furnished by the corporation, alleging that the corporation was estopped from establishing a trust as against cross-complainant's debt against the treasurer, and alleging that if the complainant was granted the relief prayed for in its bill, and the property described therein was declared to be its property, then the estate of the treasurer was insolvent, sufficiently averred insolvency without pleading facts from which it might be deduced.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 588-599; Dec. Dig. § 371.]

6. TRUSTS § 343—ESTOPPEL TO ESTABLISH RESULTING TRUST—CORPORATION PROPERTY IN NAME OF OFFICER — RIGHTS OF THIRD PARTIES.

Where a corporation, the stock and control of which was held by the members of a family, allowed its treasurer, who was also in charge of one of its business branches, to purchase property with the money of the corporation, which, although the rents and management were attended to by the corporation, stood in his own name, so that cross-complainant, a trust company, had made loans to third parties on the security of his credit and was actually misled by his apparent ownership of the property, the corporation was chargeable with such culpable negligence as estopped it from establishing a trust in the property against the representatives and heirs of the deceased treasurer and from defeating the claim or lien of the trust company, under the rule that, where some one must lose by reason of such negligence, the one that reposed the trust should lose rather than a stranger relying thereon.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 507, 508; Dec. Dig. § 343.]

Appeal from Chancery Court, Bibb County; Thomas H. Smith, Chancellor.

Bill by the H. C. & W. B. Reynolds Company against E. D. Reynolds and others, in which the Bibb County Banking & Trust Company filed a bill in the nature of a cross-bill. Decree for cross-complainant, and complainant appeals. Affirmed.

John P. Tillman and Henry P. White, both of Montgomery, and Lavender & Thompson, of Centerville, for appellant. Logan & Logan, of Centerville, for appellees.

DE GRAFFENRIED, J. H. C. & W. B. Reynolds Company, a corporation, was, for a long time, engaged in a general mercantile business in Bibb county. The great bulk of the stock of the corporation belonged to H. C. Reynolds, Sr., and to members of his immediate family, among them being his sons, E. D. Reynolds and H. E. Reynolds, deceased.

There appears to have been two mercantile establishments, one at Centerville and the other at Blocton. H. E. Reynolds, deceased, had charge of the business at Centerville, and E. D. Reynolds at Blocton. H. E. Reynolds, deceased, was the treasurer of the corporation, and he seems to have been given a free hand in the management of the mercantile establishment at Centerville.

The evidence all shows that the said H. E. Reynolds (who died in 1911) was a man of excellent character, business ability, and habits, and that he deservedly possessed the confidence and esteem of his father, who was the president of the corporation, and of the other stockholders of the corporation. On this subject we quote with approval the following from the opinion of the chancellor, which we find in the record:

"There is nothing in the evidence nor in this record to justify any imputation of improper motives to H. E. Reynolds or to these complainants. They had the utmost confidence in each other, and no doubt in the world the title was taken in H. E. Reynolds for no ulterior motives or with any but the most correct and upright intentions, and had he lived no litigation would ever have arisen. His widow has acted in the most generous, disinterested manner, and with no other purpose than to carry out the wishes of her husband, and do what she considered just and right, without regard to her own pecuniary interest. Nor do I consider that solicitors for cross-complainants have argued otherwise."

It appears that at the time of his death the said H. E. Reynolds, deceased, thought that he was, and probably was, solvent. His estate, when the bill in this case was filed, was insolvent, and this insolvency may be, and probably was, due to a misfortune to the Cleveland Mercantile Company, in which he was interested at the time of his death, and which misfortune befell the Cleveland Mercantile Company after his death. The said H. E. Reynolds, deceased, at the time of his death, was legally bound to the Bibb County Banking & Trust Company on some of the debts of the Cleveland Mercantile Company, and this liability is the mainspring of this litigation.

It appears that after the formation of the H. C. & W. B. Reynolds Company the said H. E. Reynolds, deceased, bought, with money of said H. C. & W. B. Reynolds Company, certain tracts of land and certain personal property, and took the title in his own name. This property was not bought at one time, but at several different times, stretching over a period of several years; and it is conceded that all of it was paid for out of funds of

the H. C. & W. B. Reynolds Company. It further appears that on the books of the H. C. & W. B. Reynolds Company all of this property was treated as the property of the company. The rents received from the property, the taxes paid out on the property, and the property itself, were, on the books and among the stockholders of said corporation, treated as matters of said H. C. & W. B. Reynolds Company. It is not claimed or suggested that H. E. Reynolds, deceased, took the title to this property—and a large part of it was purchased several years before his death—in his own name for evil or improper purposes. He may have taken the title in this way as a matter of convenience merely, but in his treatment of the property, in so far as the outside world was concerned, he treated it, handled it, and spoke of it as his own. The deeds were recorded, and they showed the title to be in him. When any of the property was sold, he conducted the negotiations for, and concluded, the sale. The deeds to such properties were signed by him and his wife, and the purchase money was itself paid to him. If all of the purchase money on such a sale was not paid in cash, notes were made to H. E. Reynolds for the deferred purchase money, and these notes were secured by mortgages to said H. E. Reynolds, and the mortgages were regularly recorded. He rented out the property, assessed it in his own name, was, in so far as his tenants and the world knew, in sole possession of it and the sole owner of it, and he spoke of it as his own. The stockholders of the H. C. & W. B. Reynolds Company knew that he did not own the property, but the business world regarded him as its owner.

[1] 1. The original bill of complaint in this cause was filed by the H. C. & W. B. Reynolds Company against the administrators of the estate and the heirs and distributees of the said H. E. Reynolds, deceased, and prayed that the legal title to the property, to which we have above referred, be divested out of them and vested in the complainant. The theory of the complainant is that, as the property was bought with the money of complainant, the property was and is the property of the complainant, and that said H. E. Reynolds, deceased, was, and after his death his personal representatives and heirs were, the holders of the legal title for the benefit of complainant.

The bill of complaint, of course, contains equity; and the personal representatives and heirs of said H. E. Reynolds, deceased, in no way dispute the right of the complainant to the relief prayed for in its bill of complaint.

[2] 2. Upon the application of the Bibb County Banking & Trust Company, leave was given the bank to assert its rights in this matter by an original bill in the nature of a cross-bill. Some discussion is had in briefs of counsel as to whether the Bibb County

Banking & Trust Company had the right to file in this cause the pleading which it has filed upon leave of the chancellor, but we think that the cases of *Renfro v. Goetter, Well & Co.*, 78 Ala. 314, and *Ex parte Gray*, 157 Ala. 363, 47 South. 286, 131 Am. St. Rep. 62, cited by the chancellor in his decree upon the petition of said bank to be allowed to intervene, are decisive of that question. In this case the bank was not a party to the original cause, and there was no privity between it and the complainant in the original cause. It was interested, however, in, but possessed no lien upon, the subject-matter of the suit. Leave to file a bill in the nature of a cross-bill was, under our practice, therefore, necessary, and such a pleading furnishes the appropriate remedy for said bank. *Ex parte Gray*, supra.

3. This entire litigation, in so far as this appeal is concerned, grows out of the pleading which was filed in this cause by said bank, and to which all of the parties to the original cause were made parties.

In its bill in the nature of a cross-bill the bank denies that the purchase money of the property described in the original bill was furnished by complainant, claims that the original bill was filed to divest the title of the personal representatives and heirs of H. E. Reynolds, deceased, to the property described therein, for the purpose of defrauding the bank, and then, in the alternative, alleges that, if the money which was used by H. E. Reynolds in buying the property was in fact the money of the said H. C. & W. B. Reynolds Company, then the said H. C. & W. B. Reynolds Company is estopped from setting up its claim to the property as against the debt of the bank, because, so the bill in the nature of a cross-bill alleges, the said H. C. & W. B. Reynolds Company permitted the said H. E. Reynolds, deceased, to hold himself out to the world as the owner of said property, and upon the faith of his ownership of the property the bank had extended to him credit and permitted him to contract the indebtedness to the bank. The bill in the nature of a cross-bill alleges that if the complainant is granted the relief prayed for in its bill of complaint, and the property described in the original bill is declared to be the property of the complainant, then the estate of H. E. Reynolds in insolvent.

[3, 4] We can see no reason why, in such a cross-bill, reference may not be had to the original bill, and we see no reason why, in such a cross-bill, matters of description in the original bill may not be referred to and, to save unnecessary repetition, adopted as a part of the bill in the nature of a cross-bill. Such a cross-bill is allowed by the court for the purpose of enabling one not a party to the original suit to come into the cause and, by appropriate averments, show his right to be heard in the cause, and by appropriate process in his matter bring be-

fore the court those parties who claim interests adverse to him. The prominent distinction between an original bill in the nature of a cross-bill, and a mere cross-bill, is that a cross-bill is filed in a cause by a party to the cause and seeks the enforcement of an equity touching, germane to, or springing out of the subject-matter of the original bill, while an original bill in the nature of a cross-bill is a pleading filed by leave of the chancellor, by a person not a party to the original suit, and between whom and the complainant there is no privity. In such a pleading the cross-complainant undertakes, for his own protection, to assert a new and independent claim, which touches the subject-matter of the controversy between the parties to the original suit. When such an original bill in the nature of a cross-bill is filed by proper leave, and in an appropriate way, the cross-complainant, for the purposes for which he is permitted to file the bill, becomes, in fact, a party to the cause and is dealt with by the chancellor as such. While such a party is not required to state in his pleading any of the matters which have been set up in the original bill, we see no reason why he may not shorten his pleading by referring to the pleadings already on file and, if he sees proper, by making parts of them his own. Indeed, it would appear to be the better practice for him to do so. "Vain repetitions" are useless in pleadings, as well as in everything else that human beings undertake to do.

[5] We not only think that the chancellor, for the above reasons, committed no error in overruling the demurrer to the original bill in the nature of a cross-bill, but we also think that the original bill, in the nature of a cross-bill, sufficiently alleges, as a fact, the insolvency of the estate of H. E. Reynolds, deceased. We have already stated what the bill in the nature of a cross-bill alleges with reference to the insolvency of the said estate. If it be true that a man is insolvent, and it is necessary to allege his insolvency in a pleading, then we see no reason why a pleader may not, without stating any particular facts, simply allege the bald fact of insolvency. A pleading which alleges that a man is insolvent states a situation with reference to his financial status which is well defined, and we see no reason why the pleader should be required to state facts from which his insolvency can be adduced. *Bank v. Ellis*, 30 Ala. 478.

If the allegations of the original bill are true, the complainant, as against the respondents and all others, except those possessing some peculiar equity, is entitled to all of the property described in the bill. This being true, the statement in the supplemental pleading of appellee that "if the prayer of said original bill of said H. C. & W. B. Reynolds Company hereinbefore referred to prevails, and said title is divested from the personal representatives and heirs of H. E. Reynolds, the estate of H. E. Reynolds will be insol-

vent," read in connection with the original bill, is a plain allegation that the estate is, in fact, insolvent. Of course, this allegation of fact, just as all other allegations of fact, is one which goes to the right of recovery, and must be supported by proof.

4. The bill in the nature of a cross-bill in this case possesses none of the elements of a general creditors' bill. In one aspect the pleading is an effort on the part of the pleader to prevent the divestiture of title out of respondents to the property, and it is not an effort to have an existing conveyance declared to be, as against creditors, null and void. In the other aspect the pleading is an effort on the part of the pleader to have fastened upon the property described in the bill of complaint a lien in its favor, upon the ground that, as against the debt of the bank, the complainant is estopped from laying claim to the property. The special equity, in so far as the estoppel is concerned, grows out of the oft-quoted doctrine that:

"Wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." *Noble v. Moses*, 74 Ala. 604.

5. H. E. Reynolds, deceased, was, from all the evidence, a man of much activity in business. He was not only the general manager of a large mercantile establishment at Centerville (the principal mercantile establishment of complainant), but he was a man whose activities were engaged in some of the enterprises of his vicinity. He possessed an excellent character, and his influence probably dominated in all of the activities in which he was engaged. So long as he retained his health, the business over which he exerted an influence seems to have prospered. Indeed, some time prior to his death the mercantile establishment of complainant at Centerville seems to have been disposed of, and H. E. Reynolds, deceased, became interested in, and was the dominant figure in, the Cleveland Mercantile Company, a corporation, which not only owned a stock of merchandise at Centerville, and was engaged in mercantile pursuits at that place, but which also owned two branch mercantile establishments in the state of Mississippi. The major portion of his time for a year or two before his death seems to have been spent in Mississippi, but the business men of Centerville recognized him as the guiding authority in the matters in which he was interested in Bibb county, and the bank there seems to have largely confined the credit which it extended to the Cleveland Mercantile Company to loans which not only were made with his knowledge and approval, but largely to those only upon which he personally bound himself. In other words, the bank, when it knew that H. E. Reynolds approved of a loan to the said Cleveland Mercantile Company, and that he himself personally bound himself to pay it at its maturity, made the loan, and it was usually only

upon such conditions that it made a loan to said Cleveland Mercantile Company.

At the times these loans were made to the Cleveland Mercantile Company, the bank regarded that company as solvent, but, from the entire history of these transactions, we are satisfied that the bank felt that a risk of any size upon that company was desirable, only when it was made with the knowledge of H. E. Reynolds, deceased, and when the paper of said company, evidencing the loan, was properly indorsed by said H. E. Reynolds, deceased. When such a paper above described was offered to the bank, its officers recognized that upon it, as an indorser, was the name of a man who had prospered in business in Centerville, who was one of the mainsprings of its business world, and whose investments in real estate in that community indicated a substantial, growing increase in prosperity and wealth. While these investments in real estate were not intended to deceive, they must have, in the ordinary course of things, misled the members of that community as to the actual financial condition of said H. E. Reynolds, deceased, and that condition was created by the passiveness of the H. C. & W. B. Reynolds Company. The doctrine of culpable negligence penalizes inactivity, and through it the sins of omission—the failure to do that which should be done—are visited with the same character of penalties as are the sins of commission. In small towns and communities investments in real estate do not go unheeded. The sale of a plantation brings on a discussion in the community, and the reasons for its sale, on the one hand, and for its acquisition, on the other, are usually given with remarkable freedom. The purchase of a town lot brings the seller and the purchaser into discussion upon the street corners and in the places where people are accustomed to congregate in their moments of leisure. The ownership—and the continued acquirement—by an individual of unincumbered desirable real estate is accepted as an indication of business prosperity on the part of that individual, and necessarily increases his standing and credit as a man of affairs. In such a community the commercial rating of an individual member of the community is rarely looked to. His visible property is the thing that usually counts.

6. The H. C. & W. B. Reynolds Company was, as we have already said, a close corporation. Substantially all of its stock was owned by a father and his sons. These people had confidence in each other, and they especially fixed their confidence in H. E. Reynolds, deceased. He was a business man, and knew how to handle himself in his dealings with the world. He was solvent, and but for a misfortune, which business foresight could not have anticipated—and such misfortunes sometimes strike the entire business world unawares—and which misfortune

befell his estate some time after his death, this litigation would not only not have occurred, but there would have been no reason for such litigation. This being the situation, the H. C. & W. B. Reynolds Company did not exercise that business supervision over the acts and doings of said H. E. Reynolds as one of its general managers, which it should have done. For several years property was accumulated by H. E. Reynolds, deceased, in his own name, with the funds of the H. C. & W. B. Reynolds Company, stood in his name and in his possession, was managed, controlled, and claimed by him as his own, and naturally misled the business public and the bank at Centerville as to his actual wealth. In none of his business negotiations with the bank did he actually represent that the property described in the original bill belonged to him, but the record of his conveyances, his course of conduct, and the course of conduct of the H. C. & W. B. Reynolds Company were there proclaiming his ownership of the property. It is true that at least a large part of the property—bought along, at various times, through a series of years—was paid for in checks drawn by H. E. Reynolds upon said bank, to which the name of H. C. & W. B. Reynolds Company was signed, and which checks were charged up by the bank to the account of the H. C. & W. B. Reynolds Company. The checks which were drawn by H. E. Reynolds, upon said bank, to which he signed the name of H. C. & W. B. Reynolds Company, were numerous, and upon that subject we quote with approval the following from the opinion of the chancellor, on file in this cause:

"It appears that part of the lands were bought as early as 1903, and 5 other tracts of land were bought from that date on down to 1909, during which time title stood in the name of H. E. Reynolds, and, so far as the evidence discloses, no attempt was made, until the filing of the original bill in this cause, to assert a resulting trust in the complainants. During this time H. E. Reynolds secured by his credit with the bank the loans sought to be collected by his intervention in this cause. The undisputed testimony is that the apparent ownership of the land was in him. No notice was given the bank that the lands were not his, nor was the mere fact that the checks, with which H. E. Reynolds paid for them, were drawn by him on the funds of H. C. & W. B. Reynolds Company, notice to the bank of the asserted secret equity. He drew many checks in this way, and the bank cannot be charged with notice of the claim that the purchase was for the firm, or of their unasserted claim to the land."

[8] 7. Without regard to the actual knowledge which the officers and agents of the H. C. & W. B. Reynolds Company may have had of the above transaction—and we believe them when they say that they had no actual knowledge of the transaction—we have here a corporation which, because of infinite trust in one of its officials, has permitted, for a number of years, a course of dealings on the part of that official which was calculated to mislead, and had actually misled, a

business community as to the financial situation of that official, and which has finally resulted in a loss which must either fall upon an innocent third party or the corporation. That equity must place that loss upon the negligent corporation there can be no doubt. The man, H. E. Reynolds, deceased, who developed the situation, was innocent of all wrongful purposes. The confidence which was placed in him by his father and brothers was not unnatural, but the business men of the Centerville community had a right to rely upon the reasonable business diligence of the H. C. & W. B. Reynolds Company, and this business diligence it failed to observe. *Stevens v. Dennett*, 51 N. H. 324.

8. It must be remembered that, in this case, a court of equity is appealed to by the H. C. & W. B. Reynolds Company, after the insolvency of H. E. Reynolds, deceased, to divest the legal title out of the estate of H. E. Reynolds, deceased, and vest it in the said H. C. & W. B. Reynolds Company. This is not the case of a trustee owing debts, who has conveyed the legal title to his cestui que trust, and which conveyance is attacked as fraudulent and void by the creditors of the trustee, as was the situation in the case of *Blake v. Meadows*, 225 Mo. 1, 123 S. W. 868, 30 L. R. A. (N. S.) 1; *Bell v. Stewart*, 98 Ga. 669, 27 S. E. 153; *Alkire Groc. Co. et al. v. Ballenger et ux.*, 137 Mo. 369, 38 S. W. 911; *Marston et al. v. Dresen et ux.*, 85 Wis. 530, 55 N. W. 896; *Dodd et al. v. Bond*, 88 Ga. 355, 14 S. E. 581; *Bicocchi v. Casey-Swasey Co. et al.*, 91 Tex. 259, 42 S. W. 963, 66 Am. St. Rep. 875; *Garner v. Bank*, 151 U. S. 420, 14 Sup. Ct. 390, 38 L. Ed. 218.

A careful analysis of the above cases will clearly show that they are really founded upon the common-law principle—changed by statute in this state—that:

"A conveyance by a debtor of his own property in discharge of a debt, though taken by the grantee with the knowledge that it is intended to hinder, delay, or defraud other creditors, is good as against the latter, unless the grantee takes more than the amount of his debt, either for himself, or for the debtor or others." *Dodd et al. v. Bond*, supra; *Garner v. Bank*, supra.

Each of the above cases, as well as each of the following other cases cited by counsel for appellant in their brief, was a case in which the court protected the property of the wife from plunder at the hands of the husband or his creditors, viz.: *In re Garner* (D. C.) 110 Fed. 123; *Huot v. Reeder*, 140 Mich. 162, 103 N. W. 569; *Mayor v. Kane* 69 N. J. Eq. 733, 61 Atl. 374, and *Murphy v. Clayton*, 113 Cal. 153, 45 Pac. 267.

It is true that in some of the above cases the broad doctrine is announced that:

"To constitute such an estoppel, it must * * * be shown that the person sought to be estopped has made an admission or done an act, with the intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, inconsistent with the evidence he proposes to give or the title he proposes to set up; that the other party has acted upon or been influenced by such act or declara-

tion; that the party so influenced will be prejudiced by allowing the truth of the admission to be disproved." *Murphy v. Clayton*, supra.

In none of those cases, however, did the court have, as in this case, progressive or successive investments, stretching over a period of years, by an agent of a business man, of the money of his principal, in the name of the agent, whereby the people residing in the community were actually misled as to the real worth and business success of such agent. In other words, in the above cases, the courts were dealing with situations which sprang out of the violation by the husband of a duty which he owed his wife—situations growing out of the marital relation—and they were not dealing with a case where a business man had been so culpably negligent of his own affairs as to permit an agent, for a successive period of years, to invest the money of his principal in visible property, in his own name, and assume towards that property so bought during such succession of years the attitude of an absolute owner, in so far as the outside world was informed.

The situation developed in this case probably grew out of the fact that the H. C. & W. B. Reynolds Company was a family affair, and that H. E. Reynolds probably felt that he possessed a license which he otherwise would not have taken with the affairs of the corporation. As to the general public, however, the H. C. & W. B. Reynolds Company was a business corporation, and H. E. Reynolds, deceased, simply one of its general agents. A person, who willfully or through culpable negligence enables another to hold himself out to the public as the owner of property, is estopped from claiming that property as against one who has been misled in dealing with the apparent owner of the property and upon the faith of that ownership. 2 *Herman on Estoppel*, p. 1103, subd. 979.

"Seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be loser than a stranger." *Hern v. Nichols*, 1 Salkeld, 289; *Allen v. Maury*, 66 Ala. 10.

"A recognized proposition as to estoppel in pais is that if in the transaction itself, which is in dispute, a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, he cannot be heard afterward, as against that other, to show that the state of facts referred to did not exist." 16 *Cyc.* p. 772, and authorities there cited.

"The rule has sometimes been stated," says *Pomeroy*, "as though it were universal, that an actual knowledge of the truth is always indispensable. It is, however, subject to so many restrictions as to lose its character of universality. It applies in its full force only in cases where the conduct creating the estoppel consists of silence or acquiescence. It does not apply where the party, although mistaken or ignorant as to the real facts, was in such a position that he ought to have known them, so that knowledge would be imputed to him. In such case ignorance or mistake will not prevent an estoppel. Nor does the rule apply to a party who has not simply acquiesced, but who has actively in-

terfered, by acts or words, and whose affirmative conduct has thus misled another. Finally, the rule does not apply, even in cases of mere acquiescence, when the ignorance of the real facts was occasioned by culpable negligence." 2 Eq. Jur. § 809; Sullivan v. Colby, 71 Fed. 460, 18 C. C. A. 193.

The case of Goldthwaite, Receiver, v. Janney & Chaney, Trustees, and Abraham v. Same, 102 Ala. 431, 15 South. 560, 28 L. R. A. 161, 48 Am. St. Rep. 56, did not present the facts which are presented by this record, and in no way conflicts with the above views.

9. We think that the conclusions of the chancellor on the facts of this case, as presented by the legal evidence, were in accordance with the great weight of the testimony, and we are of the opinion that his decree should be affirmed.

10. There are some matters of minor importance which we have not above discussed. We have carefully examined them, and are of the opinion that the chancellor was correct in his rulings as to all of them.

The decree of the court below is affirmed. Affirmed.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

(190 Ala. 352)

VANDIVER v. AMERICAN CAN CO.
(No. 38.)

(Supreme Court of Alabama. Nov. 7, 1914.)

1. APPEAL AND ERROR ⇐333—SUBMISSION OF CASE ON APPEAL—EFFECT OF DEATH OR DISABILITY OF PARTY.

Where a cause is regularly and appropriately submitted on appeal to the Supreme Court, neither the death nor disability of any of the parties subsequently occurring will disturb the submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1846-1850; Dec. Dig. ⇐333.]

2. APPEAL AND ERROR ⇐1184—SUBMISSION OF CASE ON APPEAL—EFFECT OF DEATH OR DISABILITY OF PARTY.

Where the Supreme Court renders a judgment on appeal regularly and appropriately submitted, but the situation of the parties have materially changed subsequent to the submission, the judgment will be as of the date of submission.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4407, 4635; Dec. Dig. ⇐1184.]

3. APPEAL AND ERROR ⇐1108—DISPOSITION OF CASE ON APPEAL—MATTERS OCCURRING AFTER JUDGMENT.

Matters occurring after judgment in the trial court do not affect the determination of the question on appeal, whether the judgment shall be affirmed or reversed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4410; Dec. Dig. ⇐1108.]

4. APPEAL AND ERROR ⇐827—DISPOSITION OF CASE ON APPEAL—MATTERS OCCURRING AFTER JUDGMENT.

Where the parties appealing from an adverse judgment voluntarily submitted the case to the Supreme Court on appeal without calling the court's attention to their bankruptcy after rendition of the judgment, the Supreme

Court will not set aside the submission, but will dispose of the appeal on the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3208; Dec. Dig. ⇐827.]

5. APPEAL AND ERROR ⇐1111—DISPOSITION OF CASE ON APPEAL—TRIAL DE NOVO.

The Supreme Court on appeal from a judgment at law may only affirm or reverse the judgment, and may not try the case de novo.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4411-4420; Dec. Dig. ⇐1111.]

6. BANKRUPTCY ⇐431—DISCHARGE—SURETIES ON APPEAL BOND.

Where bankrupts voluntarily submitted to the Supreme Court a case on their appeal from an adverse judgment rendered before their bankruptcy without calling the court's attention thereto, the remedy of a surety on the supersedeas bond must be sought in the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 783-786; Dec. Dig. ⇐431.]

7. CORPORATIONS ⇐661—FOREIGN CORPORATIONS—RIGHT TO SUE.

A foreign corporation may sue for a debt created in another state or arising in an interstate transaction, though at the time of the creation of the debt it did some business in the state in violation of the statute regulating foreign corporations.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2536, 2539, 2542, 2543, 2544, 2546, 2563-2567; Dec. Dig. ⇐661.]

8. EVIDENCE ⇐383—BOOKS OF ACCOUNT—ADMISSIBILITY.

Where a party uses books of account against the adverse party, he makes them evidence for the latter on the same subject, and, where a part is used, the whole is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. ⇐383.]

9. EVIDENCE ⇐383—BOOKS OF ACCOUNT—ADMISSIBILITY.

Where plaintiff introduced a page of defendant's ledger which showed on the debit side plaintiff's debt, an entry on the credit side containing a suggestion of a pending settlement was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1660-1677; Dec. Dig. ⇐383.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by the American Can Company against Henry F. Vandiver. From a judgment for plaintiff, defendant appeals. Affirmed.

Rushton, Williams & Crenshaw and Charles L. Harold, all of Montgomery, for appellant. Ball & Samford, of Montgomery, for appellee.

DE GRAFFENRIED, J. On the 28th day of June, 1912, the plaintiff the American Can Company, obtained a judgment in the circuit court of Montgomery county against Henry F. Vandiver and J. G. Musgrove, "late partners doing business under the firm name of Vandiver Planting & Canning Company." On the 26th day of July, 1912, the defendant Henry F. Vandiver took an appeal from said judgment to this court. In taking the appeal he superseded the judgment of the circuit court by giving a supersedeas bond with two

solvent sureties on said bond. The case was submitted in this court for the judgment of this court on said appeal, on December 19, 1912.

1. It appears, from certain applications which have been made to this court to set aside the above submission, that on the 19th day of September, 1912—after the appeal had been taken to this court and before the submission of the cause in this court—an involuntary petition in bankruptcy was filed in the federal court against the said Henry F. Vandiver, and that on the 10th day of October, 1912, the said Vandiver was adjudicated a bankrupt, and George Stuart was elected trustee in bankruptcy in said proceedings. On the 28th day of December, 1912—after this case had been submitted on the appeal taken to this court—Henry F. Vandiver filed in the said bankruptcy proceeding a petition for his discharge.

2. On the 10th day of December, 1912, the said defendant, J. G. Musgrove, filed in the federal court a voluntary petition in bankruptcy, and on the 11th day of December, 1912, was adjudicated a bankrupt. On that same day the said George Stuart was appointed trustee in said bankruptcy proceeding.

3. The schedules in the above bankruptcy proceedings show the above judgment as a debt against both Vandiver and Musgrove, and the said American Can Company has received a dividend out of the estate of the said Vandiver as a bankrupt.

4. We learn the above facts with reference to the bankruptcy proceedings against Vandiver and Musgrove from the applications which have, since this case was submitted on this appeal for the judgment of this court, been filed in this court, wherein we are asked to set aside the submission and permit the bankruptcy proceedings to be shown to this court. There are also in our hands certain papers telling us that, since this application to set aside this submission was made, both Vandiver and Musgrove have received their discharges in their respective bankruptcy proceedings, but not until after this case had been here finally submitted was this court in any way informed of the bankruptcy proceedings. We presume that this application to set aside this submission is really dictated by a desire to save the sureties upon the supersedeas bond of Henry F. Vandiver.

[1, 2] 5. When a cause is regularly and appropriately submitted on appeal to this court, the case is no longer under the control of the parties. Neither the death, nor any other sort of disability, of any of the parties, occurring after the submission, is permitted to disturb the submission. When this court renders a judgment or decision in a cause which, on appeal, has been regularly and appropriately submitted to this court for its judgment or decree, and the situation of

the parties materially changes subsequent to the submission of the cause, then, in such a case, the judgment or decree will be rendered by this court as of the day of the submission. *Booker v. Adkins*, 48 Ala. 529; *R. C. L.* 215.

[3] The bankruptcy of Vandiver and Musgrove occurred after the judgment was rendered against them in the circuit court, and the general rule is that:

"Matters occurring after judgment in the lower court do not affect the determination of the question whether the judgment shall be affirmed or reversed." 2 *R. C. L.* 214, and authorities there cited.

[4] In addition to this, the parties saw proper to voluntarily submit this cause for the judgment of this court on this appeal without, in any way, calling the attention of this court to the above bankruptcy proceedings. The situation of the parties is now substantially the same as it was when they voluntarily appeared at the bar of this court and submitted their cause to this court for a judgment of affirmance or reversal. This court therefore should not now, after the submission, in the absence of a clear right, accept the suggestion of bankruptcy and set the submission aside. *Booker v. Adkins*, supra; 2 *R. C. L.*, supra.

6. In addition to the above, it is not made to appear that it matters to the estate of the bankrupt whether this submission is or is not set aside. The worst thing that can happen to the estate of the bankrupt at the hands of this court is the affirmance of the judgment.

As we understand these applications, the judgment is being treated by the trustee as a valid debt against the estates of the bankrupts, and the only persons really interested in this proceeding are the sureties on the supersedeas bond of Henry F. Vandiver.

[5, 6] This court is not authorized to try this matter de novo. Our only authority is to affirm or reverse the judgment of the circuit court of Montgomery county. The case was brought here by the bankrupts, not for a trial de novo, but for the purpose of attempting to obtain a reversal of the judgment of the trial court because of alleged errors committed during the trial. The bankrupts saw proper, when they submitted this cause on this appeal to this court, to treat the judgment as valid, and there is no machinery provided by our laws or rules of court for such an application as they now make. If the judgment is void, as is now claimed by the appellants, then the sureties can find relief in the federal court where the estates of the bankrupts are being administered. *Slusher v. Hopkins*, 124 Ky. 44, 97 S. W. 1128; *Knapp et al. v. Anderson et al.*, 71 N. Y. 466. We are not disposed to open up a submission which was voluntarily made by the bankrupts, without in any way disclosing, at the time of the submission, that they, in any

way, desired to avail themselves of the bankruptcy proceedings or, as to that matter, without, in any way, informing this court of such bankruptcy proceedings. If we were here to try this cause de novo, then the bankrupts could plead their bankruptcy; but, as we have already said, we have no authority to try this case de novo. The judgment, if void, because of the bankruptcy proceedings, is void because of the policy which the Bankruptcy Act has established, and not because of any inherent vice or fraud in the judgment itself. It has always been the rule in this state for the courts to refuse to inquire into the validity of such a judgment, "unless its invalidity is properly pleaded or called to the attention of the court by a party interested in such judgment." *Ex parte Banks*, 64 South. 74. If a bankrupt sees proper to allow a judgment to go against him without pleading his bankruptcy, or to submit a case in this court after he becomes a bankrupt without calling the attention of this court to the fact of his bankruptcy, he alone is to blame. In this case the parties who have filed these applications to set aside this submission were *sui juris* when this submission was had, and, having then neglected to call this court's attention to this matter, the application cannot be received. It may be that, in the federal court, which has jurisdiction of these bankruptcy matters, upon appropriate proceedings, the judgment of the circuit court and all subsequent proceedings would be declared to be null and void. This case, having been regularly submitted, will be determined on this appeal just as if no bankruptcy had occurred. If, before the submission of the cause, our attention had been appropriately called to this matter, an order staying the appeal might have been entered. It may be that the bankruptcy proceedings have discharged the sureties on the supersedeas bond. *Young v. Howe*, 150 Ala. 157, 43 South. 488; *Goyer v. Jones*, 79 Miss. 253, 30 South. 851; *Hamilton v. Bryant*, 114 Mass. 544. But, if so, they must obtain relief in the federal court which has jurisdiction over the judgment which in this case is appealed from, and which court is provided with the procedure necessary for the determination of that question.

[7] 7. The pleas of the defendant setting up that the plaintiff was, at the time the demand sued upon in this case was created, a foreign corporation doing business in Alabama and not properly qualified under our laws to do business in this state, were subject to the demurrer of plaintiff. The pleas do not allege that the demand sued upon was created in Alabama, or that it arose out of an Alabama transaction. It may be that at the time this debt was created the plaintiff was doing some sort of business in Alabama in contravention of its laws. This debt, however, may have been created in another state,

or it may be that it arose in an interstate transaction. These defects were pointed out by the demurrer, and the trial court properly sustained the demurrer. *Collier & Pinckard v. Davis Bros.*, 94 Ala. 458, 10 South. 86.

[8] 8. We quote with approval the following proposition copied by appellants in their brief, from *Pendleton v. Weed*, 17 N. Y. 72:

"If a party uses books of account against his adversary, he makes them evidence for him on the same subject. * * * If part is used, the whole relating to the same matter is admissible."

The above is plainly the law and is supported by the following other authorities: *Boudinot v. Winter*, 190 Ill. 394, 60 N. E. 553; *Veiths v. Hagge*, 8 Iowa, 163; 3 *Wigmore on Ev.* § 2118.

[9] In the instant case the plaintiff introduced a page of the defendant's ledger. This page showed, on the debit side, the plaintiff's debt. On the credit side was the following entry in ink: "June 21. To 8 notes to Samford and Ball, attys., \$4,453.31." And, in pencil, the following other entry: "The notes (8) in number not delivered, holding pending settlement."

The trial court committed no error in refusing to allow the above entries on the ledger sheet to go to the jury. They had, under the pleadings, nothing to do with this case. The ledger sheet itself showed this. They simply contained an insidious suggestion of a pending settlement of the litigation, and could have had no legal effect upon the case.

9. Under all the evidence in this case, the plaintiff was entitled to affirmative instructions in its behalf, and it is therefore unnecessary for us to further consider this case.

The judgment of the court below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(190 Ala. 654)

ALLEN v. SCRUGGS et al. (No. 546.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ~~493~~—JURISDICTION
— SUPREME COURT — ORGANIZATION OF
COURT BELOW—RECORD.

As probate courts are continually open for the probate of wills, the Supreme Court's jurisdiction of an appeal from an order denying probate of a will, where the transcript showed that on all occasions when the court was called upon to act, or in fact did act, the presiding judge was present, cannot be questioned on the ground that the transcript failed to show that there was a sufficient organization of the probate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2282-2284; Dec. Dig. ~~493~~.

2. WILLS ~~238~~—PROBATE—LOST WILLS—BURDEN OF PROOF.

While a lost will may be probated, the proponent has the burden of establishing its

substantial parts by clear, full, satisfactory evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 651, 652, 662, 664; Dec. Dig. ¶288.]

3. WILLS ¶300—PROBATE—LOST WILLS—EVIDENCE.

Proof of the substance of a lost instrument as a will is sufficient, and the exact words need not be shown.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 697; Dec. Dig. ¶300.]

4. WILLS ¶289—PROBATE—LOST WILLS.

Before a lost instrument can be admitted to probate as a will, it must be established that the will was signed by the testator and attested by two witnesses, as required by Code 1907, § 6172.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 653-661; Dec. Dig. ¶289.]

5. APPEAL AND ERROR ¶934—REVIEW—FINDING OF COURT.

A decree of the probate court entered without the intervention of a jury, and denying the admission of a lost will to probate, is, under the direct provisions of Code 1907, § 5361, without presumption as to its correctness, but it cannot be overturned on appeal, unless it is so manifestly against the evidence that a trial judge would have set aside a verdict of the jury on the same testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3777-3781, 3782; Dec. Dig. ¶934.]

6. WILLS ¶294—PROBATE—EXECUTION—EVIDENCE.

While an instrument is not a valid will unless subscribed by two witnesses, testimony as to the execution may be furnished by others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 679-684; Dec. Dig. ¶294.]

7. WILLS ¶302—PROBATE—EVIDENCE—SUFFICIENCY.

Evidence held to show that an alleged lost will was executed by the testator and attested by two witnesses, as required by Code 1907, § 6172.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 575, 581, 700-710; Dec. Dig. ¶302.]

8. WILLS ¶279—PROBATE—LOST WILLS.

A verbal variance between a lost will, as set out in a petition for its probate, and the proof of its contents will not preclude probate, where the substance is the same.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 638; Dec. Dig. ¶279.]

9. WILLS ¶300—PROBATE—LOST WILLS—EVIDENCE.

Evidence held to establish the contents of a lost will and to show that the testator intended to devise and bequeath all his property, real and personal, to certain natural children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 697; Dec. Dig. ¶300.]

10. WILLS ¶300—PROBATE—LOST WILLS.

Evidence held to show that a will delivered to one of the beneficiaries was lost by one with whom the beneficiary left it for safe-keeping.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 697; Dec. Dig. ¶300.]

11. WILLS ¶167—REVOCATION—NATURE OF ACT.

"Revocation" is an act of the mind which must be demonstrated by some visible sign or action, as specified by Code 1907, § 6174, providing that a will can only be revoked by burn-

ing, tearing, canceling, or obliterating with the intention to revoke.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 438, 450; Dec. Dig. ¶167.]

12. WILLS ¶290—PROBATE—PRESUMPTION.

Where a will remains in possession of the testator and is not found at his death, there is a presumption that he destroyed it animo revocandi.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 663; Dec. Dig. ¶290.]

13. WILLS ¶290—PROBATE—REVOCATION.

Where the testator delivered a will to one of the beneficiaries for safe-keeping, the contestant, notwithstanding the will was lost, has the burden to prove that it was destroyed animo revocandi.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 663; Dec. Dig. ¶290.]

14. WILLS ¶297—PROBATE—REVOCATION.

Declarations by a testator, subsequent to the execution of a will, that he had revoked it, are inadmissible to prove revocation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 690-696; Dec. Dig. ¶297.]

Appeal from Probate Court, Choctaw County; W. H. Lindsey, Judge.

Petition by Robert Allen to establish and probate a lost will, with contest by Joe Scruggs and others. From a decree denying probate to the will, petitioner appeals. Reversed, rendered, and remanded.

The amended will sought to be probated is as follows:

Know all men by these presents that I, L. Ryal Noble, of the county of Choctaw and state of Alabama, being of sound mind and disposing memory, but in bad health, and mindful of the uncertainty of life, do make, publish and declare this writing as my last will and testament as follows: I give and devise to my children, Duff, Lucy, Joe, Robert and Alma Allen, including Berry Allen, whose whereabouts is unknown at present, but when found, to share equally with the others, all my lands in Clarke county, Alabama, known as the McCarty place, and all my lands in Choctaw, Alabama; also all my personal property to be equally divided among my aforesaid named children, this will not go into effect until my death.

The will was witnessed by two witnesses, and acknowledged before O. H. Watson, a justice of the peace.

G. E. McGowan, of Butler, and R. P. Roach and F. G. Bromberg, both of Mobile, for appellant. W. A. Gunter, of Montgomery, for appellees.

McCLELLAN, J. This is an appeal from a decree of the probate court of Choctaw county denying, upon contest, probate to an alleged lost last will and testament of L. Ryal Noble, deceased. A copy of the instrument sought to be probated was exhibited with the petition, and the copy thus exhibited was so amended, by the permission of the court during the trial, as to conform it to the proponent's assertion of the contents of the alleged lost instrument. As amended, the exhibited copy will be set out in the report of the appeal. The contest was heard and decided by the probate judge, without

the intervention of a jury. In his opinion the judge said:

"It appearing to the satisfaction of the court, by the testimony of the witnesses examined in open court, that in the month of July, 1900, in said state and county, the said decedent did sign his name to an instrument in writing purporting to be his last will and testament, but the court is not satisfied from the evidence that the copy of the purported will filed with the petition in this case is a substantial copy of the said instrument in writing, the judgment of the court is against the validity of the alleged will, as shown by said petition."

The issues controlling the result of the trial (contest) were these: Whether Noble duly, legally executed his last will and testament in July, 1900. Whether the paper proposed, as stated, for probate, was a reproduction of the substantial parts of the instrument so executed by Noble, if so he did. If both these questions are answered in the affirmative, then whether the instrument was subsequently revoked by Noble. The evidence makes no possible case of fraud or undue influence or of unsoundness of mind in the procurement or execution of the instrument, if it was executed as proponent asserts. One or two witnesses do quote Noble as saying he did not remember signing the instrument in July, 1900; but this was wholly insufficient, under the entire evidence presented to the trial court, to create any doubt of his mental capacity to make a will at the time it is asserted by proponent he did so. As appears, the issues are few and simple, though a vast volume of testimony was offered as bearing upon their correct solution. The retention in mind of the few simple issues involved necessarily contributes to simplify the determination of the cause.

[1] A preliminary matter presented will be first considered. It is urged for appellee that this court is without jurisdiction, for that there is no sufficient *organization* of the probate court, pronouncing the decree, shown in the transcript. For such purpose the probate courts are continually open for the exercise of the powers here involved. The transcript affirmatively shows the presence of the presiding judge of the court, Judge Lindsey, on all occasions when the court was called upon to act or in fact acted. The certificate of the judge of probate recites that the transcript is true to the *records* of the probate court of Choctaw county, in this proceeding. The insistence that this court is without jurisdiction on the transcript presented is without merit.

[2] While a lost will, duly executed, may of course be probated, the absence of the instrument places upon the proponent the burden of establishing its substantial parts by clear, full, and satisfactory evidence. *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110; *Potts v. Coleman*, 86 Ala. 94, 100, 5 South. 780.

In *Elyton Land Co. v. Denny*, 108 Ala. 553, 562, 18 South. 561—an expression that

has been repeated in *Whitten v. McFall*, 122 Ala. 619, 26 South. 131—it was said, in respect of the degree of proof requisite to establish a lost will or deed, that "the proof of the contents * * * ought to be such as to leave no reasonable doubt as to" its substantial parts.

Reference to *Potts v. Coleman* will disclose that the writer in *Denny's Case* mistook the quotation from Judge Marshall, made in *Potts v. Coleman*, as stating the rule this court intended to announce, whereas in *Potts v. Coleman* this court, immediately after quoting Judge Marshall, said:

"We should say, in civil cases, the proof ought to be such as to furnish satisfactory evidence of its substantial parts. *Shorter v. Sheppard*, 33 Ala. 648."

In *Skeggs v. Horton*, supra, this court, Chief Justice Stone writing, justified the refusal of a written charge, requested by the contestants, which exacted, as does the statement quoted from *Denny's Case*, supra, a degree of proof equivalent to that required as a condition to the conviction of one accused in a criminal prosecution. The court said:

"The rule invoked was too strict. * * * *Apperson v. Cottrell*, 3 Port. (Ala.) 51 [29 Am. Dec. 239]."

Shorter v. Sheppard, 33 Ala. 653, 654, declared that the degree of proof requisite to establish the contents of a lost instrument was that it (proof) "should be clear and satisfactory, and such as to secure, as far as possible, the safety designed to be given by the written evidence." It does not appear that this court intended in *Denny's Case*, supra, while also stating the theretofore accepted rule, to depart from the rule established in *Shorter v. Sheppard*, *Skeggs v. Horton*, and *Potts v. Coleman*, cited above; but, on the contrary, the conclusion is that the statement of a different, more exacting rule in *Denny's Case* was an inadvertence; and it, and its successor in 122 Ala. 619, 26 South. 131, must be taken as so explained.

[3] In proving, to sufficiency, the contents of a lost instrument, it is not necessary to prove the words of the instrument; proof of the substance of the contents is all that is required. *Potts v. Coleman*, supra; *Laster v. Blackwell*, 128 Ala. 143, 147, 30 South. 663.

[4] Of course, an essential to the availing, or the establishment, of a lost deed or will, is that the instrument in question should have been, and, in consequence, is shown to have been, executed as the law requires as to instruments of the character here under inquiry, that it was "signed by the testator or some person in his presence, and by his direction, and attested by at least two witnesses, who must subscribe their names thereto in the presence of the testator." Code, § 6172.

[5] The trial on this contest of the probate of the asserted lost will and testament of L. Ryal Noble, deceased, being by the judge of probate, without a jury, and the evidence

being almost entirely *ore tenus*, the review here of his conclusion on the facts is without presumption of its correctness (Code, § 5361); but it cannot be overturned "unless it is so manifestly against the evidence that a judge at *nisi prius* would set aside the verdict of a jury rendered on the same testimony." *Briel v. Exchange Bank*, 180 Ala. 576, 61 South. 277.

L. Ryal Noble was a white man, coming from an entirely respectable family of people. Soon after the War between the States, he began a meretricious association with Kit Allen, a negro woman. The woman lived on Noble's plantation, and during many, many years he had his residence in a building near by that occupied by her. He was once married to one of his race; but his wife appears to have left him. Whether her departure was because of his unlawful conduct or relation with the negro woman, Kit Allen, is not certainly shown. Some say the wife is dead; others that she still lives. They had not lived as husband and wife for a great many years. Of Noble's cohabitation with Kit Allen five children (those named in the proposed will) were born. His fatherhood of them was generally known in that section. The children took the mother's surname; but two of them were entered by him in a school for negroes at Selma, Ala., under the surname of Noble. To the rearing of all these children Noble at least contributed to their support up to maturity; they living with the mother on his plantation as stated. He paid their medical bills, and satisfied demands arising out of misconduct of the boys. The mother was during many years, if not at all times, Noble's cook; he taking his meals in her nearby abode. It is not to be doubted, as upon the whole evidence, that Noble's reprehensible manner of life, boldly maintained and sustained, effected to at least raise about him, as was natural, a degree of ostracism from those with whom he was related by ties of blood. While some or all of his kin may have visited with him and he with them, it does not appear from the evidence that the natural social result of his manner of life was absent in his case. Doubtless he realized his voluntarily established immoral status, and to a degree, at least, withdrew, as it were, from that social association and relation normally to be expected and observed between kindred and friends.

In July, 1900, Noble became seriously ill. In preparation for the end, which he then anticipated, he undertook the making of his will. What took place on this occasion, at that time, must determine the issue of valid execution *vel non* of a will. In brief for appellees, the contestants' theory is thus stated:

"Our theory is, and we think the court's theory was: That an undoubted attempt to write a will in July, 1900, during the night Noble was expected to die—that this will was the first and impromptu and sudden attempt

of an ignorant country justice of the peace to write a will. That he wrote it and that it was signed and acknowledged as a deed before the justice, who put his certificate of acknowledgment on it, and that he put it away in Noble's trunk and gave him the key. That afterwards he must have destroyed it, as he said he had done, since it was not found, nor was it shown to have been in existence at his death in 1911 by direct or circumstantial evidence. That, if not revoked by destruction by the testator, it was not duly witnessed as a will by two witnesses."

This assertion of theory of and for the contestants, by their eminent counsel, Mr. Gunter, not only concisely presents the contentions for conclusions of fact upon which contestants rely and urged below and rely and now urge here, but also serves to afford, by deliberate acceptance, an important fact underlying and involved in the issue of "will or no will." So, on the facts in the record, and as conceded by counsel in brief, we enter upon the consideration of the first and major inquiries with the concession 5, as of facts, that in July, 1900, under circumstances of grave illness, Noble undertook (attempted) to make a will; that in pursuit of this purpose he brought into his service (sent for) O. H. Watson, a justice of the peace; that a writing, intended to be testamentary in character, was prepared by the justice of the peace; and that this writing was "signed" by Noble, and a formal certificate of acknowledgment, as for a deed, was made on the paper by the justice and the acknowledgment taken on that occasion. It is hence to be accepted as established that Noble had a then present purpose to make a will, made a practical effort to make a will, and created a paper, expressing a testamentary purpose and intent. Aside from the issue of proof *vel non* of the substance of the instrument and of revocation *vel non*, if a will was duly executed, this established status of fact narrows the issue, in this connection, to this inquiry: Was the paper attested by two witnesses, in accordance with the provisions of the statute? Code, § 6172.

[6, 7] The evidence that bears on this inquiry has been most carefully considered and reviewed. The importance of the correct solution thereof, in affecting the conclusion in this court, will justify a discussion of such evidence in this opinion.

The evidence conclusively shows that O. H. Watson, the justice of the peace, was present on the occasion in question; that he was sent for by Noble; that upon his arrival he was told by Noble what he (Noble) wanted done; and that he (Watson) set about the performance of Noble's desire, completing a paper which was read over to Noble and signed by Noble and a certificate of Noble's acknowledgment made on the paper. The *undisputed* evidence further shows that a number of negroes were likewise present, among whom were Kit Allen, the mother of Noble's children, and also some of the children of Noble by her. This man's life, and the hu-

man results thereof, naturally made his dwelling place and its surroundings at least the familiar resort of those of the negro race who sprang from him or were attached to him by years of association. When he became seriously ill it was both reasonable and natural that they should gather about him. Among those living on his plantation was a negro woman, Mary Ross, who appears as an attesting witness on the exhibit to the petition. That she was present on this occasion is shown by the evidence beyond cavil. Another person asserted by proponent to have been present and to have witnessed the paper was a white man, William A. Callis. In addition to the more than a half dozen negroes, undoubtedly themselves present, who testified that Callis was present on this occasion, and that he subscribed his name as an attesting witness, O. H. Watson, the justice, testified that Callis was present and attested the paper. W. A. Callis was killed by Ryal Noble in 1902, some time subsequent to the time this paper was "signed" by Noble. Noble was acquitted. It appears from the record to have been the view of contestants that Noble killed him because of Callis' intimacy with Lucy Allen, the daughter of Noble. It also appears in the record that Noble killed him by mistake or accident; that he did not intend to harm or slay Callis, though Callis' attentions to or relations with Lucy were discussed by Kit Allen and Noble, and both at least deprecated the situation or Callis' action. The testimony of all those living about or with Noble before, at, and after July, 1900, goes to show that Callis was then staying at Noble's most, if not all, of the time. Substantially the only evidence opposed or tending to refute that affirming Callis' presence on the occasion of the *signing* of a paper at the time in question are brothers of Callis, who testified that Callis and Noble were unfriendly and were "carrying guns for each other." A. R. Callis also testified that he sat up with and nursed Noble two nights during the illness, in 1900, pending which the will was said to have been written by O. H. Watson. It is hardly probable that such self-sacrificing neighborly kindness would have been extended by a brother of W. A. Callis when, at a time, the sick man and the brother were "carrying guns for each other." T. H. Callis testified:

"There was an estrangement between Mr. Noble and Lucy Randolph [Noble's daughter by Kit Allen] on account of her conduct in going off with W. A. Callis. They left the community in which Mr. Noble lived and went away."

On the cross-examination he testified:

"Will Callis went to L. R. Noble's house a good deal at one time."

If it is assumed that at or about the time Noble killed W. A. Callis, which occurred in 1902, Noble was resentful and belligerent toward him because of Callis' conduct with

Lucy, it is most probable that W. A. Callis was previously at the home of Noble near which Lucy then resided; that that was the period to which T. H. Callis had reference when he said his brother W. A. Callis was at Noble's a good deal. When the "recollection" and the "best recollection" of T. H. Callis as to date of the unfriendly relations between Noble and W. A. Callis existed and the at least unusual, if not unnatural, situation related by the other brother, H. R., who nursed Noble during the illness that induced Noble's effort to make a will, are considered in connection with the testimony of the numerous other persons who were undoubtedly present on the occasion, it must be concluded that T. H. and H. R. Callis are mistaken *as to the time (the period)* during which, if at all, there was enmity between their brother and Noble. This conclusion is further strengthened by the testimony of Frank Watson to the effect that Lucy, in response to his denial that Noble had made a will giving his property to his children by Kit Allen, and banter of her to prove her assertion by showing the paper to him, brought the paper to him some time during the year it was made (1900); that he read it; that it was, as stated, Noble's will; and that the names of W. A. Callis and Mary Ross were upon it as attesting witnesses. This witness is a white man, and his testimony is unimpeached. Lucy testified to the same circumstances. The only effort to discredit Frank Watson's testimony on this matter was by C. O. Sherer, who testified that on one occasion Frank Watson told him he had seen Noble's will, but two or three months later told him he had not seen it. Watson denied this statement. It is not conceivable that Watson, who does not appear to have any interest in the controversy, would lend himself to such a flagrant act of perjury.

We think the conclusion must follow that W. A. Callis was *present* when Noble signed the paper in July, 1900. Being present, as was Mary Ross, the negro woman, it must also be concluded, under the evidence, that they attested the paper as a will. The house in which Noble was ill in July, 1900, contained only a single room. In it the paper was written by O. H. Watson, and signed by Noble. Callis and O. H. Watson and the darkies were in this room. The testimony for proponents includes a number of those who were present when Noble signed, and the attesting was done and the acknowledgment was taken by O. H. Watson. The testimony of the negroes then present of what took place is direct, clear, and without any degree of unnaturalness or improbability. They did not testify as if by rote. Their statements do not describe the abnormal or invoke belief of that which would not reasonably be expected in the light of the circumstances. All the witnesses who were examined as to the event in July, 1900, were testifying 12 years

thereafter. The variations which appear in the testimony of these witnesses, and must appear under normal conditions if a fair credibility is afforded, relate to collateral circumstances and surroundings. For instance, there is difference between some as to whether Noble had O. H. Watson put the will in the trunk, or whether Noble first put the will under his pillow. The main facts are those upon which there is general agreement by both contestants and proponents, as before stated, and then the further fact that these people saw the will signed by Noble and attested, as the statute requires, by Callis and Mary Ross, and acknowledged by O. H. Watson. Frank Watson saw the paper within the year it was written, and he says it appeared to have been attested by Callis and Ross.

The main effort below was, and the insistence here is, to discredit O. H. Watson by the testimony of 11 witnesses who testify that O. H. Watson said, in substance, to Glover and to them and to others in their presence, on different occasions, that there was no mention of personal property in the paper he wrote; that he wrote the paper, but that it had no attesting witnesses; that, if such appeared on the paper, it was a case of forgery. O. H. Watson denied that he made the affirmative statements attributed to him.

Pertinent to the subject under consideration, it was said in *Barnewall v. Murrell*, 108 Ala. 381, 382, 18 South. 838:

"It is undoubted law that any deficiency in the evidence of subscribing witnesses, as to the due execution or identity of the instrument, may be supplied by the evidence of other witnesses. If this was not true, the validity of wills would often depend, not upon the existence of facts rendering them valid, but upon the retentiveness of the memory of the subscribing witnesses. *Hall v. Hall*, 38 Ala. 131. As was said in this case: 'The law makes two subscribing witnesses indispensable to the formal execution of a will; but it by no means follows that the testimony of these witnesses is the only evidence by which the due execution of the will can be established. On the contrary, it is laid down as undoubted law that if, from forgetfulness, the subscribing witnesses should fail to prove the formal execution of the will, other evidence is admissible to supply the deficiency; or, if the subscribing witnesses all swear that the will was not duly executed, they may be contradicted, and the will supported by other witnesses or by circumstances.'"

The first headnote to *Skeggs v. Horton*, 82 Ala. 352, 2 South. 110, thus concisely states the rule in this state:

"Although a will is required to be attested by two witnesses, a lost will may be established by the testimony of a single witness, who read it, or heard it read, and remembers its contents."

In this case, if every word of the testimony of O. H. Watson was entirely disregarded, the overwhelming weight of evidence sustains the affirmative of the proposition that the paper signed in July, 1900, by Noble, was attested by two witnesses. Indeed, if

the testimony of Robert Allen and Joe Allen was also put out of consideration, still the evidence is clear, credible, and conclusive that Noble's will was attested, as the law requires, by Callis and Ross, and that others saw the acts going to perfect Noble's conceded intention to make a will. The only possible way by which to avoid this result is to captiously reject the testimony of Frank Watson, Mary Ross, Lucy Randolph, Kit Allen, Judy Barron, and Cora Dials. All of these witnesses are negroes, except Frank Watson. Of these only Lucy Randolph has an interest in the instrument sought to be probated. Kit Allen is the mother of the beneficiaries named in the instrument; but, aside from her natural concern (which we assume) that her children, by Noble, should have what the father unquestionably intended they should, upon his death, succeed to, she is without definite, substantial interest in the establishment of the paper propounded. When it is accepted, as it must be under the evidence, that Noble undertook to make a will in July, 1900, at his residence, that acts looking to that end were done, that he signed and acknowledged the instrument written as he directed, and these accepted facts and acts are testified to by these witnesses, it is not perceivable how any just ground could exist for repudiating, as wholly unbelievable, their further testimony that the paper was attested by W. A. Callis and Mary Ross as the law requires. Except the contradictory (to his evidence) statements attributed by 11 witnesses to O. H. Watson, the scrivener, there is no evidence of any degree of positiveness that these persons did not attest the paper. Frank Watson's subsequent denial, as asserted by Sherer, after Watson had told him he had seen the original will of Noble, cannot, if accepted, rise to the dignity of a contradiction that would authorize the disregard of Watson's clear and positive statements, given under oath, sustaining the existence and complete execution of a will by Noble. Besides, Frank Watson is pointedly corroborated by Lucy Randolph. The testimony of these negroes bears on its face no element of improbability. The cross-examination of them disclosed no utterance or circumstance that is inconsistent with substantial truth. Variation in the memory of witnesses and indistinctness as respects details 12 years after the event under inquiry are factors in the consideration of such matters that tend to confirm, rather than refute, the testimony appearing to be not otherwise unworthy of credit. The result is that testimony of credible witnesses, situated to know that about which they testify, is presented on the issue of attestation *vel non* of Noble's intended will, and there is no real evidence or circumstance against its verity. Our conclusion is that Noble's will was attested by Callis and Mary, and that the unreflected upon testimony is conclusive on that point. It cannot, *on the evidence here*, be

for a moment conceived that a gigantic, criminal conspiracy was organized to perjurally establish a will, duly attested, for Noble.

[8, 9] We come now, in proper order, to the question whether the paper so legally executed, under the statute (section 6172), was, in *substantial parts*, the instrument offered for probate. The proof of the *words* is not required by the law; the *substance* is all that is exacted by the law. *Potts v. Coleman*, 86 Ala. 94, 100, 5 South. 780. The form or phrase in which the lost instrument is made or couched by the pleader cannot alone determine the result of such an inquiry. So fact and argument against the establishment of a *lost* instrument cannot find just predicate or effective influence *alone* in the form or phrase in which a subsequent writer sees fit to set down a reproduction of that which is lost, for it is the *substance* of the paper that is *lost* to which the law addresses its inquiry. The alleged copy should conform *in substance* to the lost instrument it would reflect; but all those features of an alleged copy, which are matters of *form*, unaffected of the *substance*, are not material to be established to the degree of certainty stated in a forward part of this opinion.

The *substance* (apart, of course, from the execution under Code, § 6172) of the instrument executed in July, 1900, by Noble, was the devise and bequest of property, real and personal, to named persons by a writing testamentary in character. There is no doubting the purpose of Noble, at that time, to do this, nor can there be any doubt on the evidence, for it is without dispute in this connection that Noble then intended to give his estate to his children by Kit Allen. The only evidence of any adverse character is that of the several witnesses for contestants, who testify that O. H. Watson told them the will of Noble did not mention personal property. Every other witness who heard it read or read the paper positively testified that it bequeathed Noble's personal property to these children. Frank Watson so testifies. So do Mary Ross, Lucy Randolph, and Judy Barron. Other evidence and circumstances corroborate these witnesses. And it may be here noted that if, as was undoubtedly the case, Noble intended his real estate to go to his children by Kit Allen, it would be a remarkable, quite unnatural conception to attribute to Noble that his consideration for those who sprang from him should be entirely satisfied by a testamentary disposition of his real estate alone. The *substance* of Noble's will included his personal and real property.

[10] Was the will lost? The overwhelming proof is to the effect that Noble gave the paper to *his daughter*, Lucy, to keep. This was certainly no unnatural act. She was one of the beneficiaries in the instrument. Noble must have known the instrument was subject to revocation by him. Of course it was in fact. If, as is asserted, she was an immoral woman, surely Noble would not have found

in that fact a disqualification to have the custody of a will naming her as one of the beneficiaries, for she was the product of Noble's immorality with Kit Allen. That the instrument was committed to her care by Noble is proven beyond any doubt. And it is likewise established by the undisputed testimony that Lucy, *on the eve of her removal to Mobile from Choctaw county*, committed the will to the care of Judy Barron, who then lived on Noble's plantation in Choctaw county. Judy took the instrument, wrapped it in some "quilt pieces," tied the bundle up, and put it in the bottom of her trunk. Nobody else knew of the will's place of keeping, except Cora Dials, Judy's daughter. Later, when Lucy heard that Judy was going to move or had moved into Clarke county, she came from Mobile, and she and Judy found the will in the stated place in the trunk and looked at it. Shortly after Noble's death Lucy came for the paper. While the wrapping in which the paper had been put was in its place (the bottom of the trunk), the paper was missing. Diligent search has not discovered it. Who removed it is not explained. The evidence is conclusive that the paper, executed as before stated, was and is lost. It is insisted for appellees (contestants) that the fact that Lucy committed the will to the custody of Judy Barron, an ignorant "fieldhand," without advising the other beneficiaries of that fact, should have a strong influence to reflect upon, if not refute, the testimony going to show the committal of the paper to Judy by Lucy, and in consequence to neutralize the effect of the testimony to show the loss of the paper. We do not think this position well taken. The evidence is without dispute that all of the beneficiaries named in the will, except Berry, who had left some years before, knew that Noble had delivered the paper to Lucy. There does not appear to have been any want of confidence, on their part, manifested in this action. That Lucy thought it best to leave the paper in Judy's trunk and under her care, and so without advising her brothers and sister (Alma, since deceased) of it, may quite reasonably have consisted with due caution, under the circumstances. Undoubtedly Lucy had great confidence in Judy, and the evidence justifies it, unless it is assumed that Judy disposed of the paper—an idea that is not supported by any positive or persuasive evidence. When it is remembered that Lucy was changing her place of residence, and in that connection committed the paper to Judy's custody, and when it is also borne in mind that the legal effect of the paper, if not revoked, was to vest the real and personal property, left by Noble at his death, in his children by a negro woman, and thereby to deflect its possession and enjoyment from his blood relatives of the white race, this action of Lucy's may have been quite reasonably invited by a fair caution to preserve the

paper by committing its custody to one in whom she had confidence, and who would not ordinarily be expected by others to have custody of it. The evidence shows that there was general knowledge of the fact that Noble had made a will in favor of his illegitimate offspring. Indeed, it appears from the testimony of Meredith Pugh, one of Noble's next of kin, that on an occasion in the year 1902, when the witness was reconveying to Noble about 700 acres of land Noble had conveyed to witness when he (Noble) was being sued for damages by the administrator of W. A. Callis, who, as stated before, Noble had previously killed, John Kimbrough said to Noble: "What about the will? I know you made a will." Noble [Uncle Ryal] said, "Yes, its all done made." John Kimbrough, in his testimony, also refers to Noble's having stated on other occasions, beside that mentioned by Meredith, that he had previously made a will. Under the circumstances, whether the action of Lucy in placing the paper with Judy was a precaution inspired by undue anxiety or by a rational apprehension, Lucy's action in that regard cannot, under all the evidence, be said to have been so improbable or abnormal as to reflect upon the positive testimony that such course she did, in fact, pursue.

[11-14] The remaining question is whether Noble revoked the will of July, 1900. It is not asserted that he made any subsequent disposition of his property by will or subscribed any writing revocatory of his July, 1900, will. So the inquiry narrows to this issue: Was the instrument revoked by any of these acts specified in Code, § 6174, which, as here involved, reads:

"* * * A will in writing can only be revoked by burning, tearing, canceling, or obliterating the same, with the intention of revoking it, by the testator himself, or by some person in his presence, and by his direction; * * * and when any will is burned, torn, canceled, or obliterated by any other person than the testator, his direction and consent thereto, and the fact of such burning, canceling, tearing, or obliteration, must be proved by at least two witnesses."

In *Woodruff v. Hundley*, 127 Ala. 640, 653-655, 29 South. 98, 102 (85 Am. St. Rep. 145), these presently pertinent statements of established rule and doctrine were set down:

"All declarations of the testatrix subsequent to the making of this will, tending to show that she had revoked it, were clearly incompetent; *no act of revocation having been shown.* [Italics supplied.] * * * In *Law v. Law*, 83 Ala. 434, 3 South. 753, it is said: 'That no revocation can be effected by mere word of mouth or nuncupative declaration, any more than could be done under the English statute of frauds. It requires one or more of the *specific acts* mentioned in the statute—a burning, tearing, canceling or obliterating, with the intention to revoke, or a new will or codicil, properly executed and attested.' [Italics supplied.] * * * Revocation is an act of the mind which must be demonstrated by some outward and visible sign. * * * 'All the destroying in the world without intention will not revoke a will, nor all the intention in the

world without destroying. There must be two.' * * * There must be the act as well as the animus. Both must concur in order to constitute a legal revocation."

When a will remains in the possession of the deceased and is not found at his death, the legal, evidential presumption is that the testator destroyed it, *animo revocandi*, until the contrary is shown. *McBeth v. McBeth*, 11 Ala. 596; *Weeks v. McBeth*, 14 Ala. 474. Of course, when the instrument not found or produced was committed by the deceased to another's custody, the evidential presumption stated is not available—has no application or effect. The basis of the presumption, rebuttable, of course (14 Ala. 474), is the conception that the unexplained absence of the will from the place referable to the custody of the decedent, which he had retained during his lifetime, naturally suggests his destruction thereof. Here the evidence is conclusive that Noble by his own act committed the will to the custody of another, viz., his daughter Lucy. The burden of proof was therefore upon contestants to establish the revocation of the will. Other than asserted, subsequent declarations of Noble that he had destroyed his will giving his property to the illegitimate children, by Kilt Allen, there is no evidence of any *revocatory act* by Noble to that end. It is noted in *McBeth v. McBeth*, supra, that testators frequently make declarations touching their testamentary acts "for the purpose of misleading, and of stifling the importunity of relatives and friends." It may well be that Noble, in such statements as he is said to have made indicating that he had destroyed his will of July, 1900, was exercising the defensive prerogative to which the quoted allusion was made in *McBeth v. McBeth*. The pleaded assertion of revocation by Noble of his will executed in July, 1900, has not been at all sustained. There is no legal evidence to that end.

Our conclusion on the whole case is that the judge of probate erred in refusing probate to the instrument offered for probate as the *substance* of the will executed by L. Ryal Noble in July, 1900; and that the evidence to that end was so strongly supportive of every material fact necessary to be established in order to justify the probate of a lost will as that a trial judge would and should have set aside a verdict of a jury opposed thereto.

The decree of the probate court of Choctaw county is reversed; and one is here rendered directing that court to receive for probate, and to probate as the last will and testament of L. Ryal Noble the instrument offered for probate. The cause is remanded for the purpose of carrying into effect, in that court, the judgment and decree of this court.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

(190 Ala. 359)

FIRST NAT. BANK OF MONTGOMERY v. DIMMICK. (No. 80.)(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. CONSTITUTIONAL LAW ¶249—**GARNISHMENT** ¶2—**CLASS LEGISLATION—REMEDIES.** Code 1886, §§ 2968, 2971 (Code 1907, § 4301), providing that garnishment might issue in aid of a pending suit at any time before judgment, and that process of garnishment might issue on a judgment on which execution might issue without bond or security, and section 2972 (Code 1907, § 4311), providing that a judgment creditor of a corporation, having execution returned "no property found," might sue out a garnishment to reach the unpaid subscription of any stockholder, make distinct and permissible classification of creditors, and are within the legislative power and valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 710; Dec. Dig. ¶249; Garnishment, Cent. Dig. § 2; Dec. Dig. ¶2.]

2. CONSTITUTIONAL LAW ¶70—**DETERMINATION OF WISDOM OF LEGISLATION.**

The wisdom of such acts of the Legislature cannot be inquired into by the courts.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. ¶70.]

3. CORPORATIONS ¶217—**STOCKHOLDER'S LIABILITY—UNPAID SUBSCRIPTION—STATUTE.**

Plaintiff, under Code 1886, § 2972, issued garnishment in aid of judgment against a corporation to reach an unpaid subscription to stock of the corporation, without having execution against the corporation returned nulla bona. Code 1907, § 4311, enacted after issue of the writ, but before answer of the garnishee, permits any creditor of a corporation, by process of garnishment, to subject to the payment of his debt an unpaid subscription to the capital stock of a corporation, and section 10 declares that the Code shall not affect any existing right, remedy, or defense, and that the laws in force at the adoption of the Code shall continue in force. *Held*, that plaintiff could not, by virtue of the new statute, reach the garnishee's unpaid stock subscription under the writ as issued.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 835-844; Dec. Dig. ¶217.]

4. STATUTES ¶271—**ADOPTION OF CODE—EFFECT ON EXISTING LAW.**

The Legislature, in adopting the Code of 1907, had the right to declare by section 10 thereof that the Code should not affect any existing right, remedy, or defense, and that the laws in force at its adoption should continue in force in respect thereto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 364; Dec. Dig. ¶271.]

5. STATUTES ¶267—**RETROACTIVE EFFECT—REMEDIES.**

When a suit is instituted or a defense is interposed which is at the time unauthorized by law, a subsequent statute, giving such remedy, does not operate on the existing suit, especially when it does not provide that it shall so operate.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 350-359; Dec. Dig. ¶267.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Action by the First National Bank of Montgomery against the Montgomery Iron Works, defendant, and J. W. Dimmick and others, garnishees. Judgment for the garnishee named, and plaintiff appeals. Affirmed.

Plaintiff recovered judgment against defendant and sued out garnishment in aid of the judgment to J. W. Dimmick, A. M. Baldwin, and G. W. Craik, on the theory that they were indebted to said defendant on stock subscriptions.

W. A. Gunter and Alex Troy, both of Montgomery, for appellant. Tyson, Wilson & Martin and W. F. Thetford, all of Montgomery, for appellee.

DE GRAFFENRIED, J. [1] At the time the garnishment in this case was issued, there were three legislative provisions relative to the subject of garnishment, which are of interest here. These provisions were contained in the Code of 1886, and were as follows:

"A garnishment may issue in aid of a pending suit, at any time before judgment, whether the summons has been executed or not; but if the suit be for the recovery of damages, merely or for the recovery of uncertain or unliquidated damages for a breach of contract, such garnishment must be issued only on the order of a judge of probate, or chancellor, or judge of the circuit or city court, in which such suit is pending, after the plaintiff has made the special affidavit of the facts and circumstances of the case required by section 2934 (3257), and such judge or chancellor has prescribed the penalty of the bond to be given by the plaintiff; and in all cases the plaintiff, upon the issue of the garnishment, must give bond with surety, payable and with condition as in case of original attachments." Code 1886, § 2968.

"Process of garnishment may issue on a judgment or decree on which execution can issue without bond or security, and may be sued out by the assignee of such judgment or decree." Code, 1886, § 2971.

"A judgment creditor of a corporation, having execution returned 'no property found,' may sue out a garnishment to reach and subject the unpaid subscription of any stockholder in such corporation, without giving bond or security." Code, 1886, § 2972.

The Legislature, in adopting the above three subdivisions of the Code, made distinct classifications of creditors and conferred upon each class separate and distinct methods of procedure for the enforcement of their debts against garnishee. The simple contract creditor who had not reduced his claim to judgment was, to obtain process of garnishment, required to do, as shown by the above sections, some things which a judgment creditor was not required to do, and a judgment creditor of a corporation, who had obtained the issuance of execution against the corporation with a return of nulla bona on the execution, was the only person who could sue out a garnishment to reach and subject the unpaid subscription of a stockholder of such corporation. Neither a simple contract creditor nor a judgment creditor, upon whose judgment an execution had not been issued with a return of nulla bona thereon, could reach, by garnishment, the unpaid subscription of a stockholder of a corporation. Garnishment, like attachment, is a statutory remedy, and the statutes which we have above

quoted plainly show their meaning and the rights which they conferred upon those who invoke their aid. Garnishment, as a remedy for reaching the unpaid subscription of a stockholder of a corporation, was conferred by our Legislature only upon a judgment creditor who had, as we have already said, pursued the corporation to insolvency by having execution issued upon his judgment and returned, "No property found."

[2] We are not concerned with the wisdom of the Legislature in passing this law. The act was within legislative competency, and was valid. *State v. Alabama Fuel & Iron Co.*, 66 South. 169.

The issuance, with the return of an execution, "nulla bona," was, when this garnishment was issued, jurisdictional, and constituted a necessary prerequisite to the subjection by process of garnishment of the unpaid subscription of a stockholder in a corporation, and this, because the Legislature declared that it should be so.

[3] 1. Undoubtedly, when the garnishment in this case was issued, the plaintiff was entitled to sue out a writ of garnishment against the garnishee. The statute conferred upon the plaintiff that right, but at that time—the time when the garnishment was issued—the plaintiff had no right, in this garnishment proceeding, to subject the unpaid subscription of the garnishee to the capital stock of the defendant corporation; and this, for the simple reason that it had not, in accordance with the statute, pursued the corporation to insolvency by having an execution issued against it and returned, "No property found." *Bingham v. Rushing*, 5 Ala. 403; *Vaughn v. Alabama National Bank*, 143 Ala. 572, 42 South. 64, 5 Ann. Cas. 665.

2. Without pursuing the history of the above-quoted sections of the Code of 1886, it is sufficient for us to say, in so far as this case is concerned, that the Code of 1907 (see Code of 1907, § 4311) permits any creditor of a corporation, by process of garnishment, to subject to the payment of his debt an unpaid subscription to the capital stock of a corporation. This section and change in our statutory system went into effect after process of garnishment had issued in this case, but before the garnishee filed his answer. The question is: Can the plaintiff, in this garnishment proceeding, instituted before the change in our statutory system, take advantage of the change and subject the unpaid subscription of the present garnishee although he had not, when the garnishment was issued, complied with the terms of our then statute by having an execution issued against the corporation and a return thereon of "nulla bona." This is the sole question presented by this record, and the question with us is: Can we, in view of our previous decisions on the subject of garnishment, and of section 10 of the Code of 1907, which declares that "this Code shall not affect any

existing right, remedy or defense nor shall it affect any prosecution now commenced or which shall be commenced for any offense already committed. As to all such cases the laws in force at the adoption of this Code shall continue in force," so amplify this remedy as to bring the plaintiff within the operation of the above provision of the Code of 1907.

[4] The Legislature, in adopting the Code, had the right to declare that its adoption should not affect any existing right, remedy, or defense, and if, in so declaring, this court has been shorn of the power to extend the operation of the statute—although the statute is merely remedial and, in the due administration of justice, should be extended—we must declare the law as it is in our books, and not as we would otherwise have it to be. When, in the administration of justice, courts can, even by laying aside mere technical considerations, so broaden a remedy as to advance the cause of justice, they should unhesitatingly do so; but courts have no right to effectuate even a purpose which addresses itself to the favorable consideration of the wise and just, to strike from the laws a valid statute which expresses the legislative will. While it was the purpose of the Legislature, in adopting the Code of 1907, to repeal some of the provisions of our previous statutes and to nullify the effect of some of the decisions of this court in construing those statutes (see *Nicrosi v. Irvine*, 102 Ala. 648, 15 South. 429, 48 Am. St. Rep. 92), it nevertheless had the authority, as we have already stated, to declare that the repeal of the provisions of the statutes and the nullification of the effect of the decisions of this court pronounced upon those statutes should not affect causes already pending; and this legislative purpose section 10 of the Code of 1907 was intended to accomplish, and in fact accomplished. *Roberts v. Pippen*, 75 Ala. 103; *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747.

When this garnishment was issued, the plaintiff had no case against the garnishee, because he had failed, before he sued out his writ, to have an execution, with a return of nulla bona, issued against the corporation. The intention of section 10 of the Code of 1907 was to keep the provisions of that Code from giving life to that which, when the Code was adopted, had no life.

[5] "When a suit is instituted, or a defense is interposed, which is at the time unauthorized by the law, a subsequent statute giving such remedy does not operate on the existing suit, especially when it does not provide it shall so operate." *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747.

When the plaintiff sued out his writ of garnishment in this case, he, in fact, commenced a suit against the garnishee, and the laws of the state which then fixed his rights of recovery were well defined by statute and decision. He had no right then to recover

that which he now seeks—by virtue of the subsequent change in the language of the statute—to recover of the garnishee. He then had not the substantive right which he now seeks to assert. This, under section 10 of the Code of 1907, he cannot be permitted to do. *Wetzler v. Kelly*, supra.

3. The opinion in *Nicrosi v. Irvine*, supra, disposes of the other questions presented in briefs of counsel adversely to appellant. *Bingham v. Rushing*, supra. The following other cases, cited in briefs of appellee, also sustain the propositions announced in *Nicrosi v. Irvine*, supra, viz.: *Teague v. Le Grand*, 85 Ala. 493, 5 South. 287, 7 Am. St. Rep. 64; *Feore v. Miss. Trans. Co. (A. Berg, Garnishee)*, 161 Ala. 567, 49 South. 871.

Further discussion of this case would simply result in the needless republication of what was said by this court in the case above cited, and we deem it therefore unnecessary to further extend this opinion.

The judgment of the trial court was in accordance with the above views, and the judgment is affirmed.

Affirmed.

McCLELLAN, SAYRE, and GARDNER, JJ., concur.

(190 Ala. 366)

COUNTY OF MONTGOMERY v. CITY OF MONTGOMERY. (No. 85.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. HIGHWAYS §122 — HIGHWAY TAXES — CONSTITUTIONAL AND STATUTORY PROVISIONS.

Under Const. 1901, § 215, providing that no county shall be authorized to levy a greater rate of taxation in any one year on the value of taxable property than one-half of 1 per centum, provided that, to pay any debt or liability created for the erection of public buildings, bridges, or roads, any county may levy and collect such special taxes, not to exceed one-fourth of 1 per centum, as may be authorized by law, which taxes shall be applied exclusively to the purposes for which they were so levied and collected, a special road tax so levied and collected must be applied to public county roads, and not to urban ways; and hence Code 1907, § 1335, directing courts of county commissioners and boards of revenue, where there is levied a special road and bridge tax, to pay over each year to each municipality in the county one-half of the money collected on such tax on the property in such municipality, to be used exclusively for the purpose of maintaining streets and bridges within such municipality, is unconstitutional.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 380, 393; Dec. Dig. §122.]

2. HIGHWAYS §149 — HIGHWAY TAXES — DISPOSITION OF PROCEEDS.

Under Act Aug. 26, 1909 (Acts Sp. Sess. 1909, p. 303) § 2, providing that courts of county commissioners and boards of revenue, where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing, or maintaining roads or highways of any description in the county, shall pay over each year to each municipality therein

one-half of the money collected on such road tax on the property located in such municipality, a city was not entitled to the specified proportion of a part of the general fund of the county gathered by taxation under the general power conferred on counties and transferred to the road and bridge fund under Code 1907, § 5766, providing that the court of county commissioners or board of revenue may transfer to the road fund any surplus of general funds, or any part thereof, whenever it will promote the interest of the county to make such transfer, as, to entitle the city to a part of the fund, the application or devotion of a portion of the tax to road or highway purposes must be provided for in or by the tax levy.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 404; Dec. Dig. §149.]

3. TAXATION §1 — NATURE OF "TAX."

A "tax" is an authoritative exaction for the support of the government (citing *Words and Phrases*, Tax).

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1; Dec. Dig. §1.]

Mayfield and Sayre, JJ., dissenting.

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by the City of Montgomery against the County of Montgomery. From a judgment for plaintiff, defendant appeals. Reversed and rendered.

A. H. Arrington and John R. Tyson, both of Montgomery, for appellant. W. A. Gunter, of Montgomery, for appellee.

McCLELLAN, J. This is an action at law by the city of Montgomery against the county of Montgomery. Its purpose and object is to recover of the count of Montgomery \$30,000 as the city of Montgomery's asserted portion of funds garnered by the county authority, and directed by that authority to be devoted to the improvement, etc., of public roads and bridges within the confines of the county of Montgomery. The quotation of the first count of the complaint, along with the material parts of the agreed statement of facts, will serve to fully disclose the controversy now under review. The first count reads:

"The plaintiff claims of the defendant the sum of thirty thousand (\$30,000) dollars, with interest thereon from the first day of March, 1912, for this, to wit: That in the month of February, 1912, the board of revenue of the county of Montgomery transferred to the road and bridge fund of said county from its general fund, collected under the general levy for general purposes, the sum of eighty-five thousand (\$85,000) dollars, and that thereby it became and was the duty of the board of revenue of said county, making said transfer, to pay to the plaintiff, out of said funds so transferred, one-half of the proportion of said sum so transferred, as was collected on the property located in the corporate limits of the plaintiff.

"And plaintiff avers that one-half of the said proportion of said sum so transferred to the road and bridge fund, which was collected on the property located in the corporate limits of the plaintiff, amounted to the sum of thirty thousand (\$30,000) dollars, or other large sum; that the said defendant failed and refused to pay the said money, or any part thereof, to the plaintiff, and still refuses to pay the same, and

used the same for other purposes; and plaintiff claims the said sum as now due to it, with interest thereon from, to wit, the first day of March, 1912."

The agreed statement of facts is as follows:

"It is agreed by and between the attorneys of record in this cause that the board of revenue of Montgomery county during the year 1911 made a general levy of one-half of 1 per cent. for general purposes, and that in that levy there was no specification that any part of it was for road purposes; that during the month of February, 1912, the board of revenue of Montgomery county entered an order transferring \$85,000 as a surplus from the general fund in the treasury of the county to the road and bridge fund belonging to said county; that the general fund of the county, at the time this order was entered, was made up from taxes collected under the general levy of one-half of 1 per cent. and from funds collected from license taxes, taxes on recorded mortgages, money derived from hard labor convicts, and from fines imposed for convictions for criminal offenses.

"It is further agreed that under the general levy of one-half of 1 per cent. made in June, 1911, by the board of revenue, there was collected between October 1, 1911, and September 30, 1912, the sum of \$155,553.39, and that during this period there was collected from sources other than the one-half of 1 per cent. levy approximately \$80,000; the total receipts derived from one-half of 1 per cent. and other sources approximated \$235,553.39, of which sum \$102,241.19 was expended for county purposes other than road purposes, leaving a balance of \$133,314.20, out of which the \$85,000 was transferred to the road and bridge fund, which was expended by the county before this suit was commenced; that the books of the county do not show the assessed values of city property separately from the assessed values of the property outside of the city; that this, however, is shown by the books kept by the city, in which all assessed values of property within the city were taken from the county books of assessment.

"That for the year 1911 the total assessed tax value for the county was \$31,861,679, as shown by the books of the county. That, as shown by the books of the city, of the total assessed tax values of the county, \$22,394,739 was the assessed value of property in the city; that the assessed value of the property in the city was 70.29 per cent. of the total assessed tax values of the entire county; that 70.29 per cent. of one-half of \$85,000 is \$29,873.25; and that the interest on this amount from March 1, 1912, to this date, is \$3,896.77, making a total of \$33,770.02."

The city's claim is based upon sections 1 and 2 of the act approved August 26, 1909. Acts Sp. Sess. 1909, pp. 303, 304. Those sections read:

"Section 1. That the maintenance of streets of municipalities in the state of Alabama is hereby, for the purposes of this act, declared to be a county matter.

"Sec. 2. That courts of county commissioners and boards of revenue, where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads or highways of any description, in the county, shall pay over each year to each municipality therein one-half of the money collected on such road tax on the property located in such municipality."

Premitting the consideration of all other questions that might be proposed on the record for review, a controlling meritorious issue of law presented is whether the

sum claimed is a fund to which the city has a legal right.

[1] In several decisions it has been decided here, after repeated full consideration of the question, that the application of a special road tax, levied and collected within the purview of section 215 of the Constitution of 1901, cannot be controlled by legislative enactment, since the Constitution commands that funds so garnered shall be applied to public county roads, not to urban ways, *City of Tuscaloosa v. Court of County Commissioners of Tuscaloosa*, 173 Ala. 724, 54 South. 763 (a ruling based on opinion in *Board of Revenue v. State ex rel. City of Birmingham*, 172 Ala. 138, 153-155, 54 South. 757); *Pike County v. City of Troy*, 173 Ala. 442, 56 South. 181, 274; *Commissioners' Court of Tuscaloosa County v. State ex rel. City of Tuscaloosa*, 180 Ala. 479, 61 South. 431. It follows, from the doctrine of these decisions, that section 1335 of the Code of 1907 (as readopted by the act of August 26, 1909 [Acts Sp. Sess. 1909, p. 174]), which purports to alone deal with a special road and bridge tax, was and is constitutionally invalid. Constitution 1901, § 215, div. (a).

[2] As appears, the fund here in question is not the product of a special road or bridge tax, under section 215 of the Constitution; but it is a part of the general fund of the county, gathered by taxation under the general power conferred on counties. As also appears, the fund here in question is a part of the fund segregated by the county authorities in virtue of Code, § 5766, which reads:

"The court of county commissioners or board of revenue of any county of the state may transfer to the road fund of the county any surplus of general funds of the county in the county treasury or any part of such surplus whenever in the judgment of said court or board it will promote the interest of the county to make such transfer. Any surplus of general funds so transferred shall be used for the working of the public roads or the building of bridges or otherwise improving the public roads as the said court or board may determine."

We come, then, to this unclouded inquiry: Did the act of 1909 (quoted ante) effect to invest the city of Montgomery with the right to a proportion of funds not the product of a tax laid "for the purpose of constructing, repairing, or maintaining roads or highways of any description in the county"? On the inquiry presented the really controlling words of the act of 1909 are these:

"Where there is levied a road tax, general or special, or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads or highways of any description, in the county."

It is apparent that the first phrase, viz., "where there is levied a road tax, general or special," had and has reference to a specific levy of a tax for the construction, repair and maintenance of public county roads. And it is equally obvious that the fund here sued for is not of the character of fund defined in the

first phrase of section 2, just quoted. While this is manifestly true, the mentioned phrase is of consequence and importance in the ascertainment of the legislative intent sought to be expressed in the next succeeding phrase of section 2 of the act, viz.:

"Or where by the tax levy a portion of the tax is levied for or devoted to the purpose of constructing, repairing or maintaining roads or highways of any description, in the county."

It is upon the interpretation of the last-quoted language of section 2, read in connection with the other provisions of the act, that the decision here must turn.

It is entirely clear that the lawmakers purposed to require the payment over to municipalities of a proportion of certain funds that had come into the control of the county authorities. What fund—what description or character of funds—was required to be so paid over? In defining or describing the funds to be so paid over the statute writers employed both general, yet plain, terms, and also particular terms, just as plain. The general terms of description, to which we have just referred, are these, the particularly expressive words being put in capitals:

"Shall pay over each year to each municipality therein one-half of the money COLLECTED ON SUCH ROAD TAX on the property located in such municipality;" and (in section 3) " * * * provided that IF THE TAX IS LEVIED for any particular class of roads or highways, such sums shall be used on the streets of the municipality for roads of a similar character to such roads or highways."

These general, descriptive terms plainly show that in the legislative mind a particular character of tax, or a tax the product of which was to have application to a particular governmental purpose, viz., public roads or "highways," was the basis of the dominant idea. It is not possible to read the act and entertain any other conclusion with respect to the intent of the lawmakers.

[3] A tax is an authoritative exaction for the support of the government. 8 Words and Phrases, p. 6867 et seq. In this sense was the authoritative source and character of the funds dealt with in the act considered by the Legislature in enactment now under view.

When the particular terms employed in this act by the lawmakers, viz., "or where by the tax levy a portion of the tax is levied for or devoted to the purpose" described, are read and considered in connection with the general terms before quoted in this opinion, it is clear, beyond any doubt, that the Legislature was seeking, in the use of particular terms in perfect accord with the general terms indicated, to define or describe the product of a tax that in some law-fixed manner was impressed, when exacted of the taxpayer by the taxing authority of the county, with the governmentally ordained assurance and avowed purpose to devote that product of taxation to the construction, repair, or maintenance of public county roads, into which distinct class of highways

the lawmakers intended, in that act, to introduce streets by denominating their maintenance a "county matter." The correctness of this interpretation of the presently important features of the act is confirmed by several considerations.

In the first place, the very plain letter of the act (section 2) defines the fund to be affected as the product of a tax levy, for it says: "Where by the tax levy a portion of the tax is levied for or devoted to" road or highway purposes. Taxes are annually levied, as section 2 contemplated, by courts of county commissioners and boards of revenue, at a definite time. Code, § 2155. "The levy of taxes is a legislative function, and declares the subjects and rate of taxation." *Perry County v. Railroad Co.*, 58 Ala. 559. The authority to levy county taxes is conferred, as stated, on the county government. *Perry County v. Railroad Co.*, supra. The levy of taxes is the act of establishing a "rule of action," and assessment is the administration of the rule. *Perry County v. Railroad Co.*, supra. When authority to do so is conferred on the county government, the levy is the first step in the gathering of taxes. In the act, if we do not unnecessarily repeat, it was plainly provided, by the terms last quoted, that the condition to the right of the municipality to the therein stipulated portion of the fund was a tax levy in or by which provision was made for the application—devotion—of a portion of the money (tax) to road or highway purposes. Unless such provision was thus inceptively made, viz., when the tax levy was made, it could not, under this act, be thereafter introduced into the levy by a mere order of the county body. So, when it was provided that the tax levy should give assurance that a "portion of the tax" was "levied for or devoted to" road or highway purposes, reference could alone have been had to the time and the occasion and the act of levying a tax, for general purposes though it was levied, and not to some subsequent date or occasion when the mere discretionary judgment of the county body, in respect of surplus funds in the general fund (section 5766) of the county, might invite the transfer of such surplus to the road fund.

It is insisted that a proper consideration and interpretation of the word "devoted," in section 2 as several times before quoted, should and would lead to the conclusion that the city's right to the fund claimed would be entirely vindicated, for that the act would then have and should have application to funds not impressed by the tax levy with the promised purpose to apply a portion of the product of the tax to road or highway objects, but application to money devoted by order of the county body to the construction, etc., of roads or highways.

This insistence is refuted by the plain

words and clear grammatical relation associated with and component of the expression in which the word "devoted" occurs. If we omit the words "levied for or" (preceding the word "devoted") the sentence reads: "Or where by the tax levy a portion of the tax is * * * devoted to the purpose," etc. The subject of the sentence is "tax." The verb is "devoted." The phrase, "where by the tax levy a portion of the," is related to and descriptive of the subject, "tax." The tax devoted is the tax answering to the related descriptive phrase just mentioned. There is no other way to read the sentence. There is no other possible subject of the verb "devoted." It is the word "tax." Without obvious violence to its elements and structure, the sentence—following the disjunctive "or" and as deleted above—cannot be read otherwise than as having "tax" for its subject and "devoted" as its verb. This being patently true, it is not possible to deny to the words preceding "tax" in the sentence the office of describing tax. That preceding phrase has two related, qualifying ideas in it, viz., that expressed by the word defining the measure of the tax that is devoted to the purpose stipulated, namely, "portion," and that expressed by the words "where by the tax levy," thereby defining and describing the place whereat and the agency whereof—implying governmental authority so to do—the portion of the tax devoted to the purpose prescribed has been ascertained and its devotion to the purpose prescribed assured. The act in the respect under consideration simply means what it says, no more, no less. "Devoted," as therein used, consists alone with the meaning we have stated. That which is required to be paid in a proportion to a municipality is tax money that was "by the tax levy" devoted to road or highway purposes.

Now it is also suggested that to interpret the act as we have done effects to read the "where by the tax levy" sentence to the same legislative result as the antecedent thereto provisions of section 2 plainly contemplates. Not so. The provisions of section 2, preceding the sentence employing the word "devoted" has reference to a road tax, apart from the taxes laid for general county purposes, in which a part of the money derived for general county purposes was designated by law for use in constructing, repairing, or maintaining county roads, etc.

Some collateral legislative circumstances may be here noted, for they are of service in this matter:

The act of 1909 was introduced in the House by a member from Jefferson county. It seems to have passed both branches of the Legislature and to have been approved by the Executive in substantially the same form as it was when introduced. The county of Jefferson had a local law that dealt with public roads, etc., improvement. The orig-

inal local law was approved February 17, 1885. Acts 1884-85, p. 709. It appears to have been since twice amended. See Acts 1894-95, p. 205; Acts 1896-97, p. 1079. The effect of the original and amended local laws was to require the county governing body to include in its levy one-tenth of 1 per cent. for macadam road improvement, but that the aggregate levy for any one year should not exceed one-half of 1 per cent. for ordinary county purposes (the limit fixed by the Constitution of 1875), not including necessary public buildings and bridges, which that organic law, though omitting roads, allowed to be provided for by a special tax. So it readily appears that by law there was afforded a subject upon which the alternative sentence of section 2 of the act of 1909 could operate. Others of like character may have existed in 1909. It would seem that the act considered in *State v. Street*, 117 Ala. 203, 23 South. 807, had provisions of like character to the indicated feature of the Jefferson county law. It also appears that the Calhoun county law, involved in *Commissioners' Court of Calhoun County v. City of Anniston*, 176 Ala. 605, 58 South. 252, was of like character. In short, and meeting the provisions of the alternative sentence of section 2 of the act of 1909, there were laws that allowed or required a particular part of the one-half of the 1 per cent. county levy to be designated for employment on public roads.

It is further insisted that the major question to which we have given attention in this opinion was authoritatively decided by this court in *Tuscaloosa County v. Tuscaloosa City*, 180 Ala. 479, 61 South. 431. A review of that decision, in the light of the legal status there brought under consideration, will disclose that that decision is without particular point or application on this appeal.

By virtue of an act, applicable to Tuscaloosa county, approved September 29, 1903 (*Local Acts 1903*, p. 433), the order of the commissioners' court, considered in the last-cited decision, was made. See 180 Ala. 484, 61 South. 431. That local act was amended, as appears in *Local Acts 1907*, p. 227. The local act of 1903, in an effort to promote road improvement, provided that at the first regular meeting of the commissioners' court after December 1, 1903, and in each year thereafter, "said court shall appropriate and set apart out of the taxes levied for general purposes in said county such sum as the condition of the county treasury shall warrant, but in no case less than one-sixth of 1 per cent. of the total assessed valuation of property in said county, which sum shall be a part of the one-half of 1 per cent. authorized by law for general county purposes." Provision was then made with respect to the special road tax levied under section 215 of the Constitution, which this court considered when the decision reported in 173 Ala. 724,

54 South. 763, was delivered. It will be seen that a minimum proportion of the product of one-sixth of 1 per cent. on the total assessed value of all property tax laid and collected in Tuscaloosa county for general county purposes was fixed by the local act, thereby directly impressing that part of the tax levied for general county purposes with the law's imperative order devoting the sum so produced to the purpose defined in section 2 of the act of 1909. In other words, the indicated provisions of the local act operated to imprint upon the levy, raising the money there sought by the city of Tuscaloosa for general county purposes, the condition or exaction that of the product of the levy so made a definite proportion thereof should become a part of the road and bridge fund; that the levy for general county purposes included as the result of legal command superior to the county body a specific percentage minimum of money raised by taxation under a levy for general county purposes that was, when collected by the county, a part of the road and bridge fund. No such law as that in force, in this respect, in Tuscaloosa county, is made to appear to be of force in Montgomery county to effect the question here presented.

In *Tuscaloosa County v. City of Tuscaloosa*, 180 Ala. 479, 61 South. 431, no account appears to have been taken or consideration invited by the litigants looking to the separation from the one-sixth of 1 per cent. minimum—prescribed by the local act and designated by the local act as a marked part of the product of the levy for general county purposes—of the sum in excess thereof that the county body transferred to the road and bridge fund in the exercise of the discretion reposed in them by the local act. Hence that decision had no invitation to separate from a larger mass that to which, under the act of 1909, the city of Tuscaloosa was entitled, viz., one-half of one-sixth of 1 per cent. of taxes paid on property in the city of Tuscaloosa. So the decision reported in 180 Ala. 479, 61 South. 431, is without bearing on this appeal.

The first count of the complaint was subject to the demurrer. On the agreed statement of facts the city of Montgomery was without right to recover the sum claimed, or any other less sum, from the county of Montgomery under or in virtue of the act of 1909. Judgment was for the city. Consistent with the provisions of Code, § 5361, judgment will be here rendered for the county of Montgomery; and the city of Montgomery will be taxed with the costs in the court below and in this court on appeal.

Under and by authority of the foregoing opinion, like judgments will be entered in causes numbered 86 to 91, inclusive.

Reversed and rendered.

ANDERSON, C. J., and SOMERVILLE, DE GRAFFENRIED, and GARDNER, JJ., concur.

MAYFIELD, J. (dissenting). I cannot concur in the opinion or decision in this case, for the reason that, to my mind, the certainly, if not clearly, expressed will of the Legislature is thereby defeated. It is in effect held that the statute construed applies only to cases in which the counties have levied a special road tax, and not to cases like this, where a part of the general levy is thereafter applied or devoted to road purposes. Such is not, in my humble judgment, a proper construction of the statute in question. If the construction stated is the proper one, then the statute was and is wholly useless, for the reason that there is no field of operation for it.

Section 1335 of the Code provides for exactly what the court now holds is the only effect to be given to the later act of August 27, 1909 (Acts 1909, pp. 303, 304). I am of the opinion that the later act was passed to provide for cases like the one in question, where there was no levy of a special road or bridge tax, but where the funds or proceeds of a tax levy were devoted to the purpose of constructing, repairing, or maintaining roads or highways of any description. It appears to me that the only difference between the two statutes is that the latter applies to general levies of road taxes, and to cases where there is no general or special levy for road purposes, but where any part of any tax levy is devoted to the purpose of constructing, repairing, or maintaining roads.

If I correctly understand the majority opinion, it holds that, in order for the city to be entitled to any part of the county taxes under this statute, the fund or tax must be "devoted to the purposes" mentioned in the statute, by the tax levy; that is, if the levy by which the tax is raised does not so provide, then no part of the county's taxes is available to the city, no matter if it is subsequently used or devoted by the county authorities to the purposes mentioned in the statute. I may be in error in construing the opinion, but this is what the opinion seems to hold. If the fund is to be "devoted to the purposes mentioned in the statute, by a tax levy"—that is, if the levy is the sole authority or agency for appropriating or devoting the fund—then I cannot conceive how it is possible to so "devote" it. It may be that a "tax levy" can "devote" the proceeds of the levy; but I think it safe to say that such a thing has never been attempted. The levy can, of course, be made for a general or special purpose, and such is usually done; but I never before heard of a levy "devoting" the taxes or proceeds. The levy might provide that when the taxes were collected they should be devoted to the purposes for which the levy was made; but I cannot understand

how the levy can actually devote the proceeds, which are not then ascertainable, much less available for the purposes of the levy. A county tax levy is only the fixing of the tax rate for the general or special purpose for which the levy is made, and the naming of the purpose for which it is made. The levy of taxes is a legislative function, while the assessment, the collection, and the devoting of the taxes or proceeds, when collected, are administrative functions, of government. It has never been the custom or policy for the levy, as a part of it, to assess, collect, or devote the taxes. This is well pointed out by Judge Stone in the case of *Perry County v. Railroad Company*, 58 Ala. 555, a case cited in the majority opinion, where he says:

"Levy and assessment have very different meanings. The levy of taxes is a legislative function, and declares the subjects and rate of taxation. *Burroughs on Taxation*, 194; *Cooley on Taxation*, 244, 245. Assessment is quasi judicial, and consists in making out a list of the taxpayer's taxable property, and fixing its valuation or appraisement. *Hilliard on Taxation*, 290. Taxable property is here used in its broad sense, and embraces all subjects of taxation, on which a tax has been levied by the lawmaking power. The distinction is the difference between prescribing a rule of action and administering that rule to persons and subjects that fall within its provisions. The Legislature levies state taxes, and the tax assessor assesses them, except the tax on railroads and their rolling stock, which is assessed by the auditor. The court of county commissioners levies the county tax, providing for no assessment, but adopting the state assessment, as the basis and measure of the taxpayer's liability. It also adopts the aggregate of the state assessment as the basis and postulate by which it adjusts the county levy, so as thereby to raise the required sum to meet the county wants. These are the data which enable the court to determine the proper percentage to be levied on the state assessment, to provide for county expenses. Hence the levy per centum will be greater or less in the proportion which the county demands bear to the aggregate of the state assessment. State taxes are assessed; county taxes are only levied. A law which levies a tax, and provides for its assessment, will not justify the collection of the tax until the assessment is first made. To attempt otherwise would be equivalent to an attempt to execute a law against a person or thing before it had been judicially ascertained and determined that such person or thing was amenable to its provisions."

Surely there is more difference between the levy and the devotion of the taxes than there is between the levy and the assessment. I concede that the statute is not as clear in its meaning as it could be made; but I do think the meaning and intention is made certain, when it is construed in connection with other statutes on similar subjects, especially section 1335 of the Code. It is true that section 1335 was held invalid (see the case of *Anniston v. Calhoun County*, 158 Ala. 68, 48 South. 605); but that defect was cured by a readoption of the Code on the very day the subsequent statute here construed was approved. It has also been held that neither of the statutes could be applied to special

levies made under subdivision "a" of section 215 of the Constitution, but that they were applicable to tax levies, general or special, where the levy was not in excess of 50 cents on the \$100 worth of taxable property. See case of *Tuscaloosa County v. Tuscaloosa City*, 180 Ala. 479, 61 South. 431, which reviews and cites the authorities.

I cannot concur in that part of the majority opinion which attempts to distinguish this case from that of *Tuscaloosa County v. Tuscaloosa City*, supra. The fund there subjected to the city was not a general or special levy for road purposes; but it was a part of the fund levied and collected for general county purposes, and thereafter set apart from the general fund to the road fund. The facts in that case are almost identical with the facts in this case. The only difference is that the funds in that case were reached by mandamus before they were expended, while here they had been expended or already devoted, and consequently the specified funds or money set apart could not be reached or subjected by mandamus, but only the equivalent could be reached, in a common-law action for money had and received. That I am correct in my opinion, that the fund subjected in the *Tuscaloosa Case* was a part of the general tax fund, and general levy for county purposes, and not a part of any general or special levy for road purposes, is borne out by the opinion of Anderson, J. (now Chief Justice of this court), in the opinion in that case. To show this, I quote two excerpts from his opinion, one of which leaves it doubtful as to whether all the fund subjected was a part of the general fund, or of the road fund; but the last makes it certain, as I remember the facts of that record to show, that it was a part of the general tax fund, and not a part of the road fund or road levy. It is there said:

"It appears that the order appropriating the fund in question purports to have been made under the act of 1903 (*Laws 1903*, p. 433), instead of the act of 1907 (*Local Acts 1907*, p. 227), and which amended or repealed said act of 1903; yet it appears that the fund was transferred to the 'Road and Bridge Fund' of Tuscaloosa county, and one-half thereof, as was raised under the general tax on property within the city of Tuscaloosa, either by a levy for road purposes or afterwards set apart for said purpose, should have been turned over to the city, instead of to the road and bridge fund."

"It seems, however, that the fund in question—that is, which is being sought—was a part of the general tax, and was set apart for roads and bridges, not public buildings, and, instead of appropriating all of it to the road and bridge fund, a portion should have been turned over to the city of Tuscaloosa."

The local act of 1903 (page 433), above referred to, had nothing to do with special or general levies for road purposes, but related to the authority for setting apart portions of the general fund, and general levies, as distinguished from special levies, to the road and bridge fund, just as was done in this

case, under a general statute. That local act, in part, provided as follows:

"At the first regular meeting of the court of county commissioners of Tuscaloosa county, Alabama, to be held after the first day of December, 1903, and at the first regular meeting of said court in each year thereafter said court shall appropriate and set apart out of the taxes levied for general purposes in said county such sum as the condition of the county treasury shall warrant, but in no case less than one sixth of one per centum of the total assessed valuation of property in said county, which sum shall be a part of the one-half of one per centum authorized by law for general county purposes."

The only special road tax for Tuscaloosa county was the one-fourth of 1 per centum levied under subdivision "a" of section 215 of the Constitution, which this court had, in a previous case, decided could not be subjected by the city; so the only fund which could have been subjected in Tuscaloosa county was a part of the general fund for general county purposes, which was set aside to road purposes. The only difference between the Tuscaloosa County Case and the case in hand is that the same fund, in the one case, was set aside under a local act which required at least one-sixth of the general fund to be set aside; whereas, in the latter case, it was set aside or transferred from the general fund to the road fund under a general statute which allows the surplus of the general fund to be so transferred.

To show that the construction placed upon the statute by the majority opinion cannot be the correct one, and cannot be applied, is well illustrated by the Tuscaloosa Cases. In that county, the court of county commissioners, who levy the general and special taxes, and set apart the funds for the roads and bridges, have nothing whatever to do with the "devotion" or expenditure of the funds. This is done exclusively by another and a different board, viz., the board of public works; that is, the power that levies and sets apart can have nothing whatever to do with the expending or devotion of the funds. They have nothing to do with the repairing or maintenance of the public roads so far as these funds are concerned; but it is done by a board which has no power to levy any tax.

To sustain the construction placed on the statute by the majority, the court takes judicial knowledge of the facts that a member from Jefferson county introduced the bill, and that Jefferson county has local laws for levying road taxes, which other counties have not, thereby intending to meet the needs of Jefferson county. If the court can take judicial knowledge of these facts, can and should it not take notice of the fact that the Jefferson County Case, so far as its special levy for road purposes is concerned, is covered as by a blanket by section 1335 of the Code, and that the whole statute would be useless so far as the special road levy was concerned?

It seems to me that the last statute was enacted to reach funds which were taken from the general fund for general purposes, and applied or devoted to the purposes mentioned in the statute. I think the statute says so, in terms, and we so expressly held, in the Tuscaloosa Case, which is not overruled, and, as I have shown, cannot be distinguished from the case in hand. It seems to me that the court can and should take judicial knowledge of the fact that the statute in question was enacted for the very purpose of reaching funds which have been levied and "devoted" exactly as were the funds in this and in the Tuscaloosa Cases.

I cannot agree to the grammatical analysis and parsing of the statute, as contained in the majority opinion, by means of which the subject of the important and controlling passive verb "is devoted" is said to be the noun "tax." That part of the opinion to which I cannot agree reads as follows:

"If we omit the words 'levied for or' (preceding the word 'devoted'), the sentence reads: 'Or where by the tax levy a portion of the tax is * * * devoted to the purpose,' etc. The subject of the sentence is 'tax.' The verb is 'devoted.' The phrase 'where by the tax levy a portion of the' is related to and descriptive of the subject, 'tax.' The tax devoted is the tax answering to the related descriptive phrase just mentioned. There is no other way to read the sentence. There is no other possible subject of the verb 'devoted.' It is the word 'tax.'"

The word "tax" occurs twice in the sentence which is analyzed and parsed; but in neither case, in my judgment, is it the subject of the passive verb "is devoted." Where the word "tax" first occurs it is not even a noun, but is an adjective, describing the noun "levy," which noun is in the objective case, governed by the preposition "by." Where it occurs the second time it is a noun, but not in the nominative case, or the subject of the passive verb "is devoted," but is in the possessive case, and governed by the preposition "of." The word "portion" is the subject of the verb "is devoted." I confess that this may at first blush appear to be hypercritical, for the reason that the word "portion" is referable to the word "tax"; that is, a "portion of the tax." But in my judgment it is all-important if the statute is to be construed by strict grammatical rule rather than by the legislative intention. Strictly and grammatically considered, neither a tax, a levy, nor a tax levy, can be devoted to any purpose; it is only the funds or proceeds arising therefrom which can be devoted to any purpose. It is not the "tax" as a whole, or a unit, which by the levy is to be devoted, but where any portion or any part of any tax levy is devoted to the purposes mentioned. Of course, the levy cannot be devoted, nor can the tax, the fruit, or the proceeds thereof, be devoted, until gathered and collected; and in my judgment the certain legislative, if not grammatical, meaning of the sentence in question is that if

any portion of any tax levy by a county, or the proceeds of such a levy, is devoted to the purposes mentioned in the statute, then one-half of that collected from the property situated within any city must be by the county paid over to the city. It is for this reason that the word "portion" is made the subject of the verb "devoted," rather than the word "tax" or "levy."

The very object of the alternative sentence is to reach cases like this, in which there is no road tax levy; but a portion of the proceeds of some other tax levy is devoted to road purposes. In such a case, the portion so devoted must then be prorated as the statute directs. If the tax is the unit which must by the levy be devoted to the purposes mentioned, the word "portion," the real subject of the verb, is wholly useless.

SAYRE, J., concurs in the views of the writer.

(190 Ala. 397)

**ALABAMA FIDELITY & CASUALTY CO. v.
ALABAMA FUEL & IRON CO.**
(No. 844.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

**1. PRINCIPAL AND SURETY ⇨88—EXTENT OF
LIABILITY—PRINCIPAL CONTRACTS—MATE-
RIAL PROVISIONS.**

A provision in an agency contract, the performance of which was secured by surety bond, requiring an agent for the sale of coal to render monthly statements and pay over the amount shown thereby to be due, is a material provision, a change in which would affect the obligation of the surety upon its bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 155-157; Dec. Dig. ⇨88.]

**2. PRINCIPAL AND SURETY ⇨88—DISCHARGE
OF SURETY—CHANGE IN OBLIGATION OF
PRINCIPAL.**

Where a coal company relieved its agent from the obligation imposed by his contract to make monthly statements and payments for the coal sold by him, it thereby discharged the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 155-157; Dec. Dig. ⇨88.]

**3. PRINCIPAL AND SURETY ⇨108—DISCHARGE
OF SURETY—CHANGE IN OBLIGATION OF
PRINCIPAL—INDULGENCE.**

Mere indulgence granted by an employer to his agent or the extension of time to make good a default, not supported by a new consideration, does not discharge the surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 213-218; Dec. Dig. ⇨108.]

**4. PRINCIPAL AND SURETY ⇨123—DIS-
CHARGE OF SURETY—DISCOVERY OF DEFAULT
—SUBSEQUENT MISCONDUCT.**

Where an employer discovers dishonesty of his employé and fails to give notice thereof to the surety on his bond, the surety is not liable for subsequent defaults.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 304-311; Dec. Dig. ⇨123.]

**5. PRINCIPAL AND SURETY ⇨97—DISCHARGE
OF SURETY—OBLIGATION OF PRINCIPAL—
WAIVER.**

The parties to a contract, the execution of which is secured by a surety bond, cannot waive provisions of the contract so as to affect the surety's interest without his consent.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146-168; Dec. Dig. ⇨97.]

Appeal from City Court of Birmingham;
John C. Pugh, Judge.

Action by the Alabama Fuel & Iron Company against the Alabama Fidelity & Casualty Company and another. Judgment for plaintiff, and defendant Alabama Fidelity & Casualty Company appeals. Reversed and remanded.

The following is the contract between Banks and the fuel and iron company:

This contract and agreement, made and entered into on this the 4th day of October, 1911, by and between the Alabama Fuel & Iron Company, a corporation, party of the first part, and R. G. Banks, party of the second part, witnesseth: That the party of the first part agrees to allow the party of the second part to handle its coal in the city of Montgomery, Ala., and the party of the second part agrees to handle such coal, upon the following terms and conditions: (1) The party of the first part agrees to ship coal in car load lots, consigned to the party of the second part, as its agent in the city of Montgomery, Ala., in such quantities as is warranted by the trade in said city, and as the output of its mines and its ability to secure cars from the railroad company justifies. (2) The party of the second part agrees to use his best efforts to the end of selling as much of the coal of the party of the first part as he can, and to account as the agent of the party of the first part, both in selling such coal and in accounting therefor, and in accounting for the proceeds thereof. Each shipment of coal made by the party of the first part shall be accompanied with an invoice; and it is understood and agreed that the party of the second part shall not sell any of said coal at a price less than the price as shown on said invoice, plus freight and reasonable cost of handling after the arrival in Montgomery, except that small portion, not to exceed 10 per cent. of said coal, which, through process of handling, has become too small in size to be classed as nut or lump coal, which said party of the second part has, necessarily, to sell at a reduced price. He is to keep an accurate account showing the amount of coal sold, to whom sold, the price paid therefor, and the sum collected thereon; and is to render monthly statements on or before the 5th day of each month, showing the amount of such sales, and paying the party of the first part, on or before the 20th of each month, for all coal shipped to the party of the second part up to the first day of that same month, except in such cases as may be covered by special agreement in writing between said parties. All sums of money which he collects over and above said sum per ton and all accounts to be his commission or compensation for acting as agent of the party of the first part in selling such coal. (3) It is further understood and agreed that all coal of the party of the first part which is placed in the yards of the party of the second part shall be kept separate and apart from any coal belonging to the party of the second part, to any other person, firm or corporation; and that such coal so kept separate shall be marked by board or other designation showing that it is coal of the party of the first part. (4) It is distinctly understood

and agreed that the party of the second part has no interest of any kind in and to the coal which he agrees to handle for the party of the first part, except in such amount as he collects for each ton of coal over and above the amount at which said coal was invoiced by the party of the first part to the party of the second part; and that the coal, the proceeds and accounts are and shall remain the property of the party of the first part until settlement is made with the party of the first part; and the party of the second part agrees and binds himself to hold such coal and such proceeds, and such accounts as the property of and in trust for, and as the agent of the party of the first part. (5) It is further agreed and understood that the party of the first part at any time may call for a stock of its coal on hand to be taken, and can call for a settlement between the amount of coal then on hand and the amount of coal which had been shipped to the party of the second part; and in making such settlement the railroad weights at mines shall govern and be considered conclusive. Nor shall such settlement on the difference between the stock on hand and the coal shipped be waived by reason of the fact that previous settlements have been made upon the books and records of the party of the second part without taking stock of the coal in hand; it being understood that the settlements herein called for are not conclusive, but are subject to correction by the taking of stock as herein provided for; and that it is the understanding between the parties that the party of the second part shall account for each shipment of coal made to him in accordance with the invoice price. (6) It is understood and agreed that this contract shall remain in force indefinitely with the understanding that either party can at any time it desires terminate the same by giving 60 days' notice in writing and upon such termination, final settlement shall be made between the parties, and the party of the second part shall pay the party of the first part, in accordance with invoices rendered, for all coal that he then has on hand, and shall make payment of all amounts of any kind in arrears. (7) It is further understood and agreed that the party of the second part shall have no authority of any kind to incur any debts for which the party of the first part shall be responsible, and that his authority is limited solely to the handling of its coal in the manner and upon the terms herein set forth. (8) It is further understood and agreed that the party of the first part shall not be responsible for the costs of handling this coal, of advertising, freight, clerk hire, or debts of any other kind or character incurred by the party of the second part; it being the intention of this contract that the party of the first part is to receive from the party of the second part the minimum price herein set forth for each ton of coal which it ships to the party of the second part as its agent, and that all other charges and expenses are to be borne by the party of the second part. (9) It is further understood and agreed that the party of the second part shall execute a surety bond in the sum of \$7,500 to insure the faithful compliance on his part with the provisions of this contract. In witness whereof the parties hereto have caused this contract and agreement to be executed, on this the day and year above written. Alabama Fuel & Iron Company, by Chas. F. De Bardeleben, Vice President. R. G. Banks.

The following is the contract of guaranty:

Know all men by these presents, that we, Richard G. Banks, as principal, and Alabama Fidelity & Casualty Company, as surety, are held and firmly bound unto the said Alabama Fuel & Iron Company, a corporation, in the just and full sum of seven thousand and five hundred dollars, for the payment of which well and truly to be made we bind ourselves, jointly and severally, and our heirs, executors, administra-

tors, successors, and assigns, by these presents, and as against the liability hereof, the principal waives all right which he may have to claim either real or personal property as exempt to him under the laws of Alabama. The condition of the above obligation is such that whereas, the above-bound Richard G. Banks has entered into a contract with the said Alabama Fuel & Iron Company, of date the 4th day of October, 1911, copy of which is attached to and made a part of this bond, in which the said Alabama Fuel & Iron Company agrees to allow said Richard G. Banks to handle its coal in the city of Montgomery, Ala., upon certain terms and conditions, which are specifically set forth in said contract. Now, therefore, if the said Richard G. Banks shall faithfully comply with all of the provisions of said contract required of him to be performed during the term of this bond, to wit, one year from the date hereof, then this obligation to be void; otherwise to remain in full force and effect. In witness whereof, the said Richard G. Banks has hereunto set his hand and seal, and the said Alabama Fidelity & Casualty Company has caused this instrument to be executed in its name, and its corporate seal hereto affixed, by Frank N. Julian, its general manager, and J. W. Kelly, its secretary, who are duly authorized so to act, on this the 11th day of October, 1911.

John R. Tyson, of Montgomery, for appellant. Percy, Benners & Burr, of Birmingham, for appellee.

DE GRAFFENRIED, J. R. G. Banks made a contract with the Alabama Fuel & Iron Company, whereby he undertook to handle coal for said fuel and iron company in the city of Montgomery. The contract between the parties was reduced to writing. A copy of it appears on pages 3, 4, and 5, of the transcript, and the reporter will set it out.

The performance of the contract by Banks with said Alabama Fuel & Iron Company was guaranteed by the Alabama Fidelity & Casualty Company. A copy of the contract of guaranty is set out on pages 5 and 6 of the transcript, and the reporter will also set out a copy of this contract.

[1] 1. An examination of the contract made by Banks with the fuel and iron company will show that Banks agreed to pay for all coal shipped to him by the fuel and iron company, at the invoice price, and an examination of the contract of guaranty will show that the fidelity and casualty company bound itself "to the faithful performance by Banks of all the provisions" of his said contract. By its contract the fidelity and casualty company became the surety of Banks, with its liability limited to \$7,500. *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 10 South. 539, 36 Am. St. Rep. 210.

A further examination of the contract will show that among the terms of the contract which was made by the plaintiff with Banks was the following:

"He is to keep an accurate account showing the amount of coal sold, to whom sold, the price paid therefor, and the sum collected thereon; and is to render monthly statements on or before the 5th day of each month, showing the amount of such sales, and paying the party of the first part, on or before the 20th of each

month, for all coal shipped to the party of the second part up to the first day of that same month, except in such cases as may be covered by special agreement in writing between said parties."

The above-quoted excerpt from the contract made by Banks with the plaintiff—especially that part of it providing for monthly statements—was dictated by ordinary business prudence, and the contract with Banks, without that provision, would have been materially different from the contract which was actually made. The provision requiring monthly statements was one which was calculated to give to the plaintiff reasonable supervision over the peculiar agency which was created by the contract, and as the defendant, in its contract of suretyship, incorporated the contract of Banks with the plaintiff into the contract of suretyship, the provision as to monthly statements may have had its influence upon the defendant when it entered into the contract of suretyship. An agent who, under the terms of his contract with his principal, is required to make monthly statements of his acts and doings as agent, is much less likely to fall into habits of negligence, or as to that matter, into acts of actual wrong against his principal, than is an agent who, under the terms of his contract of agency, is left without restrictions as to making statements to his principal. The provision which we have quoted, taken in its entirety, was a material provision of the contract which the defendant in this case guaranteed that the agent would perform. *Fidelity Mutual Life Ass'n v. Dewey*, 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945; *Morrison v. Arons*, 65 Minn. 321, 68 N. W. 33.

[2] 2. This suit was brought by the plaintiff against the defendant, upon the bond, which the reporter has set out, for the recovery of \$4,467.19, balance due by Banks to the plaintiff for coal shipped to him by the plaintiff under the contract which the plaintiff made with Banks and which the reporter has above set out.

The defendant, among other pleas to the complaint, filed the following:

"(5) Defendant says that in and by the terms of said contract Banks was to keep an accurate account showing the amount of coal sold, to whom sold, the price paid therefor, and the sum collected thereon, and to render monthly statements on or before the 5th of each month showing the amount of such sales, and to pay the plaintiff on or before the 20th of each month for the coal shipped to him up to the first day of that same month, and plaintiff avers that the defendant relieved said Banks of his obligation to comply with this term of said contract without the consent of this defendant."

We do not find any plea, which the trial judge allowed to remain with the jury, which presents the defense which the defendant, by the above plea, undertook to make to this action. In our opinion counsel for appellant, in his brief, has properly presented the ruling of the trial court in sustaining the demurrer of the plaintiff to the

above plea to us for our consideration, and the discussion below is confined to the points which were taken against the sufficiency of the plea by the grounds of demurrer which were filed to the plea.

[3, 4] 3. There are three well-defined rules of law which are in perfect harmony with each other, and which, as applicable to contracts of suretyship, are plainly recognized by our decisions. In the case of *Saint v. Wheeler & Wilson Mfg. Co.*, supra, this court, after careful consideration, declared two of these rules as follows: (1) Mere indulgence granted by the employer to the principal, or an agreement to give the principal further time to make good a default, if not supported by any new consideration which would make it binding as a contract, does not discharge the surety. (2) If the employer discovers the dishonesty of the principal during the service, and fails to give notice thereof to the surety and continues the principal in the service, the surety is discharged from subsequent liability for subsequent defaults.

[5] In the case of *First National Bank v. Fidelity & Deposit Co.*, 145 Ala. 335, 40 South. 415, 8 Ann. Cas. 241, this court declared (3) that:

"While, as between the original parties to the contract, either party may waive any of its provisions, yet, when a third party becomes interested in the contract by binding himself to its faithful execution, the contract becomes a part of his obligation, and its provisions cannot be waived so as to affect his interest without his consent."

In that case this court took occasion to show that the two rules declared in *Saint v. Wheeler & Wilson Mfg. Co.*, supra, were not in conflict with the rule last quoted, and in that case the court also quoted with approval the following language of the Supreme Court of the United States, in the case of *Prairie State Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, viz.:

"The rulings of this court have been equally emphatic in upholding the right of a surety to stand upon the agreement, with reference to which he entered into his contract of suretyship, and to exact compliance with its stipulations."

To the same effect are the cases of *Anderson v. Bellenger & Ralls*, 87 Ala. 334, 6 South. 82, 4 L. R. A. 680, 13 Am. St. Rep. 46, and *Manatee County State Bank v. Weatherly*, 144 Ala. 655, 39 South. 988.

While we are on this subject, we desire to say that we are not unmindful of the salutary proposition that:

"The contract of suretyship is not that the obligee will see that the principal performs its condition, but that the surety will see that he performs them." *Williams v. Lyman*, 88 Fed. 237, 31 C. C. A. 511.

But the contract which the surety binds himself to see performed is the contract which he actually underwrites for his principal, and not some other contract which his principal and employer may see proper to make for themselves. *First Nat. Bank v. Fidelity & Dep. Co.*, supra; *Anderson v. Bellenger & Ralls*, supra; *Manatee County*

State Bank v. Weatherly, *supra*; Prairie State Bank v. U. S., *supra*.

In discussing the question presented by the demurrer to the above plea, we are not dealing with the question of the mere neglect of the employer to require his agent to comply with the terms of his contract, but we are dealing with the question as to whether the courts will force a surety to answer for the default of his principal when the employer has relieved the principal of a material requirement of the contract to the performance of which the surety bound himself. A careful examination of the cases of *Etina Ins. Co. v. Fowler*, 108 Mich. 557, 66 N. W. 470; *Home Insurance Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; *Williams v. Lyman*, 88 Fed. 237, 31 C. C. A. 511; *McMullen v. Winfield Bldg. Assn.*, 64 Kan. 298, 67 Pac. 892, 56 L. R. A. 924, 91 Am. St. Rep. 236; *Fanning v. Murphy*, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666, 110 Am. St. Rep. 946, 5 Ann. Cas. 435; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Frelinghuysen v. Baldwin* (D. C.) 16 Fed. 452; *Pittsburgh, etc., Ry. v. Shaeffer*, 59 Pa. 350; and *Chew v. Ellingwood*, 86 Mo. 260, 56 Am. Rep. 429—cited by counsel for appellee in their brief, convinces us that the propositions announced in those cases are not applicable to the question which we now have under discussion. On the other hand, it seems to us that under the rules laid down by this court in *First National Bank v. Fidelity & Deposit Company*, *supra*, *Anderson v. Bellenger & Ralls*, *supra*, *Manatee County State Bank v. Weatherly*, *supra*, and by the Supreme Court of the United States in *Prairie State Bank v. U. S.*, *supra*, the trial judge committed reversible error in sustaining the plaintiff's demurrer to the above quoted plea. If, as the plea alleges, the plaintiff relieved Banks of that requirement of his contract relative to rendering monthly statements of his acts and doings as agent, then the plaintiff made a material alteration in the contract which the defendant guaranteed the performance of by Banks (*Fidelity Mutual Life Ass'n v. Dewey*, *supra*; *Morrison v. Arons*, *supra*), and the plaintiff thereby released the surety from the obligations which in its contract of suretyship it assumed (*First Nat. Bank v. Fidelity & Dep. Co.*, *supra*; *Anderson v. Bellenger & Ralls*, *supra*; *Manatee County State Bank v. Weatherly*, *supra*).

4. While there is some divergence of opinion among courts of last resort with reference to some of the questions presented by this record, it seems to us that the rules which were laid down by this court in *Saint v. Wheeler & Wilson Mfg. Co.*, *supra*, *Anderson v. Bellenger & Ralls*, *supra*, and *Manatee*

County State Bank v. Weatherly, *supra*, will furnish to the trial judge a sufficient guide for the next trial of this case if one is had. We deem it unnecessary, therefore, to discuss any other question presented by the record.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

SAYRE, J. (concurring). I subscribe to the principle of the leading opinion. I think, however, that the court in sustaining plea 5 against the demurrer addressed to it has departed from the rule, as this court has heretofore construed it, which requires a plea to set out the facts relied upon in defense. For example it was held in *Osborne v. Alabama Steel & Wire Company*, 135 Ala. 571, 33 South. 687, that a plea of contributory negligence—which, I take it, is entitled on demurrer to as much consideration as any other plea of confession and avoidance—to withstand demurrer, must aver a state of facts to which the law attaches the conclusion of negligence on the part of plaintiff. Plea 5 in the present case merely states the conclusion that plaintiff "relieved" Banks of his contract duty to report sales and pay over money at stated intervals. Under this plea, defendant, it may be presumed, may have intended to prove, either an express agreement between plaintiff and Banks relieving the latter of his duty under the contract defendant had guaranteed, or that Banks had been by implication relieved, so far as defendant was concerned, by consequence of his failure to report sales and pay over money and plaintiff's failure to report that fact to defendant within a reasonable time—and this last, as the further progress of the case developed, was the line of defense followed. According to the rule heretofore followed, in many cases at least, the plea should have alleged the facts from which it drew its conclusion. I must say further, however, that the rule of *Osborne v. Alabama Steel & Wire Co.* is an impossible rule; for, in many cases, the conclusion to be drawn is, in the nature of things, a conclusion of fact to be drawn by the jury, though the evidence be without conflict. *Evans v. Alabama-Georgia Syrup Co.*, 175 Ala. 85, 56 South. 529. Further, I think I may say, without dwelling at too great length on my individual opinion, that I have always thought the rule alluded to has been applied with overstrictness in many cases. The plea in question did not need to set out the evidence; it fairly apprised plaintiff of the general nature of the proposed defense. Hence my concurrence notwithstanding the plea was not up to the mark set by many of our adjudications.

(136 La. 443)

No. 20929.

RAPIER v. GUEDRY.

In re RAPIER.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by the Court.)

1. COURTS ⇨209—ORIGINAL JURISDICTION—ASSIGNMENTS OF ERROR—FILING—TIME.

It is too late to file an assignment of errors after a cause has been submitted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 611; Dec. Dig. ⇨209.]

2. COURTS ⇨209—ORIGINAL JURISDICTION—ASSIGNMENTS OF ERRORS—FILING.

An assignment of errors may be filed in this court to sustain an appeal, or to assign errors on the face of the record on an application for a writ addressed to Courts of Appeal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 611; Dec. Dig. ⇨209.]

3. COURTS ⇨209—ORIGINAL JURISDICTION—ASSIGNMENTS OF ERROR—QUESTIONS NOT PRESENTED IN TRIAL COURT.

New points contained in an assignment of errors, which were not presented to the inferior court, or disposed of by it, cannot be considered by the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 611; Dec. Dig. ⇨209.]

4. MANDAMUS ⇨60—OFFICERS—APPOINTMENT—MINISTERIAL DUTY.

It is not a clear ministerial duty of a district judge to appoint a shorthand reporter in his court, as provided for in Act No. 141 of 1914, where said judge holds the act to be unconstitutional, as violative of certain articles embraced in the Constitution.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 70, 71; Dec. Dig. ⇨60.]

5. COURTS ⇨206—ORIGINAL JURISDICTION—SUPREME COURT—JURISDICTION.

The question is judicial, and it must be first presented in a court of original jurisdiction, and not in the Supreme Court, which has appellate and supervisory jurisdiction only.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 608-612; Dec. Dig. ⇨206.]

O'Niell, J., dissenting.

Action by William H. Rapier against Henry Guedry. Application by plaintiff for a writ of mandamus to compel respondent, as Judge of Division D of the Civil District Court of the Parish of Orleans, to appoint an official shorthand reporter to serve in his court under Acts 1914, No. 141, p. 255. Alternative writ recalled, and petition dismissed.

Breaux & Roehl, Wm. H. Byrnes, Jr., Pierre D. Olivier, and A. B. Booth, Jr., all of New Orleans, for applicant. Porter Parker, of New Orleans (Walter L. Gleason, of New Orleans, of counsel), for respondent judge. Joseph W. Carroll, George Denegre, and Hugh C. Cage, all of New Orleans, amici curiæ.

SOMMERVILLE, J. The petition of plaintiff recites that it is purely the ministerial duty, involving no discretion on his part, of the judge of division D of the civil district court, parish of Orleans, to appoint an official

shorthand reporter to serve in his court, under the provisions of Act 141 of 1914, p. 255.

Respondent judge answers that it is not his ministerial duty to appoint an official shorthand reporter to serve in his court. He alleges: That the duties imposed upon the judges of the civil district court by Act No. 141 are unconstitutional, null, and void, for the reason that said act is in conflict with article 154 of the Constitution of 1913, which provides for a judicial expense fund for the parish of Orleans, and dedicates the fund to paying the salaries of the clerk of the civil district court, the register of conveyances, the recorder of mortgages of the parish of Orleans, and the clerks of the city courts of New Orleans, "and to go to the expenses of their respective offices." That shorthand reporters, provided for by Act 141, are not designated as deputy clerks of any of the said respective offices. Further, that the provisions of the said act of the Legislature contravene articles 155 and 156 of the Constitution of 1913.

[1, 2] After the cause had been submitted, the relator filed what he termed "an assignment of errors." This assignment was filed too late to be considered by the court. Besides, an assignment of errors in this proceeding is nowhere provided for in the law. It does not fall within the terms of article 897 of the Code of Practice, inasmuch as it is not made to sustain the appeal of one of the parties to a suit. There is no appeal in this case. This assignment is not the assignment of errors provided for in section 2, Act 191 of 1898, p. 436, which refers to writs going from this court to the Courts of Appeal.

[3] The assignment of errors referred to cannot be considered by the court for the further reason that the respondent judge, in a second or supplemental return, says that the assignment, wherein it attacks the validity of articles 154, 155, and 156 of the Constitution of 1913, and charges them with being null and void, on the grounds therein set forth, is a new matter, which he was not called to pass upon, and that he has not passed upon the validity of said articles. As the points in the assignment of errors have not been adjudicated upon by the district court, they are not before this court for review, and there is no decision as to their validity to affirm, amend, or reverse. The assignment of errors cannot be considered.

A writ of mandamus will be directed to the judges of the inferior courts commanding them to render justice and perform the other duties of their office in conformity with law. Article 837, C. P.

[4] We have seen that the respondent judge denies that it is his ministerial duty to appoint a shorthand reporter, as provided in Act 141 of 1914; and he alleges that such duty is not conformable to law, for the reason that the said statute violates the provi-

sions of the Constitution defining the duties of the judges of the courts of this state, and the rights and obligations of the clerk of the civil district court, the register of conveyances, the recorder of mortgages for the parish of Orleans, as well as the clerks of the city courts of New Orleans, and that the control and management of the judicial excess fund for the parish of Orleans is not given to the General Assembly by the Constitution.

[5] The questions presented for determination are whether the Legislature may impose upon the judges of the civil district court for the parish of Orleans the duty of appointing shorthand reporters in their courts or not; whether such duty is a judicial one or not; whether the Legislature may assume control over the clerk of the civil district court and take from said clerk the authority of appointing his deputies; and whether the Legislature may appropriate any part of the judicial expense fund of the parish of Orleans for any purpose whatever.

Placed, as respondent is in this case, between the act of the Legislature which commands him to appoint a shorthand reporter in his court at a salary of \$3,600 per annum and the Constitution which gives to the clerk of the civil district court for the parish of Orleans the right to appoint all of his deputies, and which vests in the judges of the civil district court the control of the excess of the judicial expense fund for the parish of Orleans, he had to pause, to consider, to compare, to decide; and he has found the act to be unconstitutional. It plainly appears that he was not called upon to discharge a purely ministerial and incontestable duty, or to execute an evidently constitutional and valid enactment. *State ex rel. Board v. Jumel*, 32 La. Ann. 60; *State ex rel. Luminais v. Judges*, 34 La. Ann. 1114; *State ex rel. Reid v. Judge*, 41 La. Ann. 73, 5 South. 648.

Further, respondent's decision on the unconstitutionality of the act of the Legislature is concurred in by the several judges of the civil district court, as is evidenced by their written concurrence on the return of respondent.

The questions presented are judicial in their nature, and they will have to be first presented to a court of original jurisdiction, and disposed of there, before this court can determine them on appeal, or under our supervisory jurisdiction.

The pleadings in this case show that it is not a clear ministerial duty on the part of the respondent judge to appoint a shorthand reporter to his court; and a mandamus will not issue to compel him to do so.

It is therefore ordered, adjudged, and decreed that the alternative writ issued in this case be recalled, and the petition of relator is dismissed at his cost.

MONROE, C. J., concurs in the decree. O'NIELL, J., dissents.

MONROE, C. J., is of opinion that the question of the constitutionality of the Constitution of 1913, not having been raised in the district court, should not be considered and determined in the case as presented, having been raised here by an alleged assignment of errors.

He is further of opinion that, with the light thrown on the subject by the reasons given by Judge Parker, the relators have a remedy; i. e., they may renew their application to the district court, alleging that the act of 1914, on which they rely, is good law, because the Constitution of 1913 is unconstitutional, in so far as it goes beyond the call of the Legislature.

PROVOSTY, J. I concur in the view that the question of the constitutionality of the Constitution of the year 1913 is not properly before the court in the present matter; and I concur in the refusal of the application for mandamus, but for the reason that so far as now appears, as the case now stands before this court, the decision of the respondent judge is correct.

O'NIELL, J. (dissenting). Being of the opinion that we can and should dispose of all of the issues presented in this proceeding, I respectfully dissent from the foregoing opinions and from the decree recalling the writ of mandamus.

The Act No. 141 of 1914 makes it the duty of each judge of the civil district court to appoint an official stenographer or shorthand reporter for his division of the court. Whether that statute is valid or invalid is the issue presented to this court for decision by the refusal of the respondent judge to obey the act. We should not say that, as we have to consider and determine the legal questions presented by the respondent's refusal to obey the statute, therefore we have no supervisory jurisdiction in the premises. If the statute made the appointment of an official stenographer a matter of discretion instead of a ministerial duty of the judge, this court would have no supervisory jurisdiction to compel the appointment by mandamus. But, if a mandamus will not issue merely because the respondent judge had to pause, to consider, to compare, to decide whether the statute invoked by the relator was constitutional, I cannot imagine a case in which this court could exercise that "control and general supervision over all inferior courts," which was conferred by article 94 of the Constitution. In my humble opinion, the authorities cited do not warrant our dismissing these proceedings. In *State ex rel. Board v. Jumel*, 32 La. Ann. 60, the writ of mandamus was issued by a district judge; on appeal, the judgment of the district court was reversed because the statute which the respondent auditor refused to obey had been pronounced unconstitutional and invalid by

a judgment of this court, and the respondent was acting in obedience to a later statute. In *State ex rel. Luminais v. Judges*, 34 La. Ann. 1114, the relator sought to compel the judges of the civil district court to disobey a mandatory statute, assuming that it was unconstitutional. Here the situation is reversed. In *State ex rel. Reid, Sheriff, v. Read*, Judge, 41 La. Ann. 73, 5 South. 648, the relator sought to compel the district judge to approve the appointment of a certain individual as deputy sheriff, in which (it was very properly declared) the judge had to exercise his discretion.

I respectfully dissent from the opinion that we cannot consider any legal or constitutional question pertaining to the validity of the Act 141 of 1914, that was not considered by the respondent judge when he refused to obey the statute. The relator was not required to allege, in his petition to the judge of the civil district court, any legal reason why the judge should not declare the statute of 1914 unconstitutional or invalid. The respondent judge does not now suggest that he is willing to obey the statute of 1914, since his attention has been called to the errors assigned by the relator in this court. It is my humble opinion that it was not necessary for the relator to file an assignment of errors in this court. When the judge of the civil district court refused to obey a mandatory statute of this state—on the ground, not that the statute was not mandatory, but that it was unconstitutional—the relator's proper and only remedy was by mandamus; and the respondent judge cannot limit the inquiry here to the constitutional questions which he considered.

For these reasons, I am of the opinion that we should exercise the jurisdiction conferred upon this court by article 94 of the Constitution, and consider and decide every question of constitutionality or legality of every statute or article of the Constitution necessary for a determination of the validity or invalidity of the Act 141 of 1914.

(136 La. 447)

No. 20374.

BOARD OF COM'RS OF PLAQUEMINES
PARISH. EAST BANK LEVEE DIST.,
v. DOWDLE & WINDETT et al.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. LEVEES ⇐16—CONSTRUCTION CONTRACT—
VACATION BY RELETTING.

A contract for the construction of certain levees provided that, if it should become necessary, in the judgment of the president of the levee board, to declare the contract vacated or annulled, for negligence, inefficiency, or abandonment by the contractors, he might proceed to do so; and, in such case all sums due to the contractors should be forfeited; that the decision of the board should be final as to the cause of action on the part of the president or engineer in charge; and that the contract so vacated or

annulled might be relet by the board to another contractor without advertisement or other formality. Being unable to complete the work within the time stipulated in the contract the contractors abandoned the work. The board notified the contractors that, if the work was not resumed within a stipulated time and prosecuted as provided in the contract, the board would relet the work and cause the contract to be executed for the account of the contractors. On the failure of the contractors to resume operations within the time allowed, the board advertised and relet the work to another contractor under a slightly different contract, and sued the original contractors for the excess cost of the work when it was completed. *Held*, the reletting of the work to another contractor before the expiration of the time stipulated for its completion in the original contract vacated and annulled the original contract.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 6; Dec. Dig. ⇐16.]

2. LEVEES ⇐16—CONSTRUCTION CONTRACT—
RELETTING OF WORK.

The original contract did not authorize the board to relet the work to another contractor at the expense or for the account of the original contractors.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 6; Dec. Dig. ⇐16.]

3. LEVEES ⇐16—CONSTRUCTION CONTRACT—
BREACH—EXTENT OF LIABILITY.

The forfeiture of the sum due by the board to the original contractors was the extent of their liability to the board for their breach of the contract.

[Ed. Note.—For other cases, see *Levees*, Cent. Dig. § 6; Dec. Dig. ⇐16.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by the Board of Commissioners of Plaquemines Parish, East Bank Levee District, against Dowdle & Windett and another. From adverse judgments, plaintiff appeals. Affirmed.

John Dymond, Jr., James Wilkinson, and A. Giffen Levy, all of New Orleans, for appellant. Grant & Grant, of New Orleans, for appellee National Surety Co. Cage, Baldwin & Crabites, of New Orleans, for appellee Dowdle & Windett.

O'NIELL, J. [1, 2] By the very able arguments and briefs of the counsel of the plaintiff and defendants, the issues in this case are reduced to two simple questions, viz.:

First. Had the plaintiff the right, under section 9 of the contract of the 16th of October, 1902, to relet the contract for the account and at the expense of Dowdle & Windett, in the event it was vacated or annulled?

Second. Was the contract of the 16th of October, 1902, vacated or annulled?

It was decided by this court on the former appeal in this case (129 La. 517, 56 South. 426) that section 9 of the contract of the 16th of October, 1902, was not abrogated by the amendments agreed to by the contracting parties on the 11th of May, 1904. That section of the contract, stated in separate paragraphs, for convenience, is as follows:

"Should the contractor fail to prosecute the work under this contract with the vigor neces-

sary to its completion within the time stipulated, in the opinion of the engineer in charge, all estimates may be withheld; and it shall be competent for and the duty of the president of the board to employ such additional force as he may deem necessary at the expense of the contractors.

"Should it become necessary, in the judgment of the president of the board, to suspend this contract, or to declare it vacated or annulled, for negligence, inefficiency, or abandonment by contractor, he may proceed to do so, and in such a case the 20 per cent. reserved as security for completion of contract, and all other sums due to said contractor by the Plaquemines parish, East Bank levee district, shall be forfeited, the decision of the board of commissioners to be final as to the cause of action on the part of the president or engineer in charge.

"Should damage accrue to the district, or to those to be protected by the levee from such laches, or from abandonment of the work, the contractor and his sureties shall be responsible for such amount as shall be awarded by the courts.

"A contract, vacated or annulled as above described, may be relet by the president of the board to another contractor without advertisement or another formality."

Assuming that the contractor was at fault in failing to prosecute the work with the vigor necessary for its completion within the time stipulated, the board had the right, under the first paragraph of section 9 of the contract, to withhold all estimates, and it was competent for, and the duty of, the president of the board to employ such additional force as he might deem necessary at the expense of the contractor. The board did, in its resolution of the 4th of January, 1905, withhold all payments; but the board did not at any time employ an additional force for the completion of the work.

The second paragraph of the section under consideration gave the president of the board absolute authority to suspend the contract or declare it vacated or annulled if he deemed it necessary, in his judgment, for negligence, inefficiency, or abandonment by the contractor; and in that event all sums due by the board to the contractor were to be forfeited.

The third paragraph of this section of the contract is not pertinent to the issues in this case.

The fourth and last paragraph of section 9 gave the president of the board the right to relet the contract to another contractor without advertisement or other formality, if the contract should be vacated or annulled as above described, that is, as described in the second paragraph of section 9.

If the president of the board had availed himself of the right to employ an additional force, it would have been at the expense of the contractor, under the first paragraph of section 9; and the contract would not have been vacated or annulled. But the last paragraph, giving the president of the board the right to relet the contract to another contractor without advertisement or any other formality, in the event of its being vacated or annulled, did not provide that the reletting should be at the expense of the con-

tractor whose contract was vacated or annulled.

The contingency, in the last paragraph of section 9, i. e., if the contract should be vacated or annulled as above described, meant clearly if it should be vacated or annulled by the board for negligence, inefficiency, or abandonment by the contractor, as provided in the second paragraph. Under that paragraph, the authority of the president of the board to declare the contract vacated or annulled was absolute. If he deemed it necessary to vacate or annul the contract, all he had to do was to declare it vacated or annulled for negligence, inefficiency, or abandonment by the contractor, and the decision of the board as to the cause of action on the part of the president—i. e., as to the negligence, inefficiency, or abandonment by the contractor rendering the annulment of the contract necessary—was to be final. If then, in addition to forfeiting all sums due to the contractor, the board had the right to relet the contract to another contractor, without advertisement or any other formality, at the expense of the original contractor, it was indeed an unilateral contract. We are constrained to conclude that, if the parties had intended to make such an anomalous agreement, the last paragraph of section 9 would have concluded precisely as the second paragraph concludes, "at the expense of the contractor."

Counsel for the plaintiff contend that the board did not, in its resolution of the 2d of March, 1905, vacate or annul the contract of the 16th of October, 1902, but merely called upon the contractor to perform the contract and declared that the board would relet the work to another contractor for the account and at the expense of Dowdle & Windett if the latter should not resume work at or before noon on the 15th of March, 1905, and prosecute the work to its completion as provided in the contract. This is true. But the board did in fact relet the work to another contractor before the expiration of the time in which Dowdle & Windett were required to complete the work. It is true that, in the resolution of the 2d of March, 1905, calling upon Dowdle & Windett to resume and complete the work according to the contract, the board declared that the work would be relet to another contractor for the account of Dowdle & Windett. And, if the board had the right under its contract with Dowdle & Windett to relet the work for the account of Dowdle & Windett, the reletting of the contract would not have vacated or annulled the contract. But we have already observed that the board had no right to relet the contract to another bidder unless it was vacated or annulled, in which event the new contract was not to be for the account of Dowdle & Windett. In fact, the resolution of the board, calling upon Dowdle & Windett to resume and complete the work, did not declare

that the board would relet the contract, but that the board would relet the work, for account of Dowdle & Windett, if the latter failed to comply with the demand of the board. And the board did relet the work to another contractor under a new and somewhat different contract. This action on the part of the board vacated and annulled the contract with Dowdle & Windett, and the obligation for damages due by Dowdle & Windett for failing to comply with the demand of the board must be determined by the contract and the law applying to it.

The second paragraph of section 9 of the contract provides that, in the event the board should declare the contract vacated or annulled, all sums due to the contractor should be forfeited. The board had the right to exact that forfeiture as a penalty or stipulated damages due by the contractor when the president of the board exercised his absolute right to declare the contract vacated or annulled.

Section 5 of article 1934 of the Civil Code provides:

"Where the parties, by their contract, have determined the sum that shall be paid as damages for its breach, the creditor must recover that sum, but is not entitled to more. But when the contract is executed in part, the damages agreed on by the parties may be reduced to the loss really suffered, and the gain of which the party has been deprived, unless there has been an express agreement that the sum fixed by the contract shall be paid, even on a partial breach of the agreement."

In other words, if no part of the contract has been performed, the contractor who has been guilty of its breach owes the other party the full amount of damages stipulated in the contract, but no more; and, if the contract has been partly performed or executed, the damages due for its breach may be reduced by the court from the sum stipulated in the contract for an entire breach, to the amount of the loss sustained and the profits of which the innocent party was deprived, unless the agreement was that the stipulated damages should be paid in full even for a partial breach.

In a case very recently decided by the Supreme Court of the United States (*Stone, Sand & Gravel Co. and American Surety Co. v. United States*, 234 U. S. 270, 34 Sup. Ct. 865, 58 L. Ed. 1308), the contract contained a section, designated as "Clause A," very similar to section 9 of the contract in the present case. The government, on the recommendation of its engineer, declared the contract annulled and relet the work to another contractor, because the original contractor had failed to begin operations on the day stipulated; and thereafter the government sued the original contractor for the excess cost

of the work. The conclusion of the opinion by Mr. Justice Lurton is:

"The right to annul is expressly conferred by clause A for a failure to begin on the stipulated day. The United States resorted to that clause for its authority and pursued the procedure therein pointed out. It is plainly bound by the limitation of damages therein prescribed."

And in the syllabus of the case cited, the doctrine is stated thus:

"Where the contract contains a provision for a method of annulment, and liquidated damages in case of a breach by failure to commence work, and the government avails of that provision, it is only entitled to the liquidated damages, and cannot recover damages for difference in cost on reletting the contract under a provision for failure to complete or abandonment after commencing the work. *United States v. O'Brien*, 230 U. S. 321 [31 Sup. Ct. 406, 55 L. Ed. 481], distinguished. The benefit and burden of a provision in a government contract giving a right to annul in consequence of a breach by failure to commence work must hang together, and the government cannot avail of the former without accepting the latter."

In this view of the case, the pleadings filed by the National Surety Company before the trial were sufficient to avail the surety company of the contractor's defense. *Brink v. Bartlett*, 105 La. 336, 29 South. 958. The contract whereby the work was relet by the board to another contractor was a part of the plaintiff's proof. It was introduced in evidence by the plaintiff over the objection of the defendants, and they are entitled to all the benefit and effect of it. A party who introduces evidence which he might have excluded if he had objected to its introduction by the other party must abide its effect. *Philomene Foutenot v. J. B. Manuel*, 46 La. Ann. 1374, 16 South. 182; *Grangnard v. Forsyth*, 44 La. Ann. 327, 10 South. 799; *Nusbaum & Bro. v. Marks & Co.*, 20 La. Ann. 379; *Hennen v. Gilman*, 20 La. Ann. 241, 96 Am. Dec. 396; *Kean v. Brandon*, 17 La. Ann. 37; *New Orleans v. Judah Congregation*, 15 La. Ann. 389; *Langlin v. Broussard*, 12 Mart. (O. S.) 242.

[3] After a thorough reconsideration of this case, we come to the conclusion that the board had no right to add to the plaintiff's absolute right to declare the contract vacated or annulled and relet the work the phrase "at the expense of the contractor." The forfeiture and retention of the sums due by the board to the contractors is the extent and limit of the liability of the contractors for their fault in not completing their undertaking. They have suffered that penalty, and the plaintiff can exact nothing more.

Our former decree rendered in this case is therefore annulled and set aside, and the judgment appealed from is affirmed at the cost of the appellant.

BANK OF SARASOTA v. MOORE.

(Supreme Court of Florida. Dec. 22, 1914.)

Appeal from Circuit Court, Manatee County; F. A. Whitney, Judge.

Suit between the Bank of Sarasota, a corporation, and J. E. Moore. From the decree, the Bank appeals. Affirmed.

C. T. Curry, of Brandentown, and Sparkman & Carter, of Tampa, for appellant. Singeltary & Reaves, of Brandentown, for appellee.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellee do have and recover of and from the appellant his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

BROWN v. NUGENT et al.

(Supreme Court of Florida. Dec. 22, 1914.)

Appeal from Circuit Court, Duval County; Geo. Cowper Gibbs, Judge.

Suit between H. D. Brown and Mrs. S. J. Nugent and others. From the decree, Brown appeals. Affirmed.

Gibbons, Maxwell, McGarry & Daniel, of Jacksonville, for appellant. Marks, Marks & Holt, of Jacksonville, for appellees.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

COX et al. v. CAMERON et al.

(Supreme Court of Florida. Dec. 22, 1914.
Rehearing Denied Jan. 4, 1915.)

Error to Circuit Court, Santa Rosa County; J. Emmet Wolfe, Judge.

Action between J. B. Cox and others and E. W. Cameron and another. From the judgment, Cox and others bring error. Affirmed.

Clark & Magaha, of Milton, for plaintiffs in error. Watson & Pasco, of Pensacola, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term

upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court having been advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendants in error do have and recover of and from the plaintiffs in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

COX v. CARTER-DEEN REALTY CO. et al.

(Supreme Court of Florida. Nov. 17, 1914.)

Appeal from Circuit Court, Polk County; F. A. Whitney, Judge.

Suit between John F. Cox and the Carter-Deen Realty Company, a corporation, and another. From the decree, Cox appeals. Affirmed.

R. B. Huffaker, of Bartow, for appellant. Blanton & Lawler, of Lakeland, for appellees.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and briefs of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

(68 Fla. 582)

FLORIDA WAREHOUSE & DOCK CO. v. W. W. CUMMER & SONS CO.

(Supreme Court of Florida. Nov. 24, 1914.)

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Suit between the Florida Warehouse & Dock Company, a corporation, and the W. W. Cummer & Sons Company, a corporation. From the decree, the Florida Warehouse & Dock Company appeals. Affirmed.

J. T. G. Crawford, of Jacksonville, for appellant. D. H. Doig and Bisbee & Bedell, all of Jacksonville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree appealed from and briefs of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellee do have and recover of and from the appellant its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

GAVAGAN et al., City Council, v. GREENBERG.

(Supreme Court of Florida. Nov. 11, 1914.)

Error to Circuit Court, Duval County; Daniel A. Simmons, Judge.

Action between James L. Gavagan, as president, and Charles B. Burrows and others, as members, of the City Council of the City of Mayport, Duval County, Fla., a municipal corporation, and A. Greenberg. From the judgment, the parties first mentioned bring error. Affirmed.

M. M. Scarborough, of Jacksonville, for plaintiffs in error. Gibbons, Maxwell, McGarry & Daniel, of Jacksonville, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiffs in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

GODWIN et al. v. EASTERLIN.

(Supreme Court of Florida. Dec. 22, 1914.)

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Suit between Elizabeth K. Godwin and husband and Ada Easterlin. From the decree, the Godwins appeal. Affirmed.

Hampton & Hampton, of Gainesville, for appellants. C. R. Layton, of Gainesville, for appellee.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellee do have and recover of and from the appellants her costs by her in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

HUMPHREYS et al. v. WEST YELLOW PINE CO.

(Supreme Court of Florida. Nov. 24, 1914.)

Error to Circuit Court, Suwannee County; J. Emmet Wolfe, Judge.

Action between A. Lee Humphreys and another, partners under the firm name of the Madison Lumber Company, against the West Yellow Pine Company, a corporation. From the judgment, the parties first mentioned bring error. Affirmed.

Humphreys & Blackwell, of Live Oak, for plaintiffs in error. J. W. McKinnon, of Madi-

son, and H. E. Carter, of Live Oak, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiffs in error its costs by it in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

JARRETT LUMBER CORPORATION v. REESE.

(Supreme Court of Florida. Nov. 24, 1914.)

Error to Circuit Court, Jackson County; D. J. Jones, Judge.

Action between the Jarrett Lumber Corporation and R. M. Reese. From the judgment, the Lumber Corporation brings error. Affirmed.

Paul Carter, of Marianna, for plaintiff in error. Smith & Davis, of Marianna, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

PLATT v. HUNTER.

(Supreme Court of Florida. Nov. 17, 1914.)

Error to Circuit Court, Taylor County; M. F. Horne, Judge.

Action between W. N. Platt and Ola F. Hunter. From the judgment, Platt brings error. Affirmed.

W. E. Battle, of Perry, for plaintiff in error. Davis & Calhoun, of Perry, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error her costs by her in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

**SANTA ROSA ABSTRACT CO. v.
WILKINSON et al.**

(Supreme Court of Florida. Nov. 17, 1914.)

Appeal from Circuit Court, Santa Rosa County; J. Emmet Wolfe, Judge.

Suit between the Santa Rosa Abstract Company, a corporation, and J. A. Wilkinson and others. From the decree, the Abstract Company appeals. Affirmed.

Clark & Magaha, of Milton, for appellant. McGeachy & Lewis, of Milton, for appellees.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and briefs of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellees do have and recover of and from the appellant their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

SEABOARD AIR LINE RY. v. KEEN.

(Supreme Court of Florida. Dec. 22, 1914.)

Error to Circuit Court, Manatee County; F. A. Whitney, Judge.

Action between the Seaboard Air Line Railway, a corporation, and Andrew J. Keen. From the judgment, the Railway brings error. Affirmed.

P. O. Knight, of Tampa, and Singeltary & Reeves, of Bradentown, for plaintiff in error. H. S. Glazier, of Bradentown, and W. T. Harrison, of Palmetto, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

**SOUTHERN ASPHALT & CONSTRUCTION
CO. v. STIRRUP.**

(Supreme Court of Florida. Nov. 17, 1914.)

Error to Circuit Court, Monroe County; James W. Perkins, Judge.

Action between the Southern Asphalt & Construction Company, a corporation, and Cyril Stirrup. From the judgment, the Construction Company brings error. Affirmed.

W. Hunt Harris, of Key West, for plaintiff in error. E. M. Semple and H. H. Taylor, both of Key West, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term

upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

No. 20208.

(126 La. 455)

OWEN v. M. HANLON'S SONS et al.

In re HANLON.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. HUSBAND AND WIFE ~~52~~273, 274—PAYMENT ~~52~~—COMMUNITY PROPERTY—RIGHT TO MORTGAGE—VENDOR'S LIEN.

Where the community is dissolved by the death of the wife, and the property is burdened with a vendor's lien and privilege, and where the notes held by the vendor are subsequently paid by a third person, under an agreement with the surviving husband, and the notes are marked paid, and the inscription thereof is canceled, the debt is extinguished; the interest of the deceased in the property passed to her heirs, and the surviving husband could not mortgage the interest of the wife's heirs, unless he was specially authorized to do so.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1008-1024, 1026-1031; Dec. Dig. ~~52~~273, 274; Payment, Cent. Dig. § 136; Dec. Dig. ~~52~~.]

2. MORTGAGES ~~52~~76—VALIDITY—PARTIES.

Where a privileged debt bearing upon property is paid by a third person, and another agreement is entered into between the third person and some of the owners of the property to pay said third person, and a note secured by mortgage is given by them to secure said third person, the mortgage will not bind the interest of those owners who were not parties to said act of mortgage.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 174, 175; Dec. Dig. ~~52~~76.]

Monroe, C. J., dissenting.

Appeal from Twenty-First Judicial District Court, Parish of Iberville; C. K. Schwing, Judge.

Action by Dr. W. G. Owen against M. Hanlon's Sons and others, wherein J. D. Hanlon, natural tutor, filed intervention and third opposition. From a judgment for plaintiff the tutor appeals. Reversed and rendered.

Guion, Lambremont & Hebert, of Lusher, for appellant. Borron & Wilbert, of Plaquemine, for appellee.

SOMMERVILLE, J. Dr. Owen, the holder of certain past-due notes amounting to \$23,000, secured by vendor's lien and privilege, bearing upon Nottoway plantation, the property of defendants, caused executory pro-

cess to issue on one note for \$5,000. The proceeds of sale were more than sufficient to meet the notes. There is a balance in the hands of the sheriff after paying all of said notes, which is claimed by plaintiff in settlement of a \$10,000 note held by him and issued by defendants, which is secured by a mortgage on the same property.

The claim of plaintiff is opposed by J. D. Hanlon, one of the defendants, but acting in the capacity of natural tutor of his minor children, on the ground that at the time he, together with the other two defendants, his brothers, signed and issued said mortgage note for \$10,000, he (J. D. Hanlon) was not the owner of one-third of the property involved; that he was the owner of only one-sixth thereof; that the other one-sixth belonged to his minor children, whom he is representing in this proceeding; and that they (the minors) are entitled to one-sixth of the balance of the proceeds of sale now in the hands of the sheriff.

There was judgment in favor of plaintiff, and J. D. Hanlon, tutor, has appealed.

[1, 2] The record shows that plaintiff, in 1911, was the owner of a note secured by vendor's lien and privilege, the payment of which was assumed by the three defendants when they bought the Nottoway plantation; that two of several notes issued by defendants as evidence of part of the purchase price paid by them for the property involved would fall due on March 1, 1911; that, on January 7, 1911, plaintiff loaned defendants \$10,000 to run their plantation; that plaintiff and defendants agreed to allow plaintiff, Owen, to take up and hold said two vendor's notes falling due March 1, 1911, until they were paid by defendants.

It was further stipulated between them:

"In the event that the holder or holders of said notes maturing on the 1st day of March, 1911, 1912, and 1913, cancel said notes upon receiving payment of same, the said James D. Hanlon, Edmund S. Hanlon, and Alphonse Hanlon * * * do hereby agree, bind, and obligate themselves to give Dr. W. G. Owen * * * a note for ten thousand dollars, secured by an act of mortgage on said Nottoway plantation. * * * Said act of mortgage securing said note of ten thousand dollars * * * shall be a duplicate of the act of mortgage which secured the note which has been canceled. Said act of mortgage shall be drawn up by a notary, and the note for ten thousand dollars handed to the party of the first part (Dr. Owen) upon his paying cash for note canceled."

Mrs. Keith, the holder of the notes secured by vendor's lien and privilege, including the two for \$5,000 each, which fell due on March 1, 1911, refused to transfer to Dr. Owen said matured notes on his paying the value thereof; and she insisted that the two notes should be paid and canceled, thus reducing the indebtedness due by the Hanlons to the vendor of the plantation, and at the same time increasing her security. Dr. Owen paid the two notes, and the notes were marked paid, and they were canceled by Mrs.

Keith, the holder thereof. Dr. Owen subsequently became the owner of the other vendor's lien notes, aggregating \$23,000.

The Hanlons gave a second note for \$10,000, secured by a mortgage on Nottoway plantation, to Dr. Owen, as evidence of indebtedness due by them to him for the \$10,000 with which the two vendor's lien notes were paid by Owen March 1, 1911.

It is the payment of this mortgage note in full, out of the proceeds of this executory process, which Dr. Owen claims, and which J. D. Hanlon, as tutor, contests. The latter alleges and shows that his one-third interest in Nottoway plantation was community property; that the community between him and Mrs. Hanlon had been dissolved by the death of Mrs. Hanlon prior to the time of issuance of the last \$10,000 mortgage note, and that Mrs. Hanlon's one-sixth interest in the property had descended to her heirs; that he was not authorized to mortgage the property of his children, inherited from their mother; that he had not mortgaged it; and that he had mortgaged only his own interest.

Plaintiff argues that the two vendor's lien notes which fell due March 1, 1911, were community debts; that a surviving husband is authorized to pay and to settle community debts; and that J. D. Hanlon, the surviving husband, settled the two notes, by permitting him (Dr. Owen) to pay them; and that the new mortgage note for \$10,000 issued by the three Hanlon brothers to his (Owen's) order was substituted for the two vendor's lien notes which he had paid and which had been canceled on March 1, 1911.

The court has held that a surviving husband might pay the debts of the community, and that such survivor might cause community property to be sold to pay the debts of the community. But J. D. Hanlon, the surviving husband, has not so acted.

He did not pay the two notes falling due March 1, 1911, which were secured by a lien on the community property. Dr. Owen, the plaintiff, paid those notes, and the three Hanlon brothers became indebted to him for the amount thereof, and they gave him their joint mortgage note in settlement. But this new debt and new mortgage note are not debts of the dissolved community of J. D. Hanlon and his wife. The former indebtedness was between Mrs. Keith on one side, and J. D. Hanlon, E. S. Hanlon, both married, and A. Hanlon, unmarried, on the other side; while the present is between Dr. Owen, on one side, and E. S. Hanlon, married, J. D. Hanlon, widower, and A. Hanlon, unmarried, on the other side. The former indebtedness was for two notes of \$5,000 each, representing parts of the purchase price of Nottoway plantation; while the latter is for one note for \$10,000, representing cash paid for defendants. The former indebtedness was secured by a vendor's lien and privilege; while the latter is secured by a second mortgage. The two debts are

separate and distinct; and in the last act of mortgage between Dr. Owen and the Hanlons the two notes formerly held by Mrs. Keith are not referred to. The creditors are different, as are the debtors; the debts are not the same; and the securities are different.

In paying \$10,000 to Mrs. Keith in settlement of two notes due by the Hanlon brothers and secured by a vendor's lien on the property of the latter, Dr. Owen paid debts partly due by the community formerly existing between Mr. and Mrs. J. D. Hanlon, and he may have a claim against the estate of Mrs. J. D. Hanlon, or her heirs; but that indebtedness is not secured by a mortgage given by J. D. Hanlon bearing upon the property of his children, for the reason that Hanlon did not issue, and he was not authorized to grant, such mortgage.

The interest of Mrs. J. D. Hanlon in Nottoway plantation passed to her children on her death, and it could not be burdened with a mortgage by J. D. Hanlon, the father of the minors, in the absence of authority to him to mortgage their property.

If Dr. Owen has a claim against the minor Hanlons, it is not secured by mortgage, and it has not been reduced to judgment. Its payment, therefore, cannot be forced out of the proceeds of sale resulting from this executory proceeding.

There was error in the judgment appealed from.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed, and that there be judgment in favor of James D. Hanlon, natural tutor, and against plaintiff, Dr. W. G. Owen, and A. A. Browne, sheriff, decreeing said Hanlon, in his capacity as natural tutor of his minor children, to be the owner of one-sixth of the balance of the proceeds of the sale of Nottoway plantation, after paying the notes held by Dr. Owen which are secured by vendor's lien and privilege, said one-sixth to be paid to him by preference and priority to the two special mortgages held by plaintiff, Owen, against the Nottoway plantation, for \$10,000 each, of dates January 7, 1911, and March 1, 1911, and for costs in both courts.

MONROE, C. J., dissents.

(136 La. 460)

(No. 19940.)

PETERSON v. LOUISVILLE & N. R. CO.

(Supreme Court of Louisiana. Jan. 11, 1915.
On Application for Rehearing,
Feb. 8, 1915.)

(Syllabus by Editorial Staff.)

1. MASTER AND SERVANT ⇨219—INJURY TO SERVANT—ASSUMPTION OF RISK.

The danger created by a guard rail placed along a railroad track for a useful purpose was

assumed by an employé engaged in railroad construction work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. ⇨219.]

2. MASTER AND SERVANT ⇨150—RAILROAD EMPLOYÉ—DUTY TO WARN.

An employé engaged in railroad construction work was not entitled to special warning in respect to the construction of the track or manner of working, that he might avoid stumbling while engaged, with other employés, in pushing upon a railroad bridge a flat car loaded with heavy timbers.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 297, 299-302, 305-307; Dec. Dig. ⇨150.]

On Application for Rehearing.

(Syllabus by the Court.)

3. APPEAL AND ERROR ⇨833—APPLICATION FOR REHEARING—TIME.

Under Act No. 223, p. 341, of 1908, an application for a rehearing comes too late when filed on the day the judgment of the Supreme Court becomes final and executory.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. ⇨833.]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Action by Mrs. Magdalena Peterson against the Louisville & Nashville Railroad Company. From judgment for defendant, plaintiff appeals. Affirmed, and rehearing denied.

Henry W. Robinson and Dart, Kernan & Dart, all of New Orleans, for appellant. Denegre & Blair and Victor Leovy, all of New Orleans, for appellee.

PROVOSTY, J. Plaintiff's son, 19 years old, fell under the wheels of a small flat car loaded with heavy timbers, which he and 17 other men were pushing along upon the railroad bridge of the defendant company that crosses Bay St. Louis, and he died the next day from his injuries; and this suit is brought in damages.

This bridge is an open trestle, the top of which consists of the cross-ties, the two rails, and a plank walk on each side between the ends of the cross-ties and the rails. Beginning where it leaves the land, the grade for about half a mile going out is down, 8 inches to the 100 feet at first, tapering to 5 inches. The men were on each side of the car and back of it. Its platform was hip high to them, and there was sitting room on each side of the load. When it reached the down-grade and began moving of itself, the men let go, and some stood back, while others jumped and sat upon it. Plaintiff's son was on the side, with men in front and back of him. Whether his fall was caused by his attempting to jump on the car, or by his stumbling, the testimony leaves uncertain.

[1] The contention is that the place was unsafe, and that the young man was put to work there without warning of the danger. One of the assigned sources of danger we leave out of consideration, as it played no

part in the accident. It is that large spikes stuck out of the plank walk, against which a man might strike his foot and stumble. Plaintiff does not pretend that this is what happened to the young man, as there were no such spikes at the place where he fell; but that he must have struck his foot against a certain so-called guard rail laid upon the cross-ties between the plank walk and the main rail, one end of it touching the rail and the other touching, or nearly so, the plank walk.

This guard rail was 12 feet long, and, when plaintiff's son fell, he had passed that end of it which stood close to the plank walk, and had reached, or nearly reached, the end touching the main rail. At the latter point there was little, if any, danger of his striking his foot against it.

Besides, it was not as the result of negligence that this guard rail was there, but intentionally, for a useful purpose. Hence whatever danger was created by its presence was only such as men engaged in railroad construction work are encompassed with on every side, and against all of which it is not possible for warning to be given. Such dangers as these are incident to the work, and are assumed by the workmen. The accidents that result from them are due to unavoidable circumstances, and not to the fault of individuals.

[2] The plank walk was only six or eight inches wide; and three cross-pieces of the framework of the car extended out to within an inch or so of it. This tended to increase whatever danger there might otherwise have been. Even so, however, we do not see what particular danger was presented against which any special warning was called for or could have been given that would have contributed to avert the accident. No instruction, surely, was needed as to the manner of pushing the car or of letting it go when it began to move of itself and pushing became unnecessary. Counsel argue the case as if the car, on entering upon the slight downgrade, assumed a sudden speed or lurch forward; but such was not the case; the grade was not such as to cause anything of that kind, and no special warning could have been necessary as to the manner of walking on the bridge. In the latter connection, the learned counsel of defendant well observe:

"To take a young man out upon a bridge and point out the rails to him and warn him not to stumble over them would be beyond even paternal care."

And they add, with a touch of pleasantry which perhaps the baseless character of the suit excuses:

"It would be grandmotherly."

Judgment affirmed.

On Application for Rehearing.

LAND, J. [3] The decree was handed down in this case on January 11, 1915, and the ap-

plication for a rehearing was filed on January 26, 1915.

The application came one day too late, under Act No. 223, p. 341, of 1908, which reads as follows:

"That judgment rendered in the Supreme Court * * * shall become final and executory on the fifteenth calendar day after rendition, in term time and out of term time, unless the last day shall fall on a legal holiday when the delay shall be extended to the first day thereafter not a legal holiday: Provided, that in the interval parties in interest shall have the right to apply for rehearing: Provided further, in the recess of the court, the court shall have the right to dispose, at chambers, of applications for rehearing."

As January 26, 1915, was not a legal holiday, the decree of the court in this case became final and executory on that day, and the "interval" for rehearings expired on the day previous.

Therefore plaintiff's application came too late and cannot be considered by the court.

No. 20828.

(136 La. 464)

WHITE v. WALKER et al.

In re WHITE.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW \S 205, 207—Costs \S 129—PAUPER'S AFFIDAVIT—VALIDITY OF STATUTE.

Act No. 156 of 1912, allowing pauper citizens of this state and pauper aliens who have been domiciled in this state for three years to prosecute lawsuits without paying the court costs in advance or as they accrue and without giving bond for costs, does not grant a special privilege or immunity to the citizens of this state generally or discriminate against the citizens of other states, in violation of section 2 of article 4 of the Constitution of the United States.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 591-648; Dec. Dig. \S 205, 207; Costs, Cent. Dig. \S 496; Dec. Dig. \S 129.]

2. CONSTITUTIONAL LAW \S 42—PAUPER'S AFFIDAVIT—VALIDITY OF STATUTE—RIGHT TO ATTACK.

A citizen of the state of Missouri, who has never been domiciled in Louisiana, has no interest in questioning the constitutionality of a statute of this state, permitting the pauper citizens of Louisiana to sue in the courts of this state without previously paying or securing the court costs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 39, 40; Dec. Dig. \S 42.]

Action by J. N. White against S. P. Walker and others. White applies for certiorari, prohibition, and mandamus. Proceedings on application dismissed.

George Wear, Jr., of Jena, for applicant. Hundley & Hawthorn and Gus L. Alford, all of Alexandria, for defendants.

O'NIELL, J. [1] The relator seeks to compel by mandamus the trial of his suit in

the district court, without paying the costs in advance or furnishing bond and security therefor. He shows that he is too poor to pay the costs, and, on account of his poverty, is unable to furnish a bond to secure their payment. He contends that, under the provisions of the Act No. 156 of 1912, although he is a citizen of the state of Missouri and has not been domiciled or resided three years in the state of Louisiana, he is entitled to prosecute his suit against citizens of Louisiana in the courts of this state, without previously or at the same time paying the court costs and without giving bond to secure the payment of costs. The statute provides:

"That any person who is a citizen of this state or who, if an alien, has been domiciled in this state for three years, shall have the right to prosecute and defend in all the courts of this state all actions to which he may be a party, whether as plaintiff, intervener or defendant, without the previous or concurrent payment of costs or the giving of bonds for costs, if he is unable, because of his poverty, to pay such costs or to give bond for the payment of such costs," etc.

The relator contends that this statute should not be construed so as to deny the citizens of other states of the Union the same privilege and equal rights given to the citizens of this state by the terms of the act, because such a construction would, he contends, violate section 2 of article 4 of the Constitution of the United States.

This statute does not relieve a pauper citizen of this state of the obligation to pay costs. The fourth section of the act provides that, if judgment be rendered against a litigant who has availed himself of the privilege granted by the act, he shall be condemned to pay the costs incurred by him and recoverable by the other parties to the suit.

Hence the statute only relieves pauper citizens of this state of the obligation of paying court costs in advance or as they accrue or furnishing bond and security for such costs. It does not accord this privilege to the citizens of this state who are able to pay or furnish bond for court costs. Hence it does not grant a privilege or immunity to all the citizens of this state or discriminate against the citizens of other states. It merely relieves the pauper or indigent citizens of this state, and those of other states who have been domiciled in this state for three years, of a certain burden, of which this state is not bound to relieve the citizens of other states.

This statute has no effect upon nonresidents of this state, but leaves them subject to the laws of this state affecting generally the citizens of this state. It has been held in other jurisdictions that a statute requiring only nonresidents to furnish bond and security for court costs is valid legislation. *Haney v. Marshall*, 9 Md. 194; *Cummings v. Wingo*, 31 S. C. 434, 10 S. E. 107; *Kilmer v. Groome*, 19 Pa. Co. Ct. 339.

[2] However, if we should find that the Act

No. 156 of 1912 violates section 2 of article 4 of the Constitution of the United States, we would have no power to legislate or reform the statute so as to exempt from the operation of the law, requiring all other persons to pay court costs in advance or as they accrue or to give bond to secure them, the pauper or indigent citizens of other states, who have not been domiciled here for three years. Hence the relator has no interest in attacking the constitutionality of the Act No. 156 of 1912.

It was decided by this court in the case of *White v. McClanahan*, 135 La. 25, 64 South. 940, in which the present relator was the plaintiff, that:

"Where one claims the right, under Act No. 156 of 1912, to sue in forma pauperis, he must be a bona fide resident of this state, and not merely a wanderer who happened to be in the state at the time that his cause of action arose, and who does not remain here thereafter."

For the reasons assigned, the relator's proceedings are dismissed at his cost, and the respondent judge is discharged from the rule issued herein.

(136 La. 467)

No. 20843.

HARDY v. COLLINS.

(Supreme Court of Louisiana. Jan. 11, 1915.
On Application for Rehearing, Feb. 8, 1915.)

(Syllabus by the Court.)

1. DIVORCE \S 324—JUDGMENT OF SEPARATION—SUBSEQUENT PROCEEDINGS—SUPPORT OF CHILD.

The wife who has obtained a final judgment of separation from bed and board, assigning her the custody of the child of the marriage, cannot thereafter proceed by rule in the separation suit against the father for alimony for the child. Her remedy is by separate action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 826; Dec. Dig. \S 324.]

2. DIVORCE \S 324—AGREEMENT—ENFORCEMENT—SEPARATION SUIT.

Where the wife, after obtaining a final judgment of separation from bed and board, entered into an agreement with her husband for the settlement of their financial affairs, held, that the husband could not proceed by rule against the wife in the suit for separation to enforce such agreement, but that his remedy is by separate action.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. \S 826; Dec. Dig. \S 324.]

O'Niell and Provosty, JJ., dissenting on rehearing.

Appeal from Civil District Court, Parish of Orleans; Fred D. King, Judge.

Action by Mrs. Alice Lillian Hardy against William Andrew Collins. Plaintiff, having obtained judgment, ruled defendant to show cause why he should not be condemned to pay alimony, and defendant sued out a rule on plaintiff to show cause why certain certificates of stock should not be sold and the proceeds, distributed according to agreement. From judgments overruling exceptions to plaintiff's rule and dismissing defendant's rule, defendant ap-

peals. Judgment on rule for alimony reversed, and rule ordered dismissed, and judgment dismissing rule sued out by defendant affirmed.

Dinkelspiel, Hart & Davey and Foster, Milling, Brian & Saal, all of New Orleans, for appellant. Wm. Winans Wall, of New Orleans, for appellee.

LAND, J. In May, 1913, the plaintiff obtained a judgment of separation from bed and board from the defendant, for cause of abandonment, and granting unto her the permanent care, custody, and control of their minor child, Dorothy Collins.

In June, 1914, the plaintiff ruled the defendant to show cause why he should not be condemned to pay unto her the sum of \$50 per month for the support, education, and maintenance of said minor.

Defendant excepted to the rule on the following grounds:

That no claim for alimony was made in the original petition, nor allowed in the judgment thereon, and the same cannot be claimed as an incident to the suit, but must be sued for in a separate proceeding.

That said rule discloses no cause of action.

For answer defendant denied all the allegations contained in the rule, except that he was the father of the minor, Dorothy Collins, and that by final judgment herein rendered the custody of said child was given to the plaintiff.

Respondent averred that by reason of said judgment the support of said child is due by the plaintiff, unless plaintiff should prove in a proper proceeding that she has no means to care for said child.

Respondent further averred that he had no income within the meaning of the law, and should not be condemned for alimony herein, but that he had, however, contributed to the support of his said child beyond his means, and expected to continue to do so, and that, the plaintiff being possessed of ample means and steady income, under no circumstances should the respondent be charged with more than one-half for the support of said child.

The exceptions were overruled, and after trial the rule was made absolute, and the defendant was ordered to pay to the plaintiff one-half of the costs of supporting the minor child, Dorothy Collins, fixed at the sum of \$37.50, to be paid on the 1st day of each and every month.

It appears from the record that after the judgment of separation the plaintiff agreed to renounce the community, and she and the defendant had a full and complete settlement of all their financial matters by notarial act, in which the defendant acknowledged his indebtedness to the plaintiff in the sum of \$12,452.91, and to secure the repayment of the same within one year from the date of the act, together with 6 per cent.

per annum interest thereon from April 1, 1913, payable monthly, defendant pledged and hypothecated to the plaintiff \$39,000 of the capital stock of the Belle-Chase Land Company, Limited, and the defendant agreed and promised to pay said amount within said year, in any and all events, whether said stock proves very valuable or not.

The act provided that at the expiration of the year either party might require the sale of said stock for the best price obtainable, at private sale by mutual consent or by public auction in the absence of mutual consent, and for the distribution of the proceeds of the sale in such manner, as to first satisfy the debt due the plaintiff, with the unpaid interest thereon, and, out of the surplus (if any), to pay to the defendant the sum of \$5,000, with 6 per cent. interest from the date and an amount equal the interest paid or advanced by him personally to the plaintiff from said date, and the remainder, if any, to be equally divided between the parties.

On June 25, 1914, the defendant sued out a rule on the plaintiff to show cause why said certificate of stock should not be sold and the proceeds of the sale distributed in accordance with said notarial agreement between the parties.

Plaintiff excepted to the rule on the ground that plaintiff's remedy was by ordinary process. This exception was sustained by the court, and there was judgment dismissing defendant's rule with costs.

Defendant has appealed from both judgments.

We shall first consider the rule for alimony.

[1] We think that the exception to the proceeding by rule should have been sustained. The demand therein is, by the wife and mother, for a contribution of \$50 per month for the support of the child of the marriage. This demand is not incidental to the suit for a separation from bed and board, but is based on the obligation of the father and mother to support, maintain, and educate the child of the marriage. Civil Code, art. 227.

We find in article 158 of the same Code the distinct declaration that separation or divorce does not affect the rights of the children of the marriage, "but there is no right to any claim on the part of such children, except in the manner and under the circumstances where such claims would have taken place if there had been no separation."

In *State v. Seghers*, 124 La. 115, 49 South. 998, this court held that a parent's obligation to support his child arises from the fact of paternity, as provided by Rev. Civ. Code, art. 227, and is therefore not affected by a divorce, and the assignment of the custody of the child to the wife; that a divorce does not deprive children of rights secured to them by law or by the marriage, and under Act No. 34 of 1902, p. 42, it is a misdemeanor for a father to neglect willfully to sup-

port his child in necessitous circumstances, though he may by divorce or otherwise have lost the custody of the child.

In *Hanagriffe v. Hanagriffe*, 122 La. 1012, 48 South. 438, the plaintiff wife obtained a judgment of final divorce, which awarded her the custody of the children. The district court, however, refused to continue the alimony allowed pendente lite for the support of herself and children, but reserved her right to demand the same in an action instituted for that purpose. Thereafter the divorced wife instituted an action to recover alimony for her children, alleging her inability to support them. The district court condemned the defendant to pay alimony at the rate of \$40 per month, and the judgment was affirmed on appeal. This decision points to a separate action as the proper remedy to obtain alimony from the father after judgment of divorce or separation from bed and board. The record in the case at bar indicates that the mother is supporting the child, and that her demand is really for a contribution from the father for one-half of the estimated cost of permanent support, maintenance, and education.

We think it is manifest that such a demand is not incidental to the suit for separation from bed and board now closed by a judgment of the court. It is unnecessary for the court to pass on the exception of no cause of action.

[2] It is equally clear that the enforcement of the agreement of settlement between the parties is a sequel, and not an incident, to the suit for separation from bed and board, as it was made after the judgment of separation had become final.

It is therefore ordered that the judgment on the rule for alimony be reversed, and it is now ordered that said rule be dismissed as in case of nonsuit, at the cost of the plaintiff in both courts.

And it is further ordered that the judgment dismissing the rule sued out by the defendant be affirmed, at the cost of the defendant in both courts.

On Application for Rehearing.

PER CURIAM. The plaintiff having an income sufficient for her support, and the child being supported by the contributions of both parties, no claims for alimony were made in the proceedings for a separation from bed and board.

After the decree of separation from bed and board, the plaintiff renounced the community, and there was a full and complete settlement of the claims of the wife against the husband. After this settlement the wife by rule in the separation suit sought to compel the husband to contribute a certain sum monthly to the support, maintenance, and education of the child.

The mother being able to support the child, and bound in solido with the father to do

so, the controversy is really between the parents over the question of their respective contributions to their common obligation to support, maintain, and educate the minor.

We know of no law or precedent for proceeding by rule in such a case.

It may be that a wife suing for divorce or separation, and for alimony for herself, may proceed by rule for alimony for her child or children intrusted to her custody, but no such case is here presented.

Rehearing refused.

O'NIELL, J., dissents, being of the opinion that the demand for alimony for the minor child is an incident to the main suit.

PROVOSTY, J., concurs in dissent of O'NIELL, J.

(136 La. 472)

No. 20945.

LAFAYETTE REALTY CO. v. POER.
(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. COURTS \Leftrightarrow 224 — JURISDICTION — SUPREME COURT — LANDLORD AND TENANT.

This court has not jurisdiction of a suit by a landlord to evict a tenant, when the plaintiff alleges that the rental was \$80 a month and that the lease has expired.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 487, 608, 609, 614, 616, 617; Dec. Dig. \Leftrightarrow 224.]

2. APPEAL AND ERROR \Leftrightarrow 791 — JURISDICTION — DISMISSAL.

An appeal must be dismissed whenever it appears that the appellate court has not jurisdiction of the amount in dispute. Therefore the appellee's motion to have the appeal dismissed for want of jurisdiction must be entertained, although it was filed after he had answered the appeal and had prayed that the judgment appealed from be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3138-3136; Dec. Dig. \Leftrightarrow 791.]

3. COURTS \Leftrightarrow 483 — JURISDICTION — TRANSFER OF APPEAL — DISMISSAL.

The Act No. 19 of 1912 gives this court the right to transfer to the Court of Appeal any case within the jurisdiction of that court, but the statute does not compel us to transfer the appeal instead of dismissing it.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1288-1290, 1306; Dec. Dig. \Leftrightarrow 483.]

Appeal from Civil District Court, Parish of Orleans; George H. Theard, Judge.

Summary proceeding by the Lafayette Realty Company against William L. Poer. From a dismissal, plaintiff appeals. Appeal dismissed.

Foster, Milling, Brian & Saal, of New Orleans, for appellant. Hubert M. Ansley, of New Orleans, for appellee.

O'NIELL, J. This is a summary proceeding instituted by the owner of a certain building in New Orleans, to evict a tenant

or sublessee of a portion of the premises. The suit was dismissed on an exception to the summary proceeding, and the plaintiff has appealed.

The defendant has filed two motions to dismiss the appeal. The one based upon the alleged insufficiency of the appeal bond cannot be entertained, because it was filed later than three days after the return day. If it had been filed within the three days, it would be unavailing now because it was waived by the appellee's answer to the appeal, in which he prayed that the judgment be affirmed.

In his second motion, however, the appellee moves to dismiss the appeal on the ground that the amount involved, or the matter in contest, is below the jurisdiction of this court. This cause for dismissing an appeal may be suggested at any time and may even be noticed by the court without any suggestion from the appellee. His answer to the appeal did not waive his right to have it dismissed for want of jurisdiction, because he could not, by his acquiescence or consent, confer jurisdiction *ratione materiae*. The expression in *Holbrook v. Holbrook*, 32 La. Ann. 15, to the effect that a motion to dismiss an appeal for a cause for which we might dismiss the appeal *ex proprio motu* cannot be considered unless filed within three days after the return day, cannot be construed to mean that, if the appellee acquiesces in an appeal, we must consider and decide the case even though we have no appellate jurisdiction.

[1, 2] This is not an ordinary suit by petition and citation. It is an ejectment process, based upon the provisions of Act No. 313 of 1908, instituted by mere motion, on which the defendant was ordered to show cause within four days why he should not vacate the premises occupied by him.

The allegations of the plaintiff's motion, which may be considered pertinent to the question of jurisdiction, are: That the plaintiff purchased the premises from the Whitney-Central Trust & Savings Bank on the 22d of July, 1914; that, before the purchase, the Jackson Brewing Company had held the premises under a lease and had subleased the same to one Charles Schutten for the 40 months commencing on the 1st of June, 1911, and ending on the last day of September, 1914, at the monthly rental of \$450; that, in his sublease, Schutten had bound himself not to sublet the premises or any part thereof without the written consent of the lessor; that, nevertheless, mover (plaintiff) was informed, and therefore alleged, that Charles Schutten had subleased a part of the premises, that is, the third floor and half of the second floor, to William L. Poer at the monthly rental of \$80, from the

1st of October, 1911, to the last day of September, 1914; that this sublease to Poer was made without the consent of the Jackson Brewing Company, or of the former owners of the property, or of the mover (plaintiff); that the sublease to Poer had expired; that there was no renewal of the sublease to Schutten, nor of the sublease to Poer; that, although, in his sublease, Poer had waived the notice to vacate, the mover (plaintiff) served a written notice upon him to vacate, on the 23d of September, 1914, that is, more than 10 days before filing the suit, which notice was disobeyed and disregarded by the defendant.

In his answer, which was filed with the various exceptions, and has not been heard, the defendant contends that his lessor, Schutten, continues to occupy that portion of the premises not occupied by him (defendant), and that, under the terms of his contract with Schutten, he (defendant) has the right to occupy that part of the premises leased by him as long as Schutten continues to occupy the remaining portion of the premises. He alleges that while Schutten continues to occupy the premises, reconduction takes place in his (defendant's) behalf under his sublease of a portion of the premises.

The issue presented by these pleadings is not within our appellate jurisdiction. The plaintiff has not proceeded against the lessee, Schutten, but only against the sublessee, Poer, on an alleged contract of lease at the monthly rental of \$80. It is alleged in the plaintiff's motion that the contract of sublease under which Poer occupies a portion of the premises has expired; hence there is no unexpired term to be considered. In suits by landlords to eject tenants, the jurisdiction of the courts is determined by the amount of the monthly or yearly rental. *R. S. 2156; Lauga v. Baradat*, 127 La. 542, 53 South. 856. The amount of even the yearly rental in this case is below our jurisdiction.

[3] The Act No. 19 of 1912 gives us the right to transfer this case to the Court of Appeal, if that court has appellate jurisdiction; but the statute does not compel us to transfer the appeal. Article 143 of the Constitution provides that the First city court shall have exclusive original jurisdiction of suits by landlords for possession of leased premises when the monthly or yearly rent, or the rent for the unexpired term of the lease, does not exceed \$100. While we are not now called upon to decide the question, we have some doubt that the court which dismissed this suit had jurisdiction to decide it. We have concluded not to transfer the case to the Court of Appeal.

For the reasons assigned, the appeal is dismissed, at the cost of the appellant.

(136 La. 476)

No. 20958.

STATE v. JORDAN et al.

(Supreme Court of Louisiana. Jan. 25, 1915.)

*(Syllabus by the Court.)***1. JURY ~~59~~—JURY COMMISSION—VACATION OF APPOINTMENT—JUDGES.**

The election of a judge of a district court, in succession to one who has resigned, does not vacate the appointments made by the latter to membership on the jury commission, and the commission, so constituted, retains its authority, as such, until its members are removed by the succeeding judge.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. ~~59~~.]

2. JURY ~~59~~—JURY COMMISSIONERS—APPOINTMENT.

An order for the appointment of jury commissioners can have no effect until it has been communicated, by the judge who had the power to make it, to some one else; the proposed appointees being entitled to a hearing.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. ~~59~~.]

3. JURY ~~59~~—JURY COMMISSION—VALIDITY OF ACTS.

Neither the appointment of a new jury commission nor the withdrawal of such appointment can have the effect of vitiating the action taken, prior to such appointment, by the already legally constituted commission.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 268-272; Dec. Dig. ~~59~~.]

Appeal from Twelfth Judicial District Court. Parish of De Soto; John H. Boone, Judge.

Jack Jordan and another were convicted of murder, and appeal. Affirmed.

Elam & Lee, of Mansfield, for appellants. R. G. Pleasant, Atty. Gen., W. M. Lyles, Dist. Atty., of Leesville (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendants Jack Jordan and Bob Jordan prosecute this appeal from a conviction of murder and sentence to death.

The transcript discloses a bill of exception to the overruling of a motion to quash the indictment and a challenge of the array and a bill to the overruling of a motion for new trial.

[1, 2] 1. The matters set out in the motion, made part of the first bill, are, in substance, as follows:

That the grand and petit jurors who acted in the case were drawn, on August 26, 1914, by a commission, appointed by Judge Palmer, the late judge (who resigned), and were illegally drawn, for the reason that the present judge, Boone (who was elected to succeed Judge Palmer), had, prior to the date of said drawing, appointed a new commission, differently composed.

That the procès verbal of the proceedings of the "so-called" commission does not comply with Act 182 of 1914, requiring the drawing of an additional 100 jurors.

That, by reason of the matters complained of, the grand and petit juries by which defendants were indicted and tried were without legal authority in the premises, and defendants have thereby suffered, and will suffer, irreparable injury.

The reasons assigned by the trial judge for overruling the motion are (stating their substance): That the grand and petit juries by which defendants were indicted and tried were drawn by Judge Palmer, before he (Judge Boone) appointed any commission, and were legally drawn; that it is true that he (Boone) issued an order appointing a new commission, upon the day of the drawing; but that it was issued at Many, in the parish of Sabine, while the juries were drawn at Mansfield, in the parish of De Soto; and that, before the clerk of the court had, or could have, received his order, the drawing by the incumbent commission had taken place; and that he withdrew the order, before it had been filed or entered upon the minutes of the court; and, further (quoting):

"Then the only jury commissioners in and for the parish of De Soto were those appointed by my predecessor. They acted and drew the grand and petit juries for said term of court. But, had I allowed the order appointing said new jury commissioners to stand, the situation would have been the same, for the grand and petit juries for the said court were drawn and selected by the legally constituted jury commissioners, at the time they acted. They acted and selected and drew the said juries before the new order appointing new jury commissioners reached the clerk of court. They being the jury commissioners for the parish, at the time they acted, the juries were certainly legally drawn and selected."

[3] The statement of the trial judge, which is sustained by the evidence taken upon the trial of the motion, is conclusive of the question at issue. In *State v. Bradley*, 120 La. 257, 45 South. 120, it was held that jury commissioners continue in office so long as the judge by whom they were appointed, or some succeeding judge, does not, by affirmative action, remove them. From the evidence to which we have referred, it appears quite likely that the incumbent commissioners had completed their work before Judge Boone's order appointing others had been even mailed to the clerk, and, perhaps, before he had written it. It would therefore be immaterial whether he afterwards withdrew the order, or not. But we find nothing in the law or in the reason of the law (Act No. 135 of 1898, § 3) to prevent his withdrawing it, or which would give to either the appointment or the withdrawal of it the effect of vitiating the action, taken prior to the appointment, by the commissioners legally in office.

In the cases of *State v. Taylor*, 44 La. Ann. 783, 11 South. 132, and *State v. Murray*, 47 La. Ann. 912, 17 South. 424 (to which counsel for defendants refer), this court had occasion to construe so much of section 3 of

Acts 44 of 1877 and 89 of 1894, as provides that "the evidence of such selection and appointment (by the judge, or jury commissioners) shall be entered upon the minutes," etc., and held, in the one case, that the requirement was directory, and that the failure of the clerk to make the entry did not nullify the appointments; and, in the other case, that the clerk had made the entry, though not during the session of the court, because the appointments were made during vacation. In both cases, the judge had unburdened his own mind of the appointments, and the commissioners had qualified and acted. In the instant case, if, before the commissioners, then in office, had taken the action here complained of, the judge had made up his mind whom he intended to appoint in their places or had written an order making the appointments, no one knew it but himself, and no order can be given effect so long as all knowledge of it is confined to the person who has the right to give it; for, surely, the prospective appointees are entitled to be heard.

The other points suggested in the motion have been abandoned.

2. The motion for new trial and the bill to the overruling of the same appear to have been predicated on the supposed error in the overruling of the motion which we have thus considered.

Judgment affirmed.

(136 La. 480)

No. 20471.

CALVO v. CITY OF NEW ORLEANS.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS §625 — ORDINANCE—VALIDITY—OPERATION OF BUSINESS.

A city ordinance, which makes it unlawful to establish or operate any sort of business whatsoever on a named public street of New Orleans, is ultra vires of the charter, unreasonable, and invalid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1378, 1379; Dec. Dig. §625.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Injunction by Justin Calvo against the City of New Orleans. From a judgment for plaintiff, defendant appeals. Affirmed.

Andrew M. Buchmann, Asst. City Atty., and Issiah D. Moore, City Atty., both of New Orleans, for appellant. E. A. O'Sullivan, of New Orleans, for intervener. W. S. Lewis, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff is a lessee of property in Carrollton avenue, in the city of New Orleans, in which he conducts a dry grocery. He was arrested for violating a city ordinance which declares it unlawful "to

establish or operate any sort of business whatever on Carrollton avenue." Ordinance New Council Series, 9219, adopted November 20, 1912.

Plaintiff alleges that he has been warned by the city police that they would close his place of business, and he asks the court to enjoin the city and its officers from interfering with him and his property, on the ground that the ordinance referred to is unconstitutional, ultra vires of the commission council, unreasonable, extortionate, and undertakes to deprive him of his property without due process of law.

The city answers that in section 1, par. (e), of its charter (Act 159 of 1912, p. 253), the Legislature has provided that:

"The city shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this state, have been, or could be, granted to or exercised by any city."

And that it is also provided in the charter, section 6, par. 2 (c), that the commission council shall pass ordinances to regulate the location and inspection of "all places of business likely to be or (which may) become detrimental to health or comfort," etc. And further that the commission council adopted Ordinance No. 9219, N. C. S., and forbade the establishment of business houses on Carrollton avenue for the comfort of the residents and property owners on that avenue.

The trial court adjudged the ordinance unreasonable; and the city has appealed.

The Legislature long since authorized the city of New Orleans to regulate the location of stables, dairies, and all places of business likely to be or to become detrimental to health; and in 1902 it increased the authority of the city over "all places of business likely to be or which might become detrimental to health or comfort." A similar provision is in the city charter of 1912. But the city council, while it had such power since 1902, has not attempted to exclude "any sort of business whatsoever on" any street or avenue of the city for the "comfort" of the residents and property owners on that particular avenue, unless the ordinance now under consideration does so. But the Legislature did not intend to give to the commission council any such right in the section quoted from.

Cities have general police powers, and the city of New Orleans is given, in its charter, the right to open and keep open all streets, to suppress nuisances, to regulate the location, inspection and cleansing of dairies, stables, slaughterhouses, certain factories, blacksmith shops, places where dangerous articles may be stored, to close houses and places for the sale of intoxicating liquors where the public safety may require it, to close gambling houses, and other places. It is not given the right to suppress legitimate business on the streets of the city, unless

and until such business has become a nuisance, or it is likely to become detrimental to the health or comfort of the citizens generally.

The ordinance under consideration was not passed for any of these purposes. It declares plainly:

"The object and purpose of this ordinance (is) to confine buildings on said avenue for residential purposes only."

The character of business on Carrollton avenue is not regarded in the ordinance. It (the ordinance) was not adopted to safeguard the public health, safety, morals, comfort, or general welfare. It embraces aesthetic considerations only; and these are not named in the city charter as matters for consideration by the commission council.

The aesthetic does not fall within the exercise of the police power. It is not such a necessity as will authorize the police to interfere with liberty of action and property rights of the individual citizen.

The other ground of defense that "the city shall also have all powers, privileges and functions which, by or pursuant to the Constitution of this state, have been, or could be, granted to or exercised by any city," and that the commission council had the right thereunder to adopt the ordinance, is without merit. Defendant has not pointed the court to any city which exercises the power of prohibiting all business from a public street, and which restricts its use for residential purposes.

Judgment affirmed.

(136 La. 483)

No. 20905.

LEITZ v. CITY OF NEW ORLEANS et al.
(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

MUNICIPAL CORPORATIONS §337 — PAVING CONTRACTS—AWARD—READVERTISEMENT.

Where the lowest bidder to whom contracts for paving have been awarded acknowledged his inability to give satisfactory security, as required by the city charter, the contracts may be awarded to the next lowest bidder without re-advertisement.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 864, 865; Dec. Dig. §337.]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Injunction by Frederick Leitz against the City of New Orleans and others. From judgment for defendants, plaintiff appeals. Affirmed.

Frank Wm. Hart, of New Orleans, for appellant. McCloskey & Benedict, of New Orleans, for appellee Grasser Contracting Co. John J. Reilly, Asst. City Atty., and I. D. Moore, City Atty., both of New Orleans, for appellee City of New Orleans. Denegre,

Leovy & Chaffe, of New Orleans, for appellee Barber Asphalt Paving Co.

LAND, J. "This is a suit to enjoin and restrain the city of New Orleans from awarding certain contracts for street paving and subsurface drainage to the second lowest bidders therefor. * * *

"The facts are that the city of New Orleans advertised for bids for three items of street paving and subsurface drainage, which bids were to be received and opened on July 13, 1914. When the bids were opened it was found that one Preston Herndon was the lowest bidder, and in due course, on July 21, 1914, the commission council of the city of New Orleans adopted three ordinances, accepting the bids of Herndon, awarding him the work, and authorizing the mayor to sign and execute the necessary contracts with him therefor.

"After these ordinances had been adopted, accepting the bids of Herndon, and awarding him the work, but before the contracts had been signed, it developed that Herndon would not be able to furnish security, as required by law, for the faithful performance of the contracts. Upon this fact being called to the attention of the commission council by Herndon, the ordinances adopting his bids and awarding him the work were repealed, and thereupon ordinances were adopted accepting the bids of the Grasser Contracting Company and the Barber Asphalt Paving Company, each for a portion of the work; these companies being the respective second lowest bidders therefor. By these ordinances, the mayor was authorized to sign and execute the necessary contracts with these two companies."

The foregoing statement of the case is copied from plaintiff's brief.

After a hearing the court a qua refused to grant the injunction prayed for, and dismissed the suit. The plaintiff appealed.

The decision of the case hinges on the proper construction of that portion of section 60 of Act No. 159 of 1912 (the present city charter) which reads as follows, to wit:

"Sec. 60. All contracts for public works, or for materials and supplies, ordered by the commission council, exceeding five hundred dollars in amount, shall be offered by the commissioner of public finances by public auction after ten days advertisement, and given to the lowest bidder who can furnish security satisfactory to the commission council; or same shall, at the discretion of the commission council, be advertised for proposals to be delivered to the commissioner of public finance in writing, sealed, and to be opened by the commissioner of public finance in the presence of the commission council, and given to the person making the lowest proposal therefor, who can furnish security satisfactory to the commission council."

The contention of the plaintiff is that under said section—

"when Herndon failed to sign the contracts and furnish security, the matter was ended, and the

only thing left for the commission council to do was to readvertise for bids."

The position of the defendants is that:

"Herndon was not the lowest bidder, for the reason that he could not furnish security satisfactory to the commission council, and that body acted within its powers when it awarded the contracts to the next lowest bidders, who were able to furnish security satisfactory to it."

The only precedent cited by the plaintiff is *Twiss v. City of Port Huron*, 63 Mich. 528, 30 N. W. 177, as holding that:

"Where a city charter required all contracts for public improvements to be let to the lowest bidder, and one of four bidders on a grading contract, 'whose bid was the lowest, was allowed to withdraw the same on the ground of an alleged mistake in amount, and the contract was awarded to the next lowest bidder, without readvertisement, held illegal, and that such readvertisement should have been ordered by the council, which had no power to deprive the city, and the parties who would be assessed, of the benefit of a letting to the lowest bidder.'"

Counsel for the plaintiff says in his brief:

"It is true that in the cited case there was collusion between the two of the bidders, but this fact did not affect the matter according to the court."

The opinion in that case does not set forth the provisions of the charter relative to the letting of contracts for public improvements, but after stating facts, indicating fraudulent collusion between the bidders, and that the lowest bidder had made no mistake as to amounts, proceeded as follows:

"Whether the council knew or did not know these facts is unimportant. They had no power to deprive the city, and the parties who would be assessed, of the benefit of a letting to the lowest bidder. It should have been advertised over again, and the other bidders might have revised their bids."

The same court further held that the proceedings were void because the resolution calling for proposals had not been signed by the mayor, as required by the city charter. One of the four justices dissented. The first section of the syllabus of the case reads as follows:

"Where the charter of a municipality requires that contracts for public improvements be let to the lowest bidder, the city council has no power to release the lowest bidder from his offer without advertising again, and allowing the other bidders to revise their bids."

In the case at bar the city council did not release the lowest bidder on the ground of error and mistake in his proposal as in the case just cited, but he was unable to qualify as such by giving the security required by the city charter.

In *Gibson v. Owens* (1893) 115 Mo. 258, 21 S. W. 1107, the court held, as set forth in the syllabus, that:

"Under an ordinance requiring city contracts to be awarded to 'the lowest reliable and responsible bidder who will sufficiently guarantee the performance of said work,' a city engineer, who has selected the lowest bidder, may, where such bidder refuses to enter into contract and give the guaranty required, award the contract to the next lowest bidder, without readvertising for bids."

On this point the court *inter alia* said:

"We do not think the power of the engineer exhausted when he made the selection among the bidders of the one regarded the lowest. The reliability * * * of the bidder could not then have been determined. This preliminary selection was not a letting of the contract within the fair intent and meaning of the ordinance, but was necessarily conditioned upon compliance on the part of the bidder with the other requirements."

Gibson v. Owens, *supra*, and other cases, have been cited in support of the doctrine that:

"Where the lowest bidder to whom the contract has been awarded fails to comply with the conditions thereof, the contract may be awarded to the next lowest bidder without readvertisement." *A. & E. Enc. of Law* (2d Ed.) p. 1167; *Id.* 1168.

We approve this doctrine as reasonable and as well calculated to avoid unnecessary delays and expenses in awarding contracts for public improvements.

Judgment affirmed.

(136 La. 487)

No. 20944.

HUTTIG SASH & DOOR CO. v. ALLEN MFG. CO., Limited.

In re ALLEN MFG. CO., Limited.

(Supreme Court of Louisiana. Jan. 11, 1915. Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

SALES \Leftrightarrow 347—ACCEPTANCE UNDER PROTEST—WAIVER OF RIGHT—SUBSEQUENT AGREEMENT.

Where the defendant gave an order to the plaintiff for the manufacture of a certain lot of doors, sash, transoms, etc., out of "Western pine," and the plaintiff accepted the order, but manufactured the articles out of "spruce," and shipped them to the defendant, which accepted the articles under protest, reserving its right to claim a certain deduction from the contract price, and the plaintiff refused to allow any deduction on the ground that the term "Western pine" and "spruce" mean the same kind of wood; but thereafter, by agreement of the parties, the defendant paid the contract price, less the deduction claimed, and the question of the deduction was left open to be "adjusted by arbitration or by the courts." *Held*, in a suit by the plaintiff to recover the unpaid portion of the purchase price, that the question of defendant's right to accept the articles, under protest, had been eliminated by the subsequent partial execution of the contract under the agreement of the parties.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 962-972; Dec. Dig. \Leftrightarrow 347.]

Action by the Huttig Sash & Door Company against the Allen Manufacturing Company, Limited. Each party recovered. The judgment for defendant was reversed by the Court of Appeal, and it applies for certiorari or writ of review. Judgment of Court of Appeal reversed, and judgment of district court affirmed.

Herndon & Herndon, of Shreveport, for plaintiff. Thatcher & Welsh, of Shreveport, for applicant.

On Motion to Dismiss.

LAND, J. Plaintiff has moved to dismiss the foregoing application on the ground that the affidavit attached thereto made by F. Thatcher, Esq., attorney for the petitioner, who deposed that the president of the petitioning company was absent from the parish of Caddo, was insufficient, in that it did not state that there was no other officer of said company in said parish authorized to make the affidavit. The motion sets forth that the vice president and the secretary-treasurer of said company were residents of said parish, but does not aver that either of them was present in the parish when the affidavit was made, nor does it show what powers, if any, were conferred by the charter or by-laws on such officers to represent the company in matters of litigation.

The motion to dismiss is therefore overruled.

On the Merits.

Plaintiff sued the defendant to recover the sum of \$275, alleged balance due on account for sash, doors, transoms, etc., manufactured on order, and delivered, and used by the defendant. Plaintiff in its amended petition, alleged that the original order called for "Western pine," and that the material furnished by the plaintiff was in "spruce," synonymous with "Western pine" in the lumber trade.

The account attached to the petition shows that the original amount was \$1,157.87, and that the defendant was credited thereon with \$882.97, leaving a balance of \$275 to the debit of the account.

The defendant filed a voluminous answer, giving all the details of the transaction from the beginning to the end. Defendant averred that the contract called for pine, and not spruce; that the building contractors, to whom the defendant had sold the shipment as pine, rejected the same when they discovered that it was spruce; that defendant at once wired plaintiff its protest, and later wrote that the contractor would not accept the goods unless a deduction of \$325 was allowed; that plaintiff, after a considerable delay, wrote defendant that "spruce" came under the heading of "Western pine," and that the material shipped was in compliance with the order, and refused to make the allowance; that defendant, being unable to procure pine material elsewhere in time to fill his contract with the building contractors, finally allowed them a deduction of \$275, and accepted the shipment under protest, and so notified the plaintiff, defendant reserving the right to hold the plaintiff responsible for said amount. The answer averred that the defendant paid plaintiff's account, less the amount of \$275, which was a reasonable allowance in the interest of both parties to the contract. The answer further averred that plaintiff had failed to comply with its

contract to deliver "Western pine" material, and prayed that plaintiff's demand be rejected, and, in the alternative, for judgment in reconvention against the plaintiff in the sum of \$275, with interest.

The case was tried, and there was judgment in favor of the plaintiff for \$275, with interest and costs, and judgment in favor of the defendant for \$250, with interest and costs on its reconventional demand.

Plaintiff appealed to the Court of Appeal, which reversed the judgment in favor of the defendant. The case comes before us on a writ of review.

The opinion of the Court of Appeal states that the defendant sent the plaintiff its check for \$789.70 in payment of the account due it, after deducting the amount of \$275, and the plaintiff returned the check with the statement that it would accept it in part payment of its account, but not full payment. The court, however, failed to state that the account sued on shows that the amount of the check was subsequently credited to the account of the defendant, leaving a balance of \$275 in dispute.

A letter in the record from the plaintiff to the defendant reads in part as follows:

"August 26, 1911.

"Gentlemen: Your letter of the 24th day is received and contents carefully noted.

"In reply wish to state we are perfectly willing to accept your check for \$789.70 as part payment of your account and leave the amount which you deduct of \$275.00 stand until this matter is either adjusted by arbitration or the courts."

Four days later credit for the amount of \$799.70 was given to the defendant on his account with the plaintiff. This settlement left the plaintiff a creditor for \$275, subject to the defendant's counterclaim for the same amount, and was a practical acknowledgment of defendant's right to accept the goods under protest.

As to the kind and quality of the material to be furnished under the contract between the parties, the Court of Appeal said:

"The only question of fact in the case is whether or not spruce is included in the term Western pine or white pine.

"There were a number of witnesses on this point, and, while the preponderance of the testimony is with the defendant and in support of the negative side of the proposition, there is enough on the other side to make it probable at least that plaintiffs are not acting in bad faith in contending as they do.

"It may be that custom to which they refer prevails to a greater extent in their locality than it does here."

On the law of the case the Court of Appeal held that the contract could not be rejected in part and accepted in part, citing the Am. & Eng. Ency. of Law to the effect that a rejection, to be effectual, must be unconditional, and that any act done by the buyer which he would have no right to do, unless as owner of the goods, amounts to an acceptance.

Defendant claimed the right to accept the

articles under protest, with reservation of his claim for a reduction of the price on account of the defective quality of the material. Plaintiff, in its letter of August 26, 1911, conceded this right, by agreeing to leave the question of the deduction of \$275 to be "adjusted by arbitration or by the courts." This action was instituted for the very purpose of adjusting the matter through the courts. All other questions were settled in August, 1911, by the payment and receipt of the balance of the price of the sale.

It is therefore ordered that the judgment of the Court of Appeal herein be reversed, and it is now ordered that the judgment of the district court herein be affirmed; costs in both appellate courts to be paid by the plaintiff.

(136 La. 491)

No. 20853.

DREYFUS v. AMERICAN BONDING CO.
et al.

(Supreme Court of Louisiana. Nov. 4, 1914.
On the Merits, Jan. 11, 1915. Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR §801 — MOTION TO DISMISS—DETERMINATION.

In determining whether an appeal should be dismissed, this court will not decide or consider an issue raised in the motion to dismiss the appeal, which properly belongs to the merits.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3161-3164; Dec. Dig. § 801.]

On the Merits.

(Additional Syllabus by Editorial Staff.)

2. CONTRACTS §214—BUILDING CONTRACT—CONSTRUCTION—TIME OF PAYMENTS.

Under a building contract binding the contractor to construct eight cottages, "said work" to be done in conformity with the specifications, and to be commenced at once and continued uninterruptedly to completion, and providing, "in reference to each cottage," that one-fifth of the price should be paid when the "building" was framed, one-fifth when it was inclosed, one-fifth when the second coat of plastering was on, one-fifth when the "building" was completed and accepted, and the balance 15 days after completion and acceptance of the "work," such balance was payable 15 days after the completion and acceptance of each building, and the owner was not required to retain it until completion and acceptance of all the buildings.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 980-995; Dec. Dig. § 214.]

3. MECHANICS' LIENS §238 — COMPLETION OF BUILDING — NOTICE — ERROR IN DATE — CONCLUSIVENESS.

That a notice of completion of a building registered by an owner erroneously fixed the date at a date later than the true date did not render premature certain payments made by him less than 45 days after such erroneous date, where they were not made until after the 45 days given materialmen by Act No. 167 of 1912, within which to record their liens.

[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 420; Dec. Dig. § 238.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Action by Jules S. Dreyfus against the American Bonding Company and others. From a judgment for plaintiff, the defendant named appeals. Affirmed.

Solomon Wolf, of New Orleans, for appellant. A. D. Danziger, of New Orleans, for appellee Dreyfus. Fred C. Marx, for appellee Louisiana Cypress Lumber Co., Limited. Dart, Kernan & Dart, of New Orleans, for appellee J. J. Clarke Co.

On Motion to Dismiss the Appeal.

O'NIELL, J. [1] This is a concursus proceeding in which the surety on the bond of the contractor has appealed from a judgment approving the report of the commissioner. The materialmen have moved to dismiss the appeal on the ground that the appellant's exceptions taken to the report do not refer to the findings in favor of the materialmen. If they had taken this view of the exceptions in the district court, they should have moved for a confirmation of the findings in their favor, when the delays for filing exceptions expired. On the contrary, the exceptions were regarded as objections to the findings in favor of the materialmen, as well as the owner of the buildings, and the judgment of confirmation was rendered after a hearing thereon. We will not pass upon the various exceptions to determine a question which may properly be considered on the merits. The motion to dismiss the appeal is therefore denied.

On the Merits.

PROVOSTY, J. Eight cottages having been erected for plaintiff by a contractor, and the unpaid materialmen having recorded their liens, and the contractor having gone into bankruptcy, plaintiff deposited in court the balance due by him to the contractor for the last payment on the last three cottages that were completed, and ruled into court the contractor, the materialmen, and the defendant bonding company, surety on the bond given by the contractor for the faithful performance of the contract and the payment of the materialmen, to litigate inter sese their rights and claims, and prayed for judgment ordering the cancellation of the liens.

The materialmen answered, asking that plaintiff, the contractor, and the bonding company be condemned in solido to pay them the amount of their claims, and that their liens be recognized and enforced on the buildings. The bonding company answered that plaintiff had made certain payments to the contractor prematurely, and should be condemned to account for the amounts thus prematurely paid.

Judgment was rendered ordering the liens canceled, and condemning the defendant bonding company and the trustee in bankruptcy of the contractor in solido to pay to the materialmen the full amount of their

claims. The appeal has been taken by the defendant bonding company alone, and the sole question is as to whether plaintiff made any payments prematurely.

Plaintiff interpreted the contract as requiring him to make payments for each of the cottages separately, whereas the bonding company contends that the eight cottages together constituted one single work, and that the last payment was not due until all eight cottages, or, in other words, the entire work, had been completed; and that, at all events, even if the last payment was due on the cottages separately, plaintiff made it prematurely on three of them.

[2] The contract, leaving out all parts that have no bearing upon the controversy, is as follows:

"The contractor binds himself to construct eight cottages for the plaintiff; said work to be done in conformity with the specifications. He binds himself to begin said work at once, and to continue it uninterruptedly, so as to deliver the same complete on or before * * * under penalty * * * for each day said work shall remain uncompleted, provided that in case said builder be hindered in the construction of said building * * * before the work is completed. * * * The said builder binds himself to remove from the grounds or building all materials condemned by the architect. * * * He shall use due diligence to protect the work from injury. * * * He shall permit the owner to inspect said work or any part thereof. * * * In consideration of the premises, the said owner binds himself to pay to the said party of the second part for the satisfactory execution and completion of said work at the rate of twelve hundred and eighty-seven $\frac{50}{100}$ dollars for each cottage complete, which will be settled in the manner following, to wit: In reference to each cottage:

- "(1) One-fifth when the building is framed.
- "(2) One-fifth when the building is inclosed.
- "(3) One-fifth when the second coat of plastering is on.
- "(4) One-fifth when the building is completed and accepted.
- "(5) One-fifth, being the balance, fifteen days after completion and acceptance of the work, and on production of a certificate from the recorder of mortgages in this city showing that no liens or privileges have been recorded against said building."

Upon the question of whether the fifth payment was due upon each cottage separately as completed and accepted, or only when all eight cottages had been completed and accepted, the learned counsel for the bonding company argues as follows:

"I call the attention of the court to the opening paragraph. The price to be paid is at the rate of \$1,287.50 for each cottage on the satisfactory completion and acceptance of 'the work.' Clearly the word 'work' is used as meaning all the work which is to be done under the contract, namely, the erection of all the buildings.

"The contract then continues that the first four payments on each building are to be made as the building progresses, while the last and fifth payment is to be made 'fifteen days after the completion and acceptance of the work.'

"I submit that the provision referring to the payments establishes the indivisibility of the contract. The contracting parties carefully distinguish between each building specified in the contract and 'the work' as a whole. So it is provided in the contract, after describing where the eight cottages shall be built:

"'Said work' shall be done in strict conformity with the plans and specifications.

"The party of the second part binds himself to begin 'said work'; i. e., of erecting the eight cottages. The penalty established for not completing is for 'the work.' The extension of time which may be granted speaks of 'the work,' and all through the contract the parties speak of 'the work' when they intend to cover all that was to be done under the contract. Thus there was only one set of plans and one set of specifications.

"Only in the provisions relating to the first four payments which are to be made on each one of the cottages is anything said of each 'building' separately.

"We have it, therefore, that not only do the words 'the work' ordinarily include everything that was to be done under the contract, but, more, the parties themselves have established the distinction and consistently speak of 'the work' when they mean everything to be done under the contract, and of the 'building' (in the singular) when they speak of each cottage separately.

"Let us now turn back to the provision about the fifth and last payment, and we will find that it was to be made 'fifteen days after the work was completed and accepted.'

"Not 15 days after each building is completed and accepted, as provided for the fourth payment, but 15 days after 'the work' is completed and accepted.

"When was the work completed and accepted? Certainly 'the work' was not completed and accepted as each cottage was completed and accepted. 'The work' was completed and accepted when the last of the cottages was completed and accepted, and not before. Any single cottage may have been completed and accepted, but the work was not completed and accepted until the last cottage was completed and accepted.

"I now call the attention of the court to this: That every one who furnished material or labor, and who recorded his lien, as well as their respective attorneys, have treated the contract as a single, entire, indivisible one.

"The answers of the materialmen are all in the record, and in each one it is alleged that the material or labor was furnished for the erection, not of any one of the buildings, but for all of them—for the work—and each one claimed a lien, not on any one of the buildings, but on all—on the work.

"The evidence supports these allegations. No furnisher of supplies can or does say that the material furnished by him went into one or the other house. It is entirely probable that the material furnished by one man went into one building, while like material furnished by another man went into another building.

"Under the pleadings and the evidence, the liens rest on all the buildings—on the work—or they do not exist at all.

"The commissioner (the case was referred by the trial court to a commissioner under Act 52, p. 61, of 1912, for a finding on the law and the facts, and the report of the commissioner was adopted by this trial court as the basis of its judgment) saw the difficulty and gave each furnisher of material a lien on all the buildings—on the work.

"I submit that in doing this the commissioner and the court a qua recognized and maintained the indivisibility of the work, for, if they had not, no lien would exist on all the buildings—on the work.

"Suppose I made eight contracts, each for the erection of a single house. The man who furnished material, and could not say for which one he furnished it, would have no lien at all. The court could not give him a lien on all the houses when he furnished it for only one.

"The contractor in purchasing, the materialman in selling, it, all treated the contract as entire and indivisible, and the owner so treated

it, because the moment a lien was filed he stopped payment, without inquiring whether the material had been used on the houses for which he had already paid, or whether it was used on the houses not yet fully paid for, and on which he still owed the last payment.

"The commissioner also treated the contract as entire and indivisible by recognizing the lien on the work.

"If, however, the contract was indivisible as to the materialmen, why was it not so as to the surety?

"It could not be one thing to the materialmen and another thing to the surety, particularly as the latter had assumed a single obligation for one-half of the entire contract.

"The bond of the surety is not for one-half of the price of each building; it is for one-half of the entire amount of the work."

We are not convinced by this argument. The interpretation put upon the contract by the contractor and the materialmen can be binding only upon them, not upon the plaintiff. Moreover, it is doubtful whether these materialmen ever took the trouble to read the contract, well knowing as they did that, if a contract and bond for their protection had not been recorded, they could have recourse against the owner and his buildings, while the contractor had no interest in safeguarding the privilege of the materialmen, and therefore, doubtless, never gave the matter a thought, but simply distributed the materials among the several cottages as best suited his convenience, whereas the plaintiff and the contractor, who put upon the contract the interpretation that it was separate for each cottage, did so with full knowledge and after due consideration of the terms of the contract necessarily, since they could not otherwise have known how the payments were to be made. So far as the attorneys who filed the answers of the materialmen are concerned, the fact that, in claiming a privilege for their clients, they adopted an interpretation by which their clients should have a privilege, rather than one by which they should have none, is not to be wondered at, and is therefore insignificant. The commissioner did not allow the privilege, but, on the contrary, ordered the inscription of it to be canceled.

Besides, this contemporaneous interpretation could only be persuasive. It would not be conclusive. The terms of the contract would still have to be consulted; and we think they clearly indicate, if they do not actually express, an intention that the payments should be made for each building separately. Unmistakably, as the learned counsel of the bonding company has to admit, and does admit, four out of the five payments were to be made on each building separately; and the pertinent inquiry presents itself: What possible reason would the parties have had for a different agreement as to the fifth payment? Again, why fix a price upon the cottages separately, if payment was not to

be made for each as it was completed and accepted. The language of the contract is that the owner is to pay to the contractor \$1,287.50 "for each cottage complete, which will be settled in the manner following, to wit, in reference to each cottage." Then follows the specification of the manner in which the five payments are to be made, with absolutely nothing to indicate that the phrase "in reference to each cottage" does not qualify just as much the manner of the fifth payment as that of the other four. So that the reading is that all five of the payments are to be made "in reference to each cottage," and not, as contended by the bonding company, four of them in that manner and the fifth in a different manner, namely, not "in reference to each cottage," but in reference to the entire work called for by the contract. That the word "work" made use of in the phrase "after completion and acceptance of the work" has reference to the work upon each cottage separately is made manifest by what follows in the sentence, to wit, that the payment is to be made upon "the production of a certificate showing that no liens have been recorded against said building." "Said building" can only mean the separate building that has been completed and accepted and upon which the fifth payment is to be made. It cannot possibly mean the eight buildings.

[3] On the question of whether plaintiff did not make the last payment prematurely upon three of the cottages, even conceding that the payments were due upon each cottage separately as completed and accepted, we deem it unnecessary to go into details.

Under the provisions of Act 167, p. 302, of 1912, materialmen have, for recording their liens against the building, a delay of 45 days from the date of the registry by the owner in the office of the recorder of mortgages of a notice of the completion of the building. In the notice thus registered by the plaintiff a mistake in the date was made by which the date of the completion of the building was erroneously fixed at a later date than the conclusive proof shows was the case. With reference to this erroneous date the alleged premature payments in question were made too soon, but with reference to the true date, as shown by the evidence, they were made only after due, and the whole contention is based upon the supposed conclusiveness of this error upon the plaintiff. The whole and sole purpose of the registration of this notice is that it may serve as a starting point for the delay of 45 days within which the liens must be filed. So long as that purpose is not sought to be defeated, there is absolutely no reason why the owner should be held to be concluded by any errors that may have crept into said notice.

Judgment affirmed.

(136 La. 499)

No. 20699.

THOMAS et al. v. BOARD OF SCHOOL DIRECTORS OF PARISH OF WEBSTER.(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)*(Syllabus by the Court.)***1. STATUTES \S 107 — VALIDITY—SINGLENES OF OBJECT.**

A statute which deals with several branches of one subject does not violate the constitutional provision that it shall embrace but one object.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 121-134; Dec. Dig. \S 107.]

2. STATUTES \S 68 — LOCAL AND SPECIAL LAWS—CONSTITUTION—OPERATION.

Referring to local or special laws, articles 48-50 of the Constitution have no application to a statute which defines and relates to every subdivision of the state except the city of New Orleans.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 70; Dec. Dig. \S 68.]

3. STATUTES \S 109 — TITLE AND SUBJECT-MATTER.

Where the object of an act is otherwise expressed in its title, it is not necessary that the title should expressly declare its object to be to put into effect the article of the Constitution in pursuance of which the statute was enacted.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 136-139; Dec. Dig. \S 109.]

4. SCHOOLS AND SCHOOL DISTRICTS \S 103—SPECIAL TAX ELECTION—TAXPAYERS' PETITION—RECORDING.

It is not required that the petition of the taxpayers of a school district, requesting the board of school directors to call a special tax election, should be recorded, except perhaps in the minutes of the proceedings had at the meetings of the board.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 114, 115, 117, 240-245, 252; Dec. Dig. \S 103.*]

5. SCHOOLS AND SCHOOL DISTRICTS \S 103—SPECIAL TAX ELECTION—BALLOTS—REQUISITES.

In an election in which the taxpayers of a school district vote upon a proposition to levy a special tax to build a schoolhouse, it is not necessary that the location of the proposed schoolhouse within the district shall be stated on the ballots. The taxpayers have all the information required when the printed ballots conform with the requirements of the statute under which the election is held.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 114, 115, 117, 240-245, 252; Dec. Dig. \S 103.]

Appeal from Second Judicial District Court, Parish of Webster; J. N. Sandlin, Judge.

Action by J. Y. Thomas and others against the Board of School Directors of the Parish of Webster. From judgment for defendant, plaintiffs appeal. Affirmed.

Lynn K. Watkins, of Minden, for appellants. Thomas W. Robertson and Stewart & Stewart, all of Minden, for appellee.

O'NIELL, J. This is a suit by three taxpayers of Leton school district No. 25, of the

parish of Webster, to annul a special election held on the 15th of July, 1913, at which a 10-mill school tax was authorized to be levied upon all taxable property within the district for five years, and to annul the ordinance of the parish board of school directors, levying the tax.

Judgment was rendered in favor of the defendant, declaring the election proceedings and the tax valid, and the plaintiffs have appealed.

The causes of nullity of the proceedings are alleged to be:

First. That the Act 256 of 1910, as amended in 1912, has more than one object, some of which objects are not expressed in its title; and that therefore it violates article 81 of the Constitution of this state.

Second. That the Act 256 of 1910 is a local and special law, because it does not embrace in its provisions all parts of the state; and that it therefore violates article 48 of the Constitution, prohibiting the enactment of local or special laws for holding or conducting elections, or regulating the management of public schools, or building or repairing schoolhouses, or raising money for school purposes.

Third. That the statute does not expressly put into effect article 232 of the Constitution, which, without an enabling act, is inoperative.

Fourth. That the Act 256 of 1910, as amended, conflicts with article 49 of the Constitution, prohibiting the enactment of special laws by the repeal of general statutes.

Fifth. That the statute is in conflict with article 48 of the Constitution, prohibiting the Legislature from making corporate bodies and constituting the parish school board a body corporate with the right to form subdivisions of the parish with the right to levy and collect taxes.

Sixth. That notice of the intention to introduce the acts of 1910 and 1912 was not published as is required of local or special laws by article 50 of the Constitution.

Seventh. That the petition of the property taxpayers, requesting the governing authority of the school district to call the special election, was not preserved or recorded.

Eighth. That the petition was not signed by the taxpayers in person nor with their authority, and that the names on the petition do not constitute one-fourth of the property taxpayers of the district.

Ninth. That the resolution of the board, calling the election, did not state the years for which the tax would be levied, nor the total amount to be collected.

Tenth. That the ballots used at the election did not show on their face the location and site of the school building.

Eleventh. That the commissioners and clerk of election were not sworn as required by law.

Twelfth. That no list was kept, nor were any returns made, to show who voted or the result of the election.

Thirteenth. That, if the proceedings were valid, there were enough legal votes against the tax not counted, and enough votes illegally counted in favor of the tax, to change the result; and that the proposition to levy the tax was in reality defeated.

In this connection, it is alleged:

That the vote of John G. Colbert against the tax was arbitrarily reduced from \$1,120 to \$750, and, after he was permitted to vote the latter sum, his vote was not counted.

That Joe M. Elkins was entitled to vote and offered to vote against the proposition an assessment of \$375, but was not permitted to vote; and that he then offered to cast the vote for his wife, Mrs. C. E. Elkins, but, although fully authorized by her, he was not allowed by the commissioners to vote. That Walter Lewis was permitted to vote, and did vote in favor of the tax an assessment of \$490, in the name of his wife, without any authority from her; and that Martin Slack voted in favor of the tax an assessment of \$170 in the name of Miss S. E. Anderson, without any authority from her.

That the votes cast by T. W. Perkins and John S. Lee in favor of the tax should each be reduced \$80 on account of property sold by them before the election.

That I. R. Slack, who voted an assessment of \$500 in favor of the tax, was not legally registered, having made his mark to the application to register.

That the name of M. A. Blackwell, who voted an assessment of \$360 in favor of the tax, was written on the typewritten list of voters with a pencil by some unknown person, and was not on the certified list.

And that R. N. Lee, who voted an assessment of \$720, C. W. Whitaker, who voted an assessment of \$630, C. W. Johnson, who voted an assessment of \$350, D. F. Shaw, who voted an assessment of \$650, Mont. D. Lee, who voted an assessment of \$390, C. C. Lee, who voted an assessment of \$400, and J. S. Lee, who voted an assessment of \$350, all voting in favor of the tax, were not resident taxpayers of the Leton school district.

Fourteenth. That there was no procès verbal made of the recount of the ballots and canvass of the returns by the school board, and therefore none was recorded or filed with the clerk of court or the secretary of state.

Fifteenth. That W. I. Dickinson, Mrs. A. O. Dickinson, and E. D. Kight assessed for property in the district amounting, respectively, to \$330, \$110, and \$430, were opposed to the levy of the tax, but were, by a promise of being put into another district and relieved of the tax, induced not to vote against it.

The defendant, in answer to the suit, denied every material allegation in the petition, and, in a supplemental answer, alleged that

J. W. Murrell voted, not only the property assessed to him, but also that belonging to Ben Shockly; and that the property assessed to Nora Lee was not voted by her in person nor by written proxy to any one else; and that these votes were therefore illegally cast and counted against the tax.

Opinion.

[1] The first contention of the plaintiffs is that the Act 256 of 1910, as amended by the Acts of 1912, violates article 31 of the Constitution. We assume that the reference to the Acts of 1912 is to Act No. 218 of that year, amending sections 2 and 31, and repealing sections 26 and 29 of Act 256 of 1910.

The title of the statute in question is:

"An act to define the subdivisions of the state; to prescribe the mode and manner of calling, holding, and promulgating the result of elections held therein for the purpose of levying a special tax or forced contribution, or issuing bonds; to provide for the manner of levying and collecting such tax and issuing bonds; to provide the manner of the payment of the interest and principal of such bonds; to fix the limit in which elections may be contested; to make this act applicable to levee districts in certain cases; to provide a penalty for the violation of this act; and to repeal any provisions of municipal charters and all laws, in conflict with this act, and all laws on the same subject, and exempting the city of New Orleans and Parish of Orleans from the operation of this act."

We find no merit in the contention that the statute contains provisions which are not embraced within the object expressed in the title, or that the act has more than one object. A statute which deals with several branches of one and the same subject does not violate the constitutional provision that it shall embrace but one object. *Police Jury v. Colomb*, 20 La. Ann. 198; *Weise v. Thibaut*, 34 La. Ann. 556; *State v. Brown*, 41 La. Ann. 771, 6 South. 638; *Board v. Fowler*, 50 La. Ann. 1358, 24 South. 809; *Gunter v. Dale County*, 44 Ala. 639; *Bissell v. Heath*, 98 Mich. 472, 57 N. W. 585; *City of South St. Paul v. Lamprecht*, 88 Fed. 449, 81 C. C. A. 585; *Cooley's Const. Lim.* (7th Ed.) pp. 117-202.

[2] Articles 48, 49, and 50 of the Constitution of this state expressly refer only to local or special laws. The Act 256 of 1910 is not a local or special law. It defines and pertains to all of the subdivisions of the entire state outside of the city of New Orleans, and its provisions relate generally to every subdivision of each class. Hence there is no merit whatever in the second, fourth, fifth, or sixth attack upon the constitutionality of the Act 256 of 1910 as amended by the Act 218 of 1912.

[3] The statute of 1910 put into effect the provisions of article 232 of the Constitution of 1898, providing for the levy of a special tax within a school district or other subdivision of the state. And the title of the act sufficiently expresses that object, without referring to the number of the article of the Constitution.

[4] Referring to the seventh contention made in the plaintiffs' petition, we do not find any requirement, in the Act 256 of 1910 nor in the amending act of 1912, that the petition of the taxpayers, requesting the calling of the election, shall be recorded or preserved in any particular place or manner. The petition of the property taxpayers, in this instance, was preserved and recorded in the minutes of the proceedings of the parish board of school directors, and is in the record before us. We are of the opinion that all the requirements of the law in this respect were complied with.

There is no proof in the record to support the plaintiffs' eighth contention, that the signatures on the petition requesting the school authorities to call the election are not the genuine signatures of the taxpayers whose names appear upon the list certified by the clerk of court. Nor is it true that the petition is signed by less than one-fourth of the property taxpayers. The document and evidence on it show that it is signed by 22 of the 74 taxpayers in the district.

As to the ninth contention, the statute only requires that the resolution calling the election shall state the rate, object, and purpose of the tax, and the number of years it is to run, and, if the proposition be to incur a debt and issue negotiable bonds, the proposition submitted must state the object of the debt, the number of years it is to run, and the rate of interest to be paid thereon. The resolution contained all that was required.

[5] There is no merit in the tenth objection. It was not necessary that the proposed location of the school building should be stated on the ballot. The ballots used are in the form prescribed in section 8 of the statute and gave the voters all the information required by the law.

The clerk and commissioners administered the oath to each other; and, as section 10 of the statute expressly authorizes them to administer the oath, there is no merit in the plaintiffs' contention that the clerk and commissioners were not properly sworn.

The allegation that no list was kept, and that no returns were made, to show who voted or the result of the election, is unfounded in fact.

We come now to the plaintiffs' allegations challenging the correctness of the returns:

John G. Colbert, who was permitted to vote under protest, was a witness for the plaintiffs and testified that he had sold out his business and his household effects and left the parish of Webster six months before the election, with the intention of residing elsewhere permanently, and that he instructed the assessor not to assess him for a poll tax in Webster parish, as he would pay it in the parish into which he had removed. The protest against his voting in this election in Webster parish was therefore properly sustained.

Joe M. Elkins, as a witness for the plaintiffs, testified that he told the commissioners he was authorized verbally by his wife to vote the amount of property assessed to her. He admits that he had no property assessed to him and had no written proxy from his wife. He voted under protest, but there was no assessment stated on his ballot, and it was properly thrown out.

The ballots cast for and in the name of Mrs. G. A. Lewis and of Miss S. E. Anderson do not appear to have been cast by proxy. On each ballot is written the name of the lady and amount of her assessment, and there is no evidence in the record that the votes were not cast by them in person, respectively.

In support of the contention that the votes of T. W. Perkins and John S. Lee should be reduced \$80 each, it is shown that each of them sold 40 acres of land in the year 1913 before the election. But it also appears that they continued to be property taxpayers and that their assessment was not reduced. However, these complaints, if sustained, would not affect the result of the election.

I. R. Blackwell was a registered voter, and his ballot was properly counted. It is shown by the testimony of the deputy clerk of court, who made up for the clerk and ex officio register of voters the list of persons entitled to vote, that the name of M. A. Blackwell was omitted from the list by accident. He was a registered voter and taxpayer in the district, and, when it was discovered that his name was omitted from the list, the clerk or deputy clerk of court authorized one of the commissioners of election to add the name to the list.

The record discloses that the school district was regularly enlarged before the election was called, and that R. N. Lee, C. W. Whitaker, C. W. Johnson, D. F. Shaw, M. D. Lee, C. C. Lee, and J. S. Lee, were resident taxpayers of the district.

The procès verbal of the recount of the ballots and canvass of the returns appears in the record, and there is no proof that it has not been recorded in the manner provided by law.

W. E. Dickinson and E. D. Kight, as witnesses for the plaintiffs, testified that they did not offer to vote, because, on the suggestion of Mr. Dickinson, certain persons favoring the tax promised to try to have them put into another district and relieved from the tax. They admit that these parties were in good faith and tried to bring about the change in the district, and that no fraud was practiced upon the taxpayers. It is also shown that the members of the school board made no representations whatever to prevent any taxpayer from voting against the tax, and did not persuade any one to vote for the proposition or to refrain from voting against it.

Our conclusion is that the election and all

proceedings had in connection therewith were entirely regular and legal and that the tax authorized thereby is valid.

The judgment appealed from is therefore affirmed, at the cost of the appellants.

(136 La. 508)

No. 20916.

MARTEL v. PETERMAN, Sheriff, et al.
(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 150—RIGHT OF APPEAL—PARTIES IN INTEREST.

An appeal will be dismissed where the appellant has no interest in the suit; his interest, as plaintiff, having been seized and sold to the defendant in the cause, and confusion having taken place prior to the time of taking the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 934-946; Dec. Dig. \S 150.]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; T. M. Milling, Judge.

Action by J. Sully Martel against Wilson T. Peterman, sheriff, and others. From an adverse judgment, plaintiff appeals. Appeal dismissed.

See, also, 66 South. 381.

Edward N. Pugh, of Donaldsonville, for appellant. Emmet Alpha, of Franklin, for appellee E. Robichaux.

On Motion to Dismiss Appeal.

SOMMERVILLE, J. The interest of plaintiff and appellant in this injunction suit was seized and sold to Eusebe Robichaux, one of the defendants. Robichaux, as substituted plaintiff, moved the court to dissolve the injunction feature of the suit, and it was so ordered. Thereupon Martel, the original plaintiff in the cause, took the appeal now before us for consideration, and Robichaux, the substituted plaintiff in the cause, moves to dismiss the appeal on the ground that the appellant is without interest in the case, and further that the appeal is frivolous; and he asks for damages.

The rights of Robichaux, as the substituted plaintiff in the cause, have been recognized by the trial court, and again by this court in the case with the same title, wherein Robichaux made application for a mandamus to compel the district judge to dismiss the main suit on the motion of Robichaux, the substituted plaintiff. The mandamus was made peremptory. 136 La. —, 66 South. 381.

Only parties in interest are entitled to appeals to appellate courts; and as the rights of Martel, the plaintiff, have been acquired by Robichaux, one of the defendants, he (Martel) had no interest in the suit or the judgment at the time he appealed. Confu-

sion took place when the defendant acquired the rights of the plaintiff in the cause; and it remained only for the suit to be dismissed. The motion of appeal from the judgment setting aside the injunction feature of the suit should not have been allowed.

The court will take cognizance of the judgment heretofore rendered by it between the same parties with reference to the same cause. The main demand has been ordered dismissed, on application of the substituted plaintiff in the cause, and the injunction or auxiliary proceeding fell with it.

The appeal will be dismissed, but without damages, as there is no amount in dispute in the suit.

Appeal dismissed at cost of appellant.

O'NIELL, J., takes no part.

(136 La. 509)

No. 21004.

STATE v. GASPAR.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. STATUTES \S 109, 110½—RE-ENACTMENT—TITLE—SUFFICIENCY.

The title of an act which provides for the re-enactment and amendment of a named section of a prior act is sufficient when the amendment is germane to the subject covered in the original section.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. \S 136-139, 161, 162, 163; Dec. Dig. \S 109, 110½.]

2. GAME \S 4—GAME LAW—VALIDITY—CONFLICTS.

A section of an act which gives to sportsmen the right to hunt game between November 1st and February 15th does not conflict with or destroy another section which gives to dealers the right to sell game between December 15th and February 15th.

[Ed. Note.—For other cases, see Game, Cent. Dig. \S 3; Dec. Dig. \S 4.]

Appeal from Criminal District Court, Parish of Orleans; A. C. O'Donnell, Judge.

A demurrer to an affidavit charging William Gaspar with selling river ducks during the closed season was sustained, and the state appeals. Reversed, and affidavit reinstated.

R. G. Pleasant, Atty. Gen., Harry Gamble, Asst. Atty. Gen., and Chandler C. Luzenberg, Dist. Atty., and J. Arthur Charbonnet, Asst. Dist. Atty., both of New Orleans (John Dymond, Jr., P. S. Benedict, and A. Giffen Levy, all of New Orleans, of counsel), for the State. Henriques & Otero, of New Orleans, for defendant.

SOMMERVILLE, J. Defendant demurred to an affidavit charging him with selling river ducks during the closed season, on the grounds that sections 13 and 16 of Act 204 of 1912, as amended by sections 8 and 11 of Act 47 of 1914, are violative of article 31 of the state Constitution; and that sections 8

and 11 are in conflict and destructive of one another.

The second ground of the demurrer was sustained, and the state has appealed.

The court says that sections 8 and 11 are in conflict with one another, destructive of each other, and are therefore unconstitutional. This is error. The conflict of sections or of statutes does not render them unconstitutional. No provision of the Constitution is violated by the General Assembly when it adopts acts which cannot be harmonized, or when the later enactment repeals the former expressly or by implication.

[1] Defendant argues that section 11 of Act 47 of 1914, p. 114, is violative of article 31 of the Constitution, in that it is not covered by the title, which provides that it is "an act to amend and re-enact sections . . . 16 . . . of Act 204" of 1912.

Section 16 provided:

"That it shall be unlawful for any person, firm or corporation, to sell, offer for sale, or have in possession for sale, any game birds protected by law except wild sea and river ducks, coots or poule d'eau, snipe, geese, brant and rail."

It is re-enacted in its entirety; and it is amended by adding that dealers may sell wild sea and river ducks, coots or poule d'eau, snipe, geese, brant, and rail between December 15th and February 15th. It is further amended by providing a penalty; and, again, by adding:

"Any birds so sold, held in possession, or offered for sale contrary to the provisions of this section shall be confiscated by the conservation commission of Louisiana."

It is contended that this last sentence is not covered by the title, which reads that the act is to amend section 16 of the former act.

The matters are germane; and it was clearly permissible to amend the former section of the law, which forbade the having in possession of certain game birds, by providing what disposition should be made of them when found in the possession of any one.

The ruling of the trial court was correct on this point.

[2] Defendant argues that sections 8 and 11 of Act 47, 1914, pp. 113 and 114, are in conflict, and destructive of each other.

Section 8 is prohibitive in its scope. It forbids all persons to have game birds in possession from February 15th until November 1st of each year. That is the closed season to sportsmen and to dealers. While section 11 permits dealers to sell wild sea and river ducks, coots or poule d'eau, brant, and rail between December 15th and February 15th. There is no conflict between the sections. Sportsmen may hunt game birds and have them in possession, but not for sale, between November 1st and February 15th, under section 8; while dealers may hunt game birds and offer them for sale only between December 15th and February 15th under section 11.

It is ordered, adjudged, and decreed that the judgment appealed from be reversed; that the affidavit against accused be reinstated; and that the trial be proceeded with in accordance with law.

(136 La. 512)

No. 21007.

STATE v. BARNES.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

WITNESSES \S 350 — CROSS-EXAMINATION — EXTENT.

When, for the purpose of establishing the credibility of a state witness who is a stranger in the community, the district attorney has examined him with regard to his reasons for leaving another state, the defendant's counsel has the right, on cross-examination, to ask the witness whether there is a charge of murder pending against him in the state whence he came.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. $\S\S$ 1140-1149; Dec. Dig. \S 350.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Gus Barnes was convicted of retailing intoxicating liquors without a license, and appeals. Reversed and remanded for new trial.

Murff & Roberts, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen. (Wm. A. Mabry, Dist. Atty., of Shreveport, and G. A. Gondran, of New Orleans, of counsel), for the State.

O'NIELL, J. The defendant was convicted of retailing intoxicating liquor without a license, and was sentenced to pay a fine of \$500, and be imprisoned five months, and, in default of the payment of the fine, to serve an additional term of six months in the parish prison, and to be worked on the public works of the parish.

The first bill of exceptions recites that the state witness Will Lloyd, the only witness who testified that he saw the defendant sell the intoxicating drink, was questioned by the district attorney about the various persons for whom he had worked in Mississippi, and, on cross-examination, the defendant's counsel asked the witness, in order to show his unworthiness of belief and want of credibility, the following question, viz:

"Are you not charged with murder in Mississippi, and did you not leave Mississippi on that account and come to the state of Louisiana?"

The district attorney objected to the question and to the answer to be elicited, on the ground that it was irrelevant.

The trial judge, in his statement per curiam, says that the witness was asked whether he was charged with murder in the state of Mississippi, and the court sustained the objection to the question, on the ground that a charge or an indictment would not create a presumption of guilt; but the trial judge says

that he does not remember that the witness was asked about leaving Mississippi on account of being charged with murder.

As the statement of what occurred was not taken down by the clerk, as provided in the Act No. 113 of 1896, we must accept the statement or recollection of the trial judge of the question that was asked the witness. He says he would have permitted the defendant's attorney to ask the witness whether he had left Mississippi on account of being charged with murder, because the state had proven by the witness that he came from Mississippi to Louisiana to look for work in his special line, and evidence that he had left Mississippi for another reason would have been admissible to rebut the testimony given by him in his examination in chief.

Under the circumstances related above, evidence that the witness was under a charge of murder in Mississippi was admissible for the purpose of contradicting his statement that he had come from Mississippi to Louisiana for some other reason. The evidence might not have been as effective as would have been his admission that he left Mississippi because a charge of murder was pending against him; but the sufficiency of the evidence must not be confused with its admissibility.

The second bill of exceptions was reserved to the judge's ruling, sustaining the same objection made by the district attorney to the following question propounded to the same witness on cross-examination, viz:

"Have you not been guilty of carrying concealed weapons since you have been in the parish of Caddo?"

And the third bill of exceptions was reserved to the ruling of the trial judge sustaining a similar objection made by the district attorney to the following question propounded to the same witness on cross-examination, viz:

"Did you not assault a man about two months ago in the city of Shreveport with a pistol and attempt to shoot him in the house of Carrie Davis, and were you not prevented from doing so by bystanders?"

These questions were not objected to on the ground that they might compel the witness to incriminate himself.

In the case of *State v. Waldron*, 128 La. 559, 54 South. 1009, 34 L. R. A. (N. S.) 809, it was said:

"Where a defendant in a criminal prosecution tenders himself as a witness in his own behalf, he is subject to the same treatment as any other witness; and, as a litigant or defendant in a criminal prosecution who tenders a witness thereby, in effect, vouches for his credibility, and asks the court and the jury to accept him as a person to be believed, the opposing litigant, or the state, has the right to elicit further information about him than is conveyed by the mere name that he chooses to give, and may ask him such questions as: 'Are you not an escaped convict?' 'Are you not a fugitive from justice?' 'Under what name did you register at the ——— Hotel?' etc.

There is no good reason why the foregoing rule should not apply to the principal witness for the prosecution, especially one who is a stranger, and of whose worthiness or unworthiness of belief the court or jury may be entirely ignorant.

The syllabus in *State v. Casey*, 110 La. 712, 34 South. 746, is as follows:

"The accused took the stand to testify as a witness in his own behalf. On cross-examination he was asked by the prosecuting attorney: 'How many times have you been in trouble?' Which question and the answer thereto were objected to as attacking the character of the accused, which had not been put at issue. The ruling of the trial judge was that, while not admissible to impeach the character of the accused, the question and its answer were proper for the purpose of affecting his veracity as a witness."

In *State v. Callian*, 109 La. 346, 33 South. 363, it was said:

"A defendant in a criminal prosecution, who becomes a witness in his own behalf, may be asked on cross-examination, with a view of testing his credibility, how many times he has been before the court."

In *State v. Southern et al.*, 48 La. Ann. 629, 19 South. 668, it was said:

"It is competent to ask the defendant, who is a witness in his own behalf, if he is charged with other offenses, and whether there are other bills pending against him. The inquiry into a witness' credibility is always permitted."

We have no reason to doubt that the defendant's counsel were in good faith in asking the questions which they put to the state's witness Will Lloyd, on cross-examination. Their manifest purpose was to show that the witness was a refugee from justice and a thoroughly disreputable character, unworthy of belief. It cannot be assumed that the defendant would have been convicted on the testimony of a witness such as the defendant sought to prove the state's only so-called eye witness to be.

The verdict and sentence appealed from are annulled and set aside, and the case is remanded to the district court for a new trial.

(136 La. 516)

No. 20987.

STATE v. WARTON.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. JURY \S 72—PANEL—DISCRETION—CRIMINAL PROSECUTION.

Under Act No. 182 of 1914, the state and the defendant in a criminal prosecution have not the right to determine how many tales jurors shall be summoned for a particular occasion; and the state and the defendant have not the right to determine how many of those whom the judge has seen proper to order summoned shall be present, or reported on, before the selection of those needed for the jury may be proceeded with. The whole matter is left to the discretion of the judge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. \S 333-347; Dec. Dig. \S 72.]

2. CRIMINAL LAW §814—REFUSAL OF INSTRUCTIONS—ISSUES.

The refusal of a trial judge to charge a jury in a criminal case concerning the law with reference to a matter which was not involved in the trial of the cause will be sustained.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979—1985, 1987; Dec. Dig. §814.]

Provosty, J., dissenting.

Appeal from Fifteenth Judicial District Court, Parish of Allen; A. M. Barbe, Judge.

Ben Warton was convicted of manslaughter, and appeals. Affirmed.

Williams & Williams, of Lake Charles, for appellant. R. G. Pleasant, Atty. Gen., and T. A. Edwards, Dist. Atty., of Lake Charles (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Plaintiff was charged with murder, and convicted of manslaughter. His appeal is based upon two bills of exceptions.

[1] The first bill was reserved to the ruling of the court on the objection of defendant to proceed with the trial of the cause until all of the ten tales jurors who had been summoned to complete the venire should have answered to their names in open court. The tales jurors appear to have been summoned under the provisions of Act No. 182 of 1914, p. 341; and under the authority of State v. Anderson, 136 La. —, 66 South. 966, the ruling of the district judge is sustained.

[2] The next bill is reserved to the refusal of the trial judge to charge the jury on the law of self-defense. The reasons given by the trial judge for refusing the requested charge are that:

"The evidence did not show a case of self-defense. Defendant himself did not testify to a state of facts that would have supported a plea of self-defense, and a proper charge thereon. He testified that he did not know who fired the shot, himself or his brother, with whom he was struggling; that it was, in fact, an accidental discharge. The evidence disclosed the fact that defendant had gone to his brother's stable where the killing occurred to get his trunk, after he had been discharged, armed with a pistol; that he drew the pistol on his brother; that he had turned away and had gone about 10 or 12 feet when he was seized by his brother, who attempted to take the pistol away from him; that in the struggle which ensued the pistol was discharged. Defendant did not testify that he was in any fear; that the attack was violent; or that he was resisting force with force. From all the evidence, I arrived at the conclusion that the defendant was the aggressor in the commission of an unlawful act at the time the fatal shot was fired."

It appears from the statement by the court that the defense was not that of self-defense, but that of an excusable homicide, the result of an accident. What constitutes self-defense is a question of law for the court. 21 Cyc. 1028. The Constitution (article 179) makes the jury the judges of the law and the facts as to the question of the guilt or in-

nocence of the accused; but points of law, wherein the guilt or innocence of the accused is not drawn in question, are for the court, and not for the jury, to dispose of, such as admissibility of evidence, the charge of the court, etc.

The case of State v. Baptiste, 105 La. 661, 80 South. 147, involves the accidental killing of a third person where the defendant claimed to have been acting "as in case of self-defense" from an assault by another person. And there the defendant specially pleaded self-defense. He claimed to have been resisting force with force. He shot at one person with the intention of disabling him, and he accidentally killed another. And the trial court charged the jury with reference to the law of self-defense, but insufficiently. In the instant case the statement contained in the bill of exceptions, as well as that in the per curiam of the court, shows that the plea of defendant was accidental or excusable homicide, resulting from a tussle between defendant and his brother for the possession of a gun, which defendant had drawn upon his brother. It appears that the defendant did not testify that he was in any fear when his brother sought to disarm him, or that the attack upon him was violent, or that he was resisting force with force; on the contrary, he testified that he did not know who fired the shot which resulted in the death of the deceased, who was a bystander, and that the discharge of the gun was accidental. There was no evidence to the effect that he (defendant) had discharged his gun in self-defense.

In the case of State v. Kellogg, 104 La. 580 (593 et seq.), 29 South. 285, wherein we reviewed and sustained the ruling of the trial court on the question of admissibility of evidence in support of a plea of self-defense, it was shown that the accused was the aggressor at the beginning of the difficulty; and it had not been shown that defendant, after commencing the attack, and before the killing, had withdrawn in good faith from the position of aggression and assault which he had assumed, with the intention of abandoning his original purpose, and that he had clearly informed the deceased that he was seeking peace; and the reasons there given for refusing to receive the evidence have application here to the refusal of the judge to charge the jury on the law of self-defense, where no such plea had been made, and where no evidence had been received which would go to support such a plea.

If there were any evidence, however slight, tending to support the plea of self-defense, or on any material fact, it would have been the duty of the trial judge to have charged the jury on the law with reference thereto; but, in the absence of such evidence it is clearly not the duty of the trial judge to charge the jury with reference to the law on

matters not pleaded or testified to on the trial.

There is no error in the judgment appealed from.

Judgment affirmed.

PROVOSTY, J., dissenting, thinks the charge should have been given.

(136 La. 519)

No. 20846.

BLOOMFIELD v. THOMPSON, Com'r of
Public Utilities, et al.

In re THOMPSON, Com'r of Public Utilities,
et al.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS §131—MEMBERS OF PUBLIC BELT RAILROAD COMMISSION—POWER TO APPOINT—VALIDITY OF ORDINANCE.

Ordinance No. 74 of the commission council of the city of New Orleans, providing that the commissioner of public utilities shall be ex officio a member of the public belt railroad commission, and shall be acting president of said commission, and shall have active charge, management, and control of the detail operations, etc., of said railroad, violates the provisions of the constitutional amendment of 1908, which vest in the mayor of the city of New Orleans the power to appoint the members of said commission, with the consent of the council.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 305, 378; Dec. Dig. §131.]

2. OFFICERS §9—FILLING OF OFFICE—CONSTITUTIONAL PROVISION.

Where the Constitution has provided the method of filling offices, the Legislature may not provide for filling them in any other manner.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 11; Dec. Dig. §9.]

Action by William B. Bloomfield against W. B. Thompson, Commissioner of Public Utilities, and another. A judgment for defendant was reversed by the Court of Appeal, and defendants apply for certiorari or writ of review. Affirmed.

I. D. Moore, City Atty., John F. C. Waldo and John J. Reilley, Asst. City Attys., all of New Orleans, for applicants. Charles Rosen, of New Orleans (James D. Hill, of New Orleans, of counsel), for Wm. B. Bloomfield and New Orleans Board of Trade, Limited, plaintiff and intervener.

LAND, J. This case was before us on a writ of certiorari, and judgment was rendered in favor of the plaintiff on December 15, 1913. A rehearing was granted on the suggestion of the defendants that the Constitution of 1913 had vested appellate jurisdiction over this cause in the Court of Appeal for the parish of Orleans, and on rehearing the proceedings were dismissed without prejudice to the right of the litigants on

either side. See *Bloomfield v. Thompson*, 134 La. 923-950, 64 South. 853.

[1] Plaintiff thereupon appealed to the Court of Appeal for the parish of Orleans, which, for reasons assigned, rendered judgment as follows, to wit:

"It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that a peremptory injunction issue herein restraining and prohibiting the defendant, W. B. Thompson, commissioner of public utilities, and the city of New Orleans, from executing or enforcing the provisions of Ordinance No. 74, Commission Council Series, which ordinance is hereby declared null and void. It is further ordered that the city of New Orleans pay all costs."

The defendants applied to this court for a writ of certiorari or review, which was granted.

In 1904 the council of the city of New Orleans enacted Ordinance No. 2683, N. S., amending and re-enacting Ordinance No. 147, N. S., of August 7, 1900, creating a board of commissioners to be known and styled as the "Public Belt Railroad Commission" for the city of New Orleans, to be composed of the mayor of the city of New Orleans, and 16 resident taxpayers and electors of said city, to be appointed by the said mayor, by and with the approval of the council of the city of New Orleans. The ordinance provided that 11 of the members of said commission should consist of members of certain business exchanges, boards, and unions, and should be appointed on their recommendation, and that 5 members should be appointed from the citizens of New Orleans at large, 3 from above, and 2 from below, Canal street. The ordinance further provided that the commission should organize by selecting a president pro tem., a secretary-treasurer, an industrial commissioner, an auditor, and a general manager, and that the president pro tem. should be a member of the commission, and should have active charge, control, management, and supervision of the business of said commission, subject to the direction of the commission; and that the manager should be at all times subject to the supervision and control of the president pro tem.

This ordinance thus vested the executive powers of the commission in its president pro tem., subject, however, to the direction of the commission.

The commission thus organized proceeded to construct the contemplated belt railway, and had made considerable progress in the work, when, in 1908, it became evident that the construction and equipment of the railway would require a great deal more money than the city was able to provide for that purpose. The commission decided to raise the necessary funds by means of a bond issue; and the Legislature, by Act No. 179 of 1908, p. 256, authorized the city of New Orleans to issue \$2,000,000 of 5 per cent. bonds, for the purpose of constructing, maintaining,

and operating the said public belt railway system. The act was a proposed constitutional amendment, which was ratified by a vote of the people in November, 1908, and the amendment was incorporated in the Constitution of 1913 as article 323, under the caption of "Public Belt Railroad Bonds." The last sentence of article 323 reads as follows:

"All the provisions hereof shall constitute a contract between the holder of the bonds issued under Act 179 of 1908 and of this title, the state of Louisiana, the city of New Orleans and the board of commissioners of the port of New Orleans."

Section 7 of the amendment of 1908, as incorporated in article 323 of the Constitution of 1913, reads, in part, as follows:

"The city of New Orleans shall construct, equip, maintain and operate said public belt railroad system of the city of New Orleans through and by means of such board or commission as may have been or may be organized by the city of New Orleans, the members of which shall be appointed by the mayor of the city of New Orleans, with the consent of the council, the powers, duties and functions of which shall be prescribed by the city of New Orleans. * * * The control, administration, management, and supervision of the construction, maintenance, operation and development of the public belt railroad of the city of New Orleans shall be exclusively vested and remain in such board or commission, which shall always be separate and distinct from that of any railroad entering the city of New Orleans."

When the amendment of 1908 was adopted the belt railroad was under the control and management of a commission organized in 1904 under Ordinance No. 2683, N. C. S. This commission continued in control and management of said belt railroad until January 23, 1913, when the council of the city of New Orleans adopted Ordinance No. 74, C. C. S. Relative to this ordinance, this court, in *Bloomfield v. Thompson*, 134 La. 980, 931, 64 South. 856, said:

"It amends Ordinance No. 2683, New Council Series of 1904, by adding the commissioner of public utilities to the membership of the public belt railroad commission, and by abolishing the office of president pro tem. and creating, in its place, that of acting president, and by providing that the commissioner of public utilities shall be acting president of the commission; and it then provides as follows:

"The commissioner of public utilities of the city of New Orleans shall, as aforesaid, be the acting president of the commission. In the absence of the president (that is, the mayor), he shall preside at all meetings. He shall have active charge, management and control of the detail operations of the belt railroad system, and the heads of the several departments of accounting, operation and engineering shall report to him and take instructions from him. He shall report to the commission and keep the same fully advised of all matters falling within his management, and shall be the agent through whom the general directory powers of the commission shall be executed."

By the same ordinance the general manager charged with the physical construction, maintenance, operation, and development of the public belt railway was at all times made subject to the supervision and control of the acting president of the commission.

Plaintiff sued to annul said Ordinance No. 74, on the ground that after the issue of bonds under the aforesaid amendment of 1908 the city council was without authority to divest the exclusive control of the public belt commission over the public belt railway, or to reorganize the commission. The first contention was sustained in *Bloomfield v. Thompson*, supra, and the second was not passed upon.

As already stated a rehearing was granted in said case, and the proceedings were finally dismissed for want of jurisdiction in this court; and the plaintiff thereupon appealed to the Court of Appeal, which rendered judgment in his favor.

The decree of the Court of Appeal was based on the proposition that the appointment of the defendant by the council as an ex officio member of the commission was null and void, because by the constitutional amendment of 1908 the power to appoint the members of the commission was vested in the mayor of the city of New Orleans. All the judges of the Court of Appeal concurred in the opinion and decree. Judge Clalborne assigned additional reasons to the effect that Ordinance No. 74 violated the contract with the bondholders by attempting to divest the commission of its exclusive control, supervision, and management of the affairs of the public belt railroad.

The contention of the defendants that the appointment of the commissioner of public utilities by the city council with the approval of the mayor is equivalent to his appointment by the mayor with the consent of the council reverses the respective functions of the mayor and the council as prescribed in section 7 of the constitutional amendment of 1908, now article 323 of the Constitution of 1913. The Court of Appeal said:

"But the mere statement of the case makes it manifest that the ordinance violates the provisions of the statute, since the commissioner of public utilities becomes a member of the board by virtue of the ordinance, instead of by appointment of the mayor, as required by the statute."

The statute thus referred to is Act No. 179 of 1908, which became a constitutional amendment in said year. We may add that this amendment conferred on the city council no other power, quoad the appointment of members of said commission, than that of confirmation or rejection.

[2] It is well settled that:

"Where the Constitution has provided the method of filling offices, the Legislature may not provide for filling them in any other manner than that directed by the Constitution." 28 Cyc. 1369.

It has also been held that:

"An ordinance which assumes to transfer the power of appointment to persons other than those upon whom it has been committed by charter is invalid." 28 Cyc. 406.

The authorities cited by counsel for the defendants have no application to the case at bar, where the method of appointing mem-

bers of the commission is specially prescribed by the organic law.

The power to reorganize the commission does not vest any jurisdiction in the council to appoint the members thereof, or to administer the belt railroad otherwise than through a commission appointed by the mayor with the consent of the council.

It goes without saying that the powers conferred on the council by the present city charter (Act No. 159 of 1912, p. 253) must be subordinated to the provisions of the constitutional amendment of 1908 relative to the public belt railroad.

The further contention of the defendants that the issue decided by the Court of Appeal is not covered by the pleadings is without merit, because the plaintiff and intervenor alleged:

"That said Ordinance No. 74 is illegal, unconstitutional, null, and void, for the same reasons hereinabove alleged against Ordinance No. 1; and said commission council was and is without authority to make said commissioner of public utilities a member of said public belt railroad commission, and vest in him the powers conferred by said ordinance."

The judgment of the Court of Appeal is based on the proposition that the ordinance violates the provisions of the constitutional amendment of 1908, because the commissioner of public utilities became a member of the board by virtue of the ordinance, instead of by appointment of the mayor. No other issue was decided by the Court of Appeal, and, as we affirm the judgment, it is unnecessary for this court to consider other points discussed by counsel.

Judgment affirmed.

(136 La. 526)

No. 20961.

DUVALL v. LOUISIANA WESTERN R. CO.

In re DUVALL.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

CARRIERS §219—SHIPMENT OF LIVE STOCK — DAMAGES — LIABILITY OF DELIVERING CARRIER—EVIDENCE.

In the case of a railroad interstate shipment of live stock, which was delivered in bad condition, owing to delays in transportation and want of proper attention to the animals, the delivering carrier will not be held responsible in damages to the shipper, where the evidence shows that said carrier was not responsible to any appreciable extent for delay in transportation, and not at all for want of proper attention to the animals.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 950, 951; Dec. Dig. §219.]

Certiorari to Court of Appeals, Parish of Acadia.

Action by Elsie Duvall against the Louisiana Western Railroad Company. Judgment for defendant in the Court of Appeals, and

plaintiff applies for certiorari or writ of review. Affirmed.

See, also, 65 South. 104.

M. I. Varnado, of Crowley, for applicant. Philip S. Pugh and Lawrence H. Pugh, both of Crowley, for respondent.

LAND, J. The cause was originally decided by the Court of Appeals in favor of the defendant, but a rehearing was granted, and thereupon the said court certified to the Supreme Court the following question:

"In a case like this, where plaintiff proves only that the damages occurred somewhere between the point of shipment and the point of delivery, but fails absolutely to show that the damages occurred to the stock while it was in the custody of the defendant company and whilst it was being transported over its line, or where the proof fails to show on which of the intermediate railroad lines the damage was inflicted on the stock, is not plaintiff, under such a state of facts, by virtue of the Carmack amendment, relegated for recovery to a suit in damages against the initial carrier?"

We answered the question in the negative, for the reasons that the Carmack amendment (Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. 1913, § 8592]) did not take away the legal right of the plaintiff to sue the defendant for damages to the stock inflicted on its own line, through its own negligence, and did not abrogate the rule of evidence that goods received in good order by the initial carrier are presumed to have been received in like good order by the succeeding carrier, and that a delivery in bad order by the terminal carrier raised the presumption that the injury occurred on the delivering carrier's line. See *Duvall v. Louisiana Western Ry. Co.*, 135 La. 189, 65 South. 104.

After receiving these instructions the Court of Appeals again rendered judgment in favor of the defendant.

The case is before us on a writ of review granted on the application of the plaintiff, who complained that said judgment was rendered contrary to the instructions of this court.

Our learned brothers below based their judgment on the allegations of plaintiff's petition and on the evidence, as shown by the following extracts from their opinion:

"Here, plaintiff admits that the said stock was fed at Houston, Tex., although he does not say that they were watered, and on this branch of his demand seems to pitch his action on the fact that they could have been delivered at Crowley in a shorter time than was taken to transport them to that point. The record shows, however, that the stock was properly cared for at Houston, where they were delivered to the defendant company for transportation to Crowley. It is shown that they were carried to Echo practically on schedule time, as the freight was delayed only a little over one hour, and that from Echo they were conveyed on schedule time to Crowley, the point of destination."

"Even if the animals had been delayed between Houston and Crowley, though fed at Houston, which plaintiff admits, but not watered there, which he does not allege, still how

could this court fix the amount of damages these animals suffered for such delays and want of water or insufficient attention between the two points. This damage would have to be proportioned to the damage which plaintiff alleges that the stock suffered for want of food, water, rest, and (from) delays all along the various railroad lines from Clarence, Okl., to Crowley, La."

The preponderance of the evidence supports the foregoing statement of facts. It was proven that the animals were watered, fed, and rested at Houston, Tex., before delivery to the defendant, which safely transported and delivered them at Crowley about one hour and a half behind schedule time.

The only damages claimed are for delay in transportation and want of proper attention to the animals.

This brief delay could not have appreciably changed the condition of the animals. The plaintiff might have sued the initial carrier, and recovered on the facts disclosed by the record.

Judgment affirmed.

(136 La. 528)

No. 21075.

BASS v. YAZOO & M. V. R. CO.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW — 305 — VENUE — 3 — DUE PROCESS — LOSS OF SHIPMENT — OPERATION OF STATUTE.

A statute conferring jurisdiction of a certain class of cases upon a court elsewhere than at the domicile of the defendant relates only to the remedy, and applies to a case in which a plea to the jurisdiction of such court was pending, but not tried, when the statute went into effect.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 925-927; Dec. Dig. — 305; Venue, Cent. Dig. § 2; Dec. Dig. — 8.]

(Additional Syllabus by Editorial Staff.)

2. CONSTITUTIONAL LAW — 309 — "DUE PROCESS OF LAW."

"Due process of law" only means due notice and opportunity to be heard.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 929, 930; Dec. Dig. — 309.]

For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

Certified from Court of Appeal, First Circuit.

Action by B. A. Bass against the Yazoo & Mississippi Valley Railroad Company. From a judgment of dismissal, plaintiff appeals to the Court of Appeal, which certifies two questions to the Supreme Court. Questions answered in the affirmative.

Kilbourne & Walker, of Clinton, for plaintiff. H. H. Kilbourne, of Clinton, for defendant.

O'NIELL, J. This is a suit for damages alleged to have been sustained as a result of negligence on the part of the defendant

railroad company in the alleged failure to deliver in good condition several car loads of cattle shipped by the plaintiff from the parish of East Feliciana, La., to a firm in East St. Louis, Ill. The suit was filed in the district court of the parish of East Feliciana on the 25th of March, 1914. On the 5th of May, 1914, the defendant, whose domicile is in New Orleans, filed a plea to the jurisdiction of the court.

While the defendant's plea to the jurisdiction was pending, and before it was heard in the district court, the law was amended by Act No. 80 of 1914, approved July 6th of that year, so as to confer upon the district court at the place of shipment jurisdiction of such a case as this.

On the 14th of November, 1914, after the statute of that year had gone into effect, the defendant's plea to the jurisdiction was heard and sustained by the district judge; and, from the judgment dismissing his suit, the plaintiff appealed to the Court of Appeal of the First Circuit.

[1] Under the provisions of article 101 of the Constitution, the Court of Appeal has certified the following questions to this court, asking for instructions, viz.:

(1) Does the jurisdiction conferred upon the court at the place of shipment, by Act No. 80 of 1914, apply to a cause of action existing at the time the statute was enacted?

(2) Did the statute give the court jurisdiction of the case that was pending when the statute was enacted?

Under the provisions of Act No. 182 of 1908, amending and re-enacting Act No. 93 of 1888, a suit of this character might have been instituted at the place at which the freight was to be delivered, or at the domicile of the carrier, at the option of the plaintiff. Until the enactment of the statute of 1914 there was no authority for instituting a suit of this character at the place from which the freight was shipped. Act No. 80 of 1914 amended and re-enacted Act No. 182 of 1908 so as to authorize the institution of a suit of this character at the place at which the freight was to be delivered, or at the place from which it was shipped, or at the domicile of the carrier, at the option of the plaintiff.

Act No. 80 of 1914 refers only to the remedy, and there can be no constitutional objection to its applying to a case in which the plea to the jurisdiction had been filed, but not tried, when the statute went into effect.

[2] "Due process of law" only means due notice and opportunity to be heard. The district court was vested with jurisdiction of the case when the plea to the jurisdiction was heard. The dismissal of the suit could accomplish no good purpose, because the plaintiff would have the right to file it again immediately. To apply the statute to this suit that was pending when the law was

enacted would not be giving the act a retroactive or retrospective effect. The promulgation of the law was full notice to the defendant, and the latter's failure to try the plea to the jurisdiction until after the statute of 1914 had gone into effect placed the defendant in the same situation as if the defendant had waived the plea to the jurisdiction.

We answer both questions in the affirmative.

(136 La. 531)

No. 20436.

Succession of **SERRES**.

(Supreme Court of Louisiana. March 2, 1914.
On the Merits, June 29, 1914. On
Rehearing, Feb. 8, 1915.)

(Syllabus by the Court.)

On Motion to Dismiss.

1. APPEAL AND ERROR ¶640—INCOMPLETE TRANSCRIPT—DISMISSAL.

Where a transcript of appeal is filed, from which several documents are missing, but the appellant obtains a writ of certiorari and completes the transcript within three days after the return day, the appeal will not be dismissed because of the incomplete transcript filed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2788, 2829; Dec. Dig. ¶640.]

2. APPEAL AND ERROR ¶660—COMPLETION OF TRANSCRIPT—CERTIORARI—DISMISSAL OF APPEAL.

The fact that one applying for a writ of certiorari to a lower court to complete a transcript does not allege that it is not his fault that the transcript is incomplete is no reason for setting aside the writ and dismissing the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2829, 2844-2847; Dec. Dig. ¶660.]

On Rehearing.

3. WILLS ¶525—CONSTRUCTION—BEQUEST.

Where the testator declares that the first legatee is his only child and that he gives and bequeaths to her all that the law requires, and gives the balance of his estate to her and another legatee jointly, the first bequest is of the third of the estate reserved to an only child as a forced heir.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1129-1139; Dec. Dig. ¶525.]

4. BASTARDS ¶13—LEGITIMIZATION—WILLS.

The testator's acknowledgment, in a nuncupative will by public act, that the legatee is his child, is a sufficient acknowledgment to convert an illegitimate legatee from a bastard into a natural child, entitled to receive by the will one-fourth of the testator's estate if he leaves only legitimate ascendants or brothers or sisters or descendants of brothers or sisters, or one-third of his estate if he leaves only more remote collateral relations.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 16, 17; Dec. Dig. ¶13.]

5. WILLS ¶229—CAPACITY OF LEGATEE—RIGHT TO OBJECT.

A legatee who is not a relation of the testator has no right to question the capacity of a colegatee to receive under the will on the ground of illegitimacy.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. ¶229.]

Provosty, J., dissenting in part.

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Succession of Jean Serres. From a judgment sustaining exceptions to petition of Mrs. Catherine Dautch Bordes, she appeals. Affirmed on rehearing.

See, also, 66 South. 342.

Dufour & Dufour, of New Orleans, for appellant. C. C. Friedrichs and Harold A. Moise, both of New Orleans (W. S. Parker, of New Orleans, of counsel), for appellee.

On Motion to Dismiss Appeal.

BREAUX, C. J. [1] On motion to dismiss appeal taken by Mrs. Catherine Dautch Bordes.

The gravamen of the motion is that defendant in motion does not have the least ground for an appeal; in the second place, that a party to an appeal, intending to use the record upon which a former appeal has been taken, should obtain the court's permission on motion. Lastly, that the appeal bond is insufficient.

There was neglect and oversight in confecting the record of appeal, and, while there was cause of complaint at first on the part of the appellee, the documents not copied at first in the transcript have since been copied, and the copies now form part of the transcript. The copies were brought up to this court in due time. The transcript was filed in this court on the 28th day of January, 1914. The motion to dismiss the appeal because of want of copies of the proceedings was filed on the 30th day of the same month, and, on the day following, the clerk of court made his return and produced the following copies, which he annexed to and attached as part of the transcript.

(1) Motion of Mrs. Catherine Dautch Bordes and Pierre Bordes.

(2) Petition for registry and execution of will for confirmation of executor for letters, for an inventory and order of said petition.

(3) Exception to petition of Mrs. Catherine Dautch Bordes.

(4) Judgment sustaining exception.

(5) Reasons for judgment.

(6) Notarial will.

If copies are filed in due time, there is no good ground to have the appeal dismissed.

As these documents were filed within three days after the transcript had been filed, from no point of view can the appeal be dismissed.

The original transcript, although defective, was amendable. Had it been defective so as not to be a record at all, a complete transcript might have been filed at the date that the copies before mentioned were filed.

The appeal was made returnable by the district trial judge on the 28th day of January, 1914. We have seen that the copies, a list of which is given above, were filed within the three days after the return day. That was all-sufficient.

The appellant, in order to meet objection urged by plaintiff in motion to dismiss the appeal, obtained a writ of certiorari to complete the record.

[2] The appellee objects and asks that no effect be given to the writ issued to the clerk to complete the record because, as alleged by appellee, appellant did not set out the grounds which show that the irregularities in the transcript arose through no fault on his part.

The clerk had delivered a transcript which was duly filed with the certificate sufficiently full, as it referred to another case on appeal, owing to the fact, we infer, that appellant desired to use another transcript already filed.

It did not contain certain copies. Appellant, doubtless fearing that his appeal would be dismissed, filed the copies in due time, and, in addition, sued out a writ of certiorari. Although he did not allege that it was not his fault that the transcript was not complete, there was nothing to give rise to the inference that he was at fault, as charged by the appellee.

The writ of certiorari was issued and has been executed; the papers are all before the court and were all timely filed: We therefore cannot dismiss the appeal.

For reasons stated, it is ordered, adjudged, and decreed that the motion to dismiss is overruled.

On the Merits.

PROVOSTY, J. The decedent made his will providing as follows:

"I, Jean Serres, declare that I was married twice, once to Anna Dautch, now deceased. We had three children. Two died without issue. The living child is Marie Serres, wife of Louis Bordes. And my second wife, born Barbara Cook, lived with me, and has been unheard from for about twenty-five years, and I had no issue from said marriage.

"I give and bequeath to my daughter Marie Serres, wife of Louis Bordes, all that the law requires, and the balance of my estate, I give and bequeath to my daughter Marie Serres, wife of Louis Bordes, and Catherine Dautch, wife of Pierre Bordes."

Mrs. Catherine Dautch, wife of Pierre Bordes, has brought this suit to have the court decree that the separate legacy to Marie Serres, wife of Louis Bordes, is inoperative; and that, as a consequence, the whole estate has passed to herself and Marie Serres Bordes jointly under the bequest of "the balance of my estate." Her contention, duly covered by allegations of her petition, is that Marie Serres Bordes was an illegitimate child, to whom the law did not "require" the testator to bequeath anything; and that therefore, by giving her "all that the law requires," he gave her nothing.

An exception of no cause of action was sustained by the trial court, and the plaintiff has appealed.

In support of this exception, the defendant, Mrs. Marie Serres Bordes, contends that the

plaintiff is without standing to sue for the reduction of said donation; that only forced heirs can sue for the reduction of a testamentary donation. C. C. 1504; Succession of Desina, 123 La. 469, 49 South. 23. And, again, that the plaintiff shows no pecuniary interest in the present suit, and that a person without a pecuniary interest cannot maintain an action. And, finally, that the subsequent marriage of her parents and the acknowledgment which her father made of her in his will had the effect of legitimating her.

The first of these contentions loses sight of the distinction between a suit in reduction of a donation, and a suit, such as the present, where the object is to have the court decree that no donation at all has been made. A suit in reduction of a donation is predicated upon some right in existence at the time the donation was made, and which has been violated by the donation. This happens when the testator has disposed of more than the law allows him to dispose of. The instant suit is predicated upon the alleged fact that no donation at all has been made. It is merely a suit to have the will interpreted. Its theory is that this will must be interpreted as if, instead of reading, I bequeath "all that the law requires," it read, I bequeath nothing. That, as the law requires nothing to be given, the giving of all that the law requires is the giving of nothing. That the will must be interpreted as if it read: I give my estate jointly to Marie Serres and Catherine Dautch, except in so far as the law may have made it obligatory upon me to give a certain portion to Marie Serres Bordes.

The contention that the plaintiff in this suit shows no interest is a begging the question. Success in the present suit would increase her legacy by one-half of the legacy she is attacking.

We pass, then, to the third contention of defendant, that she was legitimated as an effect of the subsequent marriage of her parents and of the acknowledgment which her father made of her in his will.

Articles 198 and 200 of the Code read as follows:

"Art. 198. Children born out of marriage, except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally acknowledged them for their children, either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself."

"Art. 200. A natural father or mother shall have the power to legitimate his or her natural children by an act passed before a notary and two witnesses, declaring that it is the intention of the parent making the declaration to legitimate such child or children."

Under the first of these articles, the acknowledgment must have been made "either before their marriage by an act passed before a notary and two witnesses, or by their con-

tract of marriage itself." This was not done in this case.

Under the second of these articles, the acknowledgment must have been made by a notarial act in which the father has declared that it is his intention to legitimate the child. The will in the instant case was by notarial act, but it does not contain the declaration that it was the intention of the testator to legitimate the child. It makes no declaration at all on the question of illegitimacy. It does not declare that the defendant was born in wedlock; and, as the testator knew the contrary (if we take the allegation of plaintiff's petition for true, which must be done for the purpose of the trial of this exception of no cause of action), we must assume that he either did not intend to be understood as declaring that the child was legitimate; or, if he so intended, then, that he was under the mistaken impression that a child born before marriage became legitimate as an effect of the subsequent marriage. The supposition that he was under that impression is rendered probable by the fact that, as appears by the will, he was under the impression that the law required him to dispose of a certain portion of his estate in favor of defendant. But the fact remains that this will makes no express declaration either of the legitimacy of defendant or of an intention to legitimate her. The nearest it comes to making this declaration is that it gives rise to the inference that the testator was under the impression that his subsequent marriage had legitimated her, and that he therefore considered her to be legitimate.

But if this will had contained the most formal and express declaration that the child was legitimate, this would not have fulfilled the requirement of said article 200. The requirement of that article is, not that the parent shall declare the child to be legitimate, but that he shall declare his intention to legitimate the child.

There is quite a difference, psychologically, between the acknowledgment, or declaration, that a certain condition of things exists, and the expression of a desire, or intention, to bring about the existence of a certain condition of things. A father might, as a truthful person, have to admit the legitimacy of a child, whom, if illegitimate, he might be entirely unwilling to legitimate. But, putting that aside, as being more or less of a refinement, and dealing with this case broadly from the standpoint of the interpretation which our jurisprudence has placed upon said article 200, we do not think that the expressions of this will can be held to fulfill the requirement of said article. In the case *Succession of Llula*, 41 La. Ann. 90, 6 South. 556, this court said:

"In *Dupe v. Caruthers*, 6 La. Ann. 156, it was said, in alluding to the intention of the Legislature in adopting the articles of the Code relating to the acknowledgment and legitima-

tion of children born out of marriage: * * * But we know the objects of the Legislature: In the first place, to honor matrimony, which is of such incalculable importance to society; and, in the next place, to discourage concubinage, which is the cause of much dissoluteness and evil. To prevent it the Legislature held out the strongest motive which can influence a parent—the legal disinherison of his offspring, unless he avows his shame before a notary public and witnesses, or in the face of the church.

"The object of the law was fully carried out when Joseph Llula, obeying those strong motives alluded to by the court, appeared before E. A. Peyroux, notary public, avowed his shame publicly in the presence of two witnesses, and then and there, still further obeying his strong natural impulses, legitimated his daughter, thus removing, as the reward of his public avowal, the stain of illegitimacy from his daughter Louisa, and giving her the rights in law of a child born in wedlock."

This is the interpretation which, rightly or wrongly, this court has heretofore, in these two sharply contested cases, placed upon this article, and it will now be for the Legislature to change this article if a different effect is desired to be given to it.

The judgment appealed from is therefore set aside; and the exception of no cause of action is overruled; and the suit is remanded, to be proceeded with according to law. Mrs. Marie Serres Bordes to pay the costs of this appeal.

On Rehearing.

O'NIELL, J. [3] After a careful reconsideration of this case, we have concluded that this will is not to be interpreted as if the testator had said:

"I give my estate jointly to Marie Serres Bordes and Catherine Dautch Bordes, except in so far as the law makes it obligatory upon me first to give a certain portion to Marie Serres Bordes."

If the testator had thus declared merely that Marie Serres Bordes was his only child and as such was entitled (under article 1493 of the Civil Code) to one-third of his estate, that declaration would not have been a bequest to Marie Serres Bordes; and if, as the plaintiff alleges, she was not legitimate nor legitimated, her father's declaration that she was entitled to inherit one-third of his estate would avail her nothing under the law. But the testator did not stop at the statement that Marie Serres Bordes was his only child, and that he was forbidden to dispose of her legitimate portion of his estate. He went further and said:

"I give and bequeath to my daughter, Marie Serres, wife of Louis Bordes, all that the law requires, and the balance of my estate I give and bequeath to my daughter, Marie Serres, wife of Louis Bordes, and Catherine Dautch, wife of Pierre Bordes."

If the allegations of the plaintiff's petition are true, the law did not require the testator to give Mrs. Marie Serres Bordes anything. But what difference does that make if the law did not forbid him to give her two-thirds of his estate? As a matter of fact, the law does not require a testator to give a portion

of his estate to his legitimate child. The law only requires him to reserve the portion due to the legitimate child. Hence if the testator had merely reserved the portion which he thought Mrs. Marie Serres Bordes was entitled to inherit as a forced heir, her right to inherit it would depend upon whether she is or is not in fact a forced heir.

If Mrs. Marie Serres Bordes was born before the marriage of her mother to the testator, he knew it. Hence it must be assumed that the testator believed that his subsequent marriage to the mother of Mrs. Marie Serres Bordes had the effect of legitimating his daughter; or it may be that he desired merely to acknowledge her to be his child, without making any allusion to the fact that she was born before his marriage to her mother. Whatever may have been in the mind of the testator regarding the status of the legatee whom he acknowledged to be his only child, we must interpret the bequest according to the rules of construction, and then determine whether the plaintiff has a right to contest it.

Article 1712 of the Civil Code provides:

"In the interpretation of acts of last will, the intention of the testator must principally be endeavored to be ascertained, without departing, however, from the proper signification of the terms of the testament."

To hold that the expression, "I give to my daughter all that the law requires," must be interpreted as a gift of nothing, because the law required the testator to give her nothing, would be adhering too rigidly to the terms of the testament and departing entirely from the manifest intention of the testator. A disposition must be understood in the sense in which it can have effect, rather than that in which it can have none. R. C. C. 1713. From the subsequent bequest of the balance of his estate, it is plain that the testator intended the first bequest to be of something—not nothing. And from the declarations made by the testator as a preface to the disposing clauses of his testament, we are forced to the conclusion that he intended the first bequest to be a legacy of the portion of his estate which an only child would be entitled to inherit as a forced heir. That declaration was:

"I, Jean Serres, declare that I was married twice, once to Anna Dautch, now deceased. We had three children. Two died without issue. The living child is Marie Serres, wife of Louis Bordes. And my second wife, born Barbara Cook, lived with me, and has been unheard from for about twenty-five years, and I had no issue from said marriage."

Then immediately follows the will, viz.:

"I give to my daughter, Marie Serres, wife of Louis Bordes, all that the law requires; and the balance of my estate, of all kind and nature, I give and bequeath, share and share alike, to my daughter, Marie Serres, wife of Louis Bordes, and Catherine Dautch, wife of Pierre Bordes."

That was the same as to say: I give to my daughter all that the law requires me to reserve for her as a forced heir.

We would not be justified in assuming that the testator would not have given his daughter the portion of his estate reserved to her as a forced heir if the testator had not believed that she was a forced heir, because, if she was born before the marriage of her parents, her father knew it, and therefore did not make the bequest to her, under an error of fact. We must also assume that he knew the law or had legal advice. If, however, he made the bequest under the erroneous belief that she was legitimated by his marriage to her mother and was entitled to inherit one-third of his estate as a forced heir, we would yet have no right to assume that he would not have made the bequest to her except for his ignorance of the law. On the contrary, it must be assumed that he would not have acknowledged her as his child if he had not intended to give her the portion of his estate which the law would have reserved to her if she was his legitimate child.

Our conclusion is that the testator intended to give, and did give, to Mrs. Marie Serres Bordes what the law would have reserved to her if she was the legitimate daughter and forced heir of the testator—that is, one-third of his estate—and that he bequeathed only the remaining two-thirds of his estate to Mrs. Marie Serres Bordes and Mrs. Catherine Dautch Bordes; one-third to each.

Assuming—as we have to assume in deciding whether the plaintiff's petition discloses a cause of action—that the allegations are true that Mrs. Marie Serres Bordes is the daughter of Jean Serres and Anna Dautch, and that she was born before the marriage of her parents, we adhere to the opinion that the marriage of her parents did not legitimate her if she was not legally acknowledged by them, either by an act passed before a notary public and two witnesses before the marriage, or in the contract of marriage itself. R. C. C. 198; Succession of Vance, 110 La. 765, 84 South. 767; Landry v. American Creosote Works, 119 La. 231, 43 South. 1016, 11 L. R. A. (N. S.) 387.

[4] On the rehearing of this case, the plaintiff's counsel contend that the defendant is not only not a legitimated child, but that she is not even an acknowledged or natural child, and that she is therefore incapable of receiving anything under the testament of her father. Hence they argue that, under the doctrine of accretion, the plaintiff, as one of the universal legatees, is really entitled to the entire estate, although she is claiming only one-half of it. They refer to article 1707 of the Civil Code, which provides that legatees shall have the benefit of accretion when a legacy is bequeathed to several persons conjointly; and counsel rely upon the interpretation put upon this article of the Code in the case of Mackie v. Story, 93 U. S. 589, 23 L. Ed. 986, and by this court in

Lebeau v. Trudeau, 10 La. Ann. 164; City of New Orleans v. Hardie, 43 La. Ann. 257, 9 South. 12; and Succession of Villa, 132 La. 714, 61 South. 765.

This proposition is untenable under the allegations of the plaintiff's petition. All that the law requires, to convert a bastard into a natural child, is that the child be acknowledged by his or her father by a declaration executed before a notary public and two witnesses, if it was not made in registering the birth or baptism of the child. R. C. C. 202 and 203. The rights conferred by such acknowledgment are not to be confused with the right to alimony, which alone an unacknowledged child may acquire by proof of his or her paternal descent, under article 209 of the Civil Code. This article only applies to illegitimate children who have not been legally acknowledged. R. C. C. 208. And the declaration that proof of paternal descent may be made "by all kinds of private writings in which the father may have acknowledged the bastard as his child" leaves no other inference than that if the father had made such acknowledgment in a public act before a notary and two witnesses, instead of a private writing, the illegitimate child would then be a natural child, and not a bastard. The act in which Jean Serres declared and acknowledged that he and Anna Dautch had three children, of whom Mrs. Marie Serres Bordes was the surviving one, was executed in the presence of a notary public and three witnesses. He did not say whether she was born in or out of wedlock; and it was not necessary for him to declare that she was not born in wedlock, to confer upon her the rights of a natural or acknowledged child, whatever might have been necessary to legitimate her. What necessity can there be for Mrs. Marie Serres Bordes to prove her paternity, either by private writings or otherwise, since she has been legally acknowledged by her father in an act before a notary and two witnesses?

The plaintiff has not alleged in her petition that the defendant was not legally acknowledged. On the contrary, she alleged:

"That the said Mrs. Marie Serres, wife of Louis Bordes, is the illegitimate child of Jean Serres and Anna Dautch; that the said Marie Serres was born of the said parents several years before their marriage, and out of wedlock; and that the said Marie Serres was not legitimated by her said parents; * * * that the said Jean Serres, at his death, left no lawful ascendants or descendants; and that his estate is and forms a testamentary succession to be entirely disposed of under the terms and conditions of and in accordance with his last will and testament before Anthony J. Rossi, notary public, under date of August 1, 1911, which has been filed and registered herein; * * * that, in accordance with the terms and provisions of the said last will and testament of the deceased, Jean Serres, all of the property of which he died possessed is bequeathed and disposed of unto and in favor of your petitioner, Catherine Dautch, wife of Pierre Bordes, and Mrs. Marie Serres, wife of Louis Bordes, in equal proportions, share and share alike, except to such extent as the said

testator was and is required by law to bequeath any of his property to the aforesaid Marie Serres, wife of Louis Bordes; that said Mrs. Marie Serres, the illegitimate child of the said Jean Serres, is not a forced heir of the said estate of the said Jean Serres, and is therefore not entitled to any legitimate in the estate of the said Jean Serres; that therefore the said Jean Serres was not required by law to give any portion of his estate to his said illegitimate child; that the disposable portion of his said estate is the entire estate; and that your petitioner, Mrs. Catherine Dautch, wife of Pierre Bordes, and Mrs. Marie Serres, wife of Louis Bordes, were and are jointly named and instituted the testamentary heirs of the deceased, Jean Serres, and as such each is entitled to an undivided one-half interest in all of the property, real, personal, and mixed, left by the deceased; and they should be recognized as such testamentary heirs and sent into possession of all of said property in the proportions aforesaid."

The plaintiff did not allege, in her petition, that Jean Serres left no brothers or sisters or descendants of brothers or sisters, or even more remote collateral relations. Under the provisions of article 1486 of the Civil Code, a natural child who has been acknowledged by his or her father may receive from him, by donation inter vivos or mortis causa, one-fourth of his property if he leaves legitimate ascendants or legitimate brothers or sisters or descendants from such brothers or sisters, and one-third if he leaves only more remote collateral relations. And the next following article provides that:

"In all cases in which the father disposes, in favor of his natural children, of the portion permitted him by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations; every other disposition shall be null, except those which he may make in favor of some public institution."

The plaintiff alleges in her petition that the defendant has been recognized, by a judgment of the district court, "as the sole and only heir of her deceased parent, Jean Serres, and as such entitled to one-third of his estate, and also as testamentary heir under the last will and testament of the deceased (to use the terms of said judgment) 'for an additional portion of one-half of the remaining two-thirds'; and that petitioner, Mrs. Catherine Dautch, wife of Pierre Bordes, was recognized as testamentary heir of the deceased, Jean Serres, and, as such, declared to be entitled to one-half of the said remaining two-thirds of the estate of Jean Serres." The judgment recognizing the defendant to be the owner of one-third of the estate as forced heir and recognizing the plaintiff and defendant to be entitled each to one-third as joint legatees is alleged to be made a part of the plaintiff's petition. And the prayer of the petition is that the aforesaid judgment be canceled and annulled, and that the plaintiff and defendant be recognized as the testamentary heirs of Jean Serres and be sent into possession, each as owner of an undivided half, of his estate.

[6] From the allegations and prayer of the petition, therefore, this may not be regarded as a suit for the reduction of a donation.

which, under article 1504 of the Civil Code, can be sued for only by forced heirs of the donor or testator. It is an attack upon the capacity of the defendant to inherit one-third of the estate as a forced heir of Jean Serres. Against such attack, article 974 of the Civil Code provides that the exclusion, either for cause of incapacity or unworthiness, shall not be sued for by others than the relations who are called to the succession in default of the unworthy heir or in concurrence with him. The plaintiff does not allege that she is a relation of the deceased, Jean Serres; and therefore does not disclose a right of action.

The judgment heretofore rendered by this court is set aside and annulled, and the judgment appealed from is affirmed.

MONROE, C. J. I concur in the decree.

PROVOSTY, J., dissents in so far as an interpretation is put upon the will different from that adopted in the original opinion; but otherwise concurs.

(136 La. 546)

No. 20029.

ROHR v. NEW ORLEANS GASLIGHT CO.
et al.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

NEGLIGENCE §121 — PROXIMATE CAUSE —
PROOF REQUIRED.

To recover damages for injuries sustained through the alleged fault of another, the fault, and the connection between the fault and the injuries, must be established with reasonable certainty; there can be no recovery where only the possibility or the probability of such fault and connection is shown.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 217-220, 224-228, 271; Dec. Dig. §121.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Consolidated action by Mrs. Marie Magdeline Rohr, widow of Ferdinand E. Becker, individually and as natural tutrix, against the New Orleans Gaslight Company and another. From judgment for plaintiff, both parties appeal. Reversed, with directions.

Louis R. Hoover, of New Orleans, for plaintiff. James Legendre and Edward Rightor, both of New Orleans, for defendant New Orleans Gaslight Co. Buck, Walshe & Buck and McCloskey & Benedict, all of New Orleans, for defendant New Orleans Railways & Light Co.

MONROE, C. J. Plaintiff brought two suits, the one, in her own behalf, and the other, as tutrix of her minor children, against the New Orleans Railways & Light Company and the New Orleans Gaslight Company, in solido, for the recovery of damages

sustained by reason of the death of the husband and father through the alleged negligence of the gaslight company, in allowing a certain "Pintsch" gas, manufactured by it, to escape from a defective pipe, whence it is said to have found its way to a refrigerating or cooling room of the National Packing Company, in which the decedent was working, and there to have exploded; and, through the alleged negligence of the railways company, in so handling the electric current generated by it as to produce the defect in the gas pipe by electrolytic decomposition. The suits were consolidated, and there was a verdict and judgment against the gaslight company, in favor of the plaintiff, individually, for \$5,000, and against the same defendant, in favor of plaintiff, as tutrix, for \$6,000, from which plaintiff and the gaslight company appealed.

Plaintiff admits, in her testimony, that, after the death of her husband, the National Packing Company paid her, through her attorney, the sum of \$250, as an "amount due to this accident," and this suit was instituted some three months later.

We are not informed as to the basis upon which indemnity was demanded of the packing company, but the testimony suggests the inference that it was; that the accident was the result of an explosion of ammonia gas, generated in the plant of that company.

Plaintiff has dismissed her appeal from the judgment rejecting her demands against the railways company, and the controversy that we are here to consider involves only her claims against the gaslight company, as to which she prays for an increase in the amounts awarded.

It appears from the evidence that the decedent, Ferdinand Becker, was employed by the packing company as an engineer, in charge of its plant, at the corner of Tchoupitoulas and St. Joseph streets, in this city; that he had had an experience of 23 years, and was regarded as a very careful man, and an expert; that on the morning of July 5, 1911, when the employes came to their work, they observed a peculiar odor, which was attributed by Mr. Collins, the manager, and Mr. Becker, the engineer, to leakage of the ammonia gas, generated in the plant. Miss Sullivan, a young lady employed in the office, and called as witness for plaintiff, testifies as follows upon that subject, to wit:

"Q. Do you recall anything unusual? Did you smell anything there on the 4th or the 5th of July, 1911? A. Yes, sir; when I came down to work in the morning, about half past 8 o'clock, there was a peculiar odor, and, as I came in, I asked Mr. Collins, where was Mr. Becker, and Mr. Collins told me not to be a bit uneasy; there was just an ammonia leak. * * * That was in the morning of July 5th, about half past 8 o'clock. * * * Mr. Becker came into the office (between half past 1 and a quarter to 2 o'clock), and he requested Mr. Collins to send for the Armour Company's engi-

neer, that he was unable to locate what the trouble was, and he evidently had gotten an inferior drum of ammonia."

The witness then called up the Armour Packing Company, whose plant was near by, and Mr. Collins telephoned (quoting the testimony of Miss Sullivan):

"They evidently gave us an inferior drum of ammonia, and to send their chief engineer over, so that they could find out the trouble; that our engineer was unable to locate the cause."

In the same connection, we quote the following from the testimony of Mr. Broadmeyer, another employé of the packing company (also called as a witness for plaintiff), concerning an occurrence which had taken place shortly before that above referred to and upon a floor and in a part of the building other than where the explosion occurred a few hours later, to wit:

"Q. Did you have a conversation with Mr. Becker that morning? A. I did. Q. Was there anything that occurred in that conversation that fixes the fact in your mind that you had that conversation? A. Yes, I remember, during that conversation, Mr. Becker and I were speaking about different sorts of meat to put in the smokehouse for the day. During that conversation, him and I heard a bubbling noise, which could be heard plainly, and, to find that noise, Mr. Becker takes a match and lit it underneath the water pipe, and he dropped it into the drain hole. It flashed up and blazed fire. * * * Q. What did he do? A. He took a mop and put it out. * * * Q. Was that the drain that the engine floor drained into? A. Yes, sir. * * * Q. Do you know what water runs into the drain? A. There is two vats upstairs, the soaking vat, that drains in that hole, and the ham boiling vat, and a small, inch and a half, or quarter, drain, drains in there too. I can't say about any more."

Resuming the narrative of events, following the telephone message to the Armour Packing Company, Mr. Corwin, the engineer of that company, responded to the message, and he and Mr. Collins and Mr. Becker began an investigation, which led them into the cooling room, on the second floor. Just at that moment, however, Mr. Collins was summoned to the telephone, on the first floor, and he answered the call, leaving the other two men in the cooling room, and it was then that the explosion occurred. It appears that they were endeavoring to find the leak, in the pipes, charged with ammonia, with which the room was equipped, and, for that purpose, were making use of a lighted "sulphur candle." Mr. Collins, however, after testifying that Becker was an experienced expert and a careful man, says:

"I would not have permitted him (to), nor did he, use any sulphur candle, in my presence. I emphatically warned them not to use any matches or other light."

The cooling room is described as "a room within a room"; that is to say, it was in the interior of the building and had no windows, and but one door, which was a heavy one, that was kept closed save when it became necessary to open it in order to admit or to take out the stock or for some special purpose, such as that for which it was open-

ed upon the occasion here in question. We infer that there were some apertures (probably in, or about, the ceiling), for ventilation, and there was a drainage pipe (the inlet of which was covered with a grating) leading from the floor to, and beneath, the floor below, and beneath the sidewalk on St. Joseph street, to an open gutter, where it had its outlet; that portion of it which extended under the sidewalk being of terra cotta and provided, as we understand the testimony, with two "traps," intended to exclude sewer gas from the cooling room. Beneath the same sidewalk, and parallel therewith, about seven feet from the property line and buried two feet in the ground, and perhaps half that depth below the terra cotta drainage pipe, was a two-inch pipe, through which the gaslight company conveyed "Pintsch" gas to a railroad depot on the river front, where it supplied the gas for the illumination, as we assume, of passenger cars. The pipe was incased in close plank boxing, measuring 16x16 inches, which, in turn, was filled with cement, or concrete. But it appears that the neighborhood was the home of the packing companies, that the ammonia discharged from their plants had so saturated the ground that the shoes of laborers who made excavations therein were destroyed by it, and that the skin was eaten from their hands. To quote from the testimony:

"The leather of their shoes was actually eaten up. When the boys came in contact, with their bare hands in the soil, it actually ate the skin off their fingers and made them raw."

And the destructive effect of the ammonia was not confined to the shoes and hands of the laborers; it extended to the pipes of the defendant, and to the cement in which they were inclosed. Referring to the pipe here in question, defendant's superintendent of construction says, in his testimony:

"Yes, at various times we had to change it from the sidewalk to the street, to get away from the ammonia. * * * This line was laid on the downtown sidewalk, and we changed and switched across the street, and went on the other side," etc.

There had theretofore been leaks in the pipe on several occasions and at several places, other than those in question, and, on July 4th and the following day, when the accident occurred, the odor of gas in front of the plant of the National Packing Company was quite perceptible, though it was mixed, as we conclude, with that of ammonia and with other odors with which the neighborhood appears to have abounded. The witnesses testify that there was always a smell of ammonia wherever there were excavations in the gutters in front of the packing houses, that there was a distillery in the neighborhood from which refuse was discharged into the gutter, and that there was an odor therefrom concerning which one of them testified as follows:

"Q. Is there any odor from that refuse? A. Yes, sir; there is. There is an odor that I

cannot exactly describe, that contains molasses and other ingredients, and I know there is a considerable quantity of molasses in it, which I can only state has a sweet, sickening kind of a smell."

Another witness gives the following testimony:

"Q. In what did that soil differ in so far as it had any effect on you. A. When you got down there with your shoes, they were ruined, and your fingers got eaten up with ammonia in the ground. I found that in the packing houses, only. * * * Q. Was there any odor of ammonia from any of those packing house plants? A. It was a mighty peculiar odor that used to come along the gutter. Q. This is a neighborhood where they handle meats and ammonia, and where there are warehouses and some machinery shops? A. Yes, sir. Q. Is it not a fact that in this particular neighborhood there are all kinds and varieties of odors? A. Yes, sir."

The explosion occurred about 2:30 o'clock in the afternoon and was followed by a fire, which brought the fire marshal and his deputy, and others, to the scene, and the deputy marshal testifies that he observed a peculiar odor about the premises, like gas, though he was unable to say what kind; that "he smelled gas coming in at the door" (referring to the door of the building on the ground floor); that he returned on the following morning (July 6th), and suggested that an excavation be made in front of the door, which was done, with the result that it was discovered that there was a leak in the gas pipe. He was asked whether he had examined the drainpipe which extended from the cooling room to the gutter, and through which the gas is supposed to have reached the cooling room, and he replied as follows:

"A. Yes, I did; in the cooling room. * * * About 8:45 (on the morning of July 6th) I went to the plant and went over the ground again, in company with Mr. Palms, of the gas company. We tried to locate how the gas got into the building, and placed our nostrils close to the pipe in the cooling room. The cooling room that they had the fire in that morning was the one they had trouble the next morning; and, when you got close to the drain, you would not smell gas, but the moment you rose up you got it, and it led me to believe that it did not come through the drain; and, while standing on the outside, discussing this, a whiff came into the window, and I said: 'Here it is. Coming in here. It is right out in front.'"

The witness further says:

"I know the smell of ammonia. I don't know that I ever came in contact with ammonia and other gases. I am not an expert on gas. Q. Did this smell like ordinary illuminating gas? A. No, sir; it smelled sickening to me. I got about a dozen whiffs of it, trying to find it on every drain about the building."

He was, however, of the opinion that the odor that he found in the cooling room was the same as that which emanated from the excavation where the leak in the gas pipe was discovered.

Mr. Palms, defendant's superintendent of construction, to whom the witness above quoted refers, testifies that he received notice that the fire marshal was under the impression that the fire had originated in an explosion of gas, and that he repaired to the

scene, on the morning of July 6th, and participated in the investigation then made; and, further, as follows:

"Q. Did you go into the cooling room? A. Yes, sir. Q. Did you make any investigation in that cooling room? A. We did. Q. What was the result of the investigation? A. We could not detect any odor of gas in the cooling room, with the exception of a little odor of gas which was carried in the windows and doors from St. Joseph street. Q. Mr. Callahan (the deputy fire marshal) stated that he had placed his nose to the entrance to this drain in the cooling room, and that he could smell no gas, and, when he took his nose away from that drain hole, two or three feet, he could smell some gas. Did you smell the drain? A. Yes, I did. Q. Could you smell anything in the drain? A. Absolutely no odor of gas whatever. Q. Could you smell it when you removed your nose from the drain? A. Occasionally. Q. Was the smell a continued smell? A. No, sir; you could smell it, at times, in places, and, again, you could not smell it. It depended how the wind carried the gas through the open window."

It was shown that a hole, into which a match could be inserted by the use of force, was found in the under side of the gas pipe, and that there was also discovered a hole, about an inch in diameter, in the upper side of the drainage pipe, approximately, over, and probably from 9 to 12 inches distant, through packed earth, from, the boxing which inclosed the gas pipe. And the theories propounded on behalf of plaintiff are that the gas which escaped from the hole in the lower side of the gas pipe, first ascended and then descended through the hole in the upper side of the drainage pipe, and, instead of making its exit through the nearby outlet, into the warm air of the street, passed through that pipe into the cooling room; or, that it followed the pipe, on the outside, into the cooling room; and that, in either case, it may have become mixed with gas that may have entered through the occasionally opened door, and hence the explosion.

A careful consideration of all the testimony leads us to the conclusion that the theory first maintained is destroyed by the testimony of the deputy fire marshal (a witness called by plaintiff) and of defendant's superintendent of construction, who were the only witnesses who actually tested the question and who say, positively, that there was no gas entering the cooling room through the drainage pipe. And our conclusion upon that point is confirmed by the testimony of the distinguished head of the Department of Chemistry in Tulane University of Louisiana, who, speaking as an expert, and without contradiction, said that it was improbable that the gas should have passed, without condensing and dropping, through the traps and the cold atmosphere of the drainage pipe, into the still lower atmosphere of the cooling room. The other theories are purely conjectural and find not even the shadow of support in the evidence. Dr. Metz, the expert chemist to whom we have referred, also testified that ammonia gas will explode when

combined with oxygen in certain proportions; and we may add that, in our opinion, the testimony of some of plaintiff's witnesses, to the effect that the odor in the cooling room appeared to them to be the same as that which they observed in the trench where the leak in the gas pipe was found, may readily be accounted for by the fact that the odor, whether in the cooling room or in the trench, may have been dominated by the ammonia gas, with which most of the witnesses were unfamiliar, but which the manager of the packing company and the unfortunate engineer are shown to have recognized as the trouble, the source of which they were seeking. To recover damages for injuries sustained through the alleged fault of another, the fault, and the connection between the fault and the injuries, must be shown, with reasonable certainty. There can be no recovery where only the possibility, or the probability, of such fault and connection is shown. The evidence herein fails to make the case alleged against the defendant reasonably certain, and plaintiff cannot recover.

It is therefore ordered that the judgment appealed from be set aside, and that plaintiff's demands, individually and as tatrix, be rejected, and these consolidated suits dismissed, at her cost in both courts.

(136 La. 555)

Nos. 20998 and 20999.

STATE v. CRUDUPT.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION §110 — SALE OF INTOXICATING LIQUOR—VALIDITY—LANGUAGE OF STATUTE.

An information charging that the defendant on October 10, 1914, "unlawfully did retail intoxicating liquors without previously obtaining a license therefor from the police jury of the parish of Caddo, or the municipal authorities of any city or town in said parish and state aforesaid," follows substantially the words of the statute, and is therefore sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. §110.]

2. INDICTMENT AND INFORMATION §196 — PREPARATION FOR TRIAL—BILL OF PARTICULARS—OBJECTION TO DELAY—WAIVER.

The defendant has no ground to complain of tardy furnishing of a bill of particulars by the state after defendant had announced ready for trial, when he did not thereupon move for a postponement of the trial.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 628-635; Dec. Dig. §196.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Robert Crudupt was convicted of retailing intoxicating liquors without a license, and appeals. Affirmed.

B. H. Lichtenstein, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen. (Wm. A.

Mabry, Dist. Atty., of Shreveport, and G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. The defendant in these cases was charged with retailing intoxicating liquors without previously obtaining a license therefor from the police jury of the parish of Caddo or from the municipal authorities of any city or town in said parish.

The defendant was duly tried, convicted, and sentenced in both cases, and has appealed.

We will consider the bills of exception as presented in defendant's brief.

[1] 1. "The first bill of exception was taken to the court's action in overruling a demurrer to all of the evidence on the ground that the information charged no crime known to the law, as there was no allegation of price contained in the information; and, while this information was furnished a few minutes before going to trial, it was not a compliance with the requisites of the law and should have been specifically alleged in the information."

The information charged the offense in the language of the statute (Act No. 66, p. 93, of 1902), and that is all the law requires (see *State v. Kuhn*, 24 La. Ann. 474; *State v. Brown*, 41 La. Ann. 771, 6 South. 638).

[2] 2. "The next bill of exceptions was taken to the ruling of the court permitting the arraignment of the defendant upon bills of particulars after the issue was made between the state and defendant by both announcing ready for trial."

Defendant had been previously arraigned and had pleaded not guilty, and the rearrangement to which he refers was wholly unnecessary.

3. "The next bill of exceptions was taken to the ruling of the court permitting the state to file a bill of particulars after the announcement of ready having been made."

Defendant had called for a bill of particulars stating inter alia the price of the whisky alleged to have been sold by him. We cannot conceive how the tardy furnishing of this information by the state, after the defendant had announced ready for trial, without it, could have worked any possible injury to him. Defendant did not ask for a postponement of the trial.

Judgment affirmed.

No. 21003.

SIBILLE v. EASTHAM.

In re EASTHAM.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

TRESPASS §52—CUTTING TIMBER—MEASURE OF DAMAGES.

One who cuts timber on the land of another in good faith, believing it to be his own

(136 La. 557)

land and timber, is liable for the value of the timber at the stump, and not as manufactured into lumber.

[Ed. Note.—For other cases, see Trespass, Cent. Dig. §§ 137, 138; Dec. Dig. § 552.]

O'Niell, J., dissenting.

Action by V. H. Sibille against E. K. Eastham. Judgment for plaintiff, and defendant applies for certiorari or writ of review. Judgment reduced.

John W. Lewis, of Opelousas, for applicant. Dudley L. Guilbeau, of Opelousas, for respondent.

SOMMERVILLE, J. It is well settled that one who cuts timber on the land of another in good faith, believing it to be his own land and timber, is liable for the value of the timber at the stump, and not as manufactured into lumber. *Ball & Bro. Lumber Co. v. Simms Lumber Co.*, 121 La. 627, 46 South. 674, 18 L. R. A. (N. S.) 244, and authorities therein cited.

And where the Court of Appeals gives judgment for the value of stumpage and profits, the amount of the judgment will be reduced to the value of the stumpage.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeals be reduced to \$130, with interest; costs of this court to be paid by plaintiff.

O'NIELL, J., dissents.

(136 La. 558)

No. 20965.

STATE v. O'NEAL

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 600—APPLICATION FOR CONTINUANCE—SUBSEQUENT PROCEEDINGS.

Under Act No. 84 of 1894, whenever the state or the defendant, in a criminal prosecution, asks for a continuance, on the ground of the absence of an important or material witness, duly summoned, but prevented by sickness from attending, the other is entitled to proceed with the trial, upon admitting that the witness, if present, would testify as stated in the affidavit for continuance, unless the judge, in the exercise of his discretion, with respect to the whole case, or particular circumstances of the case, as presented, should be of opinion that the continuance should be granted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1304; Dec. Dig. § 600.]

2. CRIMINAL LAW § 1156—APPEAL—DISCRETIONARY RULING—DENIAL OF NEW TRIAL.

Where a motion for new trial fails to give the names of the witnesses from whom the alleged newly discovered evidence is expected to be obtained, and the trial judge is of the opinion that due diligence has not been used, and that the granting of the motion would amount to a miscarriage of justice, his ruling, in refusing the new trial, will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Maggie O'Neal was convicted of murder, and appeals. Affirmed.

Thos. M. Bankston, of Amite, for appellant. R. G. Pleasant, Atty. Gen., and Wm. H. McClendon, Dist. Atty., of Amite (G. A. Goudran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant prosecutes this appeal from a conviction of murder, without capital punishment, and sentence of imprisonment at hard labor for life, and she relies, in this court, upon a bill of exception to the refusal of the court to grant a continuance on account of the absence of Minerva Dillon, a witness who had been summoned but was reported sick and unable to attend, and upon another bill to the refusal of the court to grant a new trial.

[1] 1. The motion for continuance, duly verified and made part of the bill first above mentioned, contains an allegation that the witness, if present, would testify to certain facts; but another allegation, which follows, leaves it uncertain which of the facts alleged the witness would testify to. The district attorney, however, offered to admit that the witness, if present, would testify to all the facts set out in the motion; and the continuance was refused.

There was no error in the ruling. Act 84 of 1894 provides that:

"In all criminal cases, whenever either the state or the defendant asks for a continuance on the ground of the absence of an important or material witness, the other shall be entitled to an immediate trial on admitting that if said absent witness were present, that he would testify as stated in the affidavit made for a continuance. * * * That this act shall in no way interfere with the trial judge's discretion to grant continuance on other grounds."

The act was held to be constitutional and its application sustained in *State v. Lee*, 50 La. Ann. 10, 22 South. 954. See, also, *State v. Nathaniel*, 52 La. Ann. 585, 26 South. 1008; *State v. Stewart*, 117 La. 490, 41 South. 798.

[2] 2. The motion for a new trial alleges:

"First. That there were three witnesses who testified to the actual shooting—Lizzie Smith, an aunt of the deceased, Polastine Conney, and Mattie Martin, all colored. That defendant did not expect or have any reason to believe that Polastine Conney and Mattie Martin would testify that they were in a position to see the alleged difficulty or shooting. That she (defendant) has discovered, since the trial, that these persons were not in a position to see the shooting, or the position occupied by the deceased or the defendant at the time of the shooting, and that, if given an opportunity, she can produce competent witnesses to prove these allegations. That she employed due diligence in trying to find all eyewitnesses, who saw the occurrence at the time of the homicide, and that, in addition to this, she can prove other facts and circumstances to discredit the testimony of the two above-mentioned witnesses, as well as

the testimony of Lizzie Smith, the aunt of the deceased."

The statement per curiam reads:

"Defendant had been in jail since May last, and the case was assigned for trial in July, also last week, and continued on account of the absence of Minerva Dillon. I do not believe due diligence has been used, and" (do believe) "that the granting of a new trial would be a miscarriage of justice."

Defendant failed to give the names of the witnesses from whom she expected to obtain the newly discovered evidence, and, in view of the statement of the trial judge, we find nothing that would authorize the conclusion that the motion for new trial has not been properly refused.

Judgment affirmed.

(136 La. 560)

No. 20883.

STATE v. WOOTEN.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW \Leftrightarrow 596—CONTINUANCE—ABSENT WITNESSES—CUMULATIVE TESTIMONY.

A continuance for absence of a witness, whose testimony would bear on an unimportant point and would be merely cumulative, was properly denied.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. \Leftrightarrow 596.]

2. CRIMINAL LAW \Leftrightarrow 193½—FORMER JEOPARDY—VERDICT FOR MANSLAUGHTER—ACQUITTAL OF MURDER.

Where accused is convicted of manslaughter on an indictment charging murder, he is thereby acquitted of murder, and can never be again convicted of that offense on the same facts.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 366, 387, 339, 394; Dec. Dig. \Leftrightarrow 193½.]

3. CRIMINAL LAW \Leftrightarrow 965—CONVICTION OF MANSLAUGHTER—NEW TRIAL—AMENDMENT OF INDICTMENT.

Accused having been convicted of manslaughter on an indictment charging murder, and having been granted a new trial, the court properly refused to strike from the indictment the words "willfully, feloniously, and of his malice aforethought," together with the word "murder," before entering on the second trial for manslaughter; the court having fully explained to the jury that accused was no longer charged with having acted maliciously and deliberately.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2421, 2422; Dec. Dig. \Leftrightarrow 965.]

4. HOMICIDE \Leftrightarrow 158—MANSLAUGHTER—THREATS.

In a prosecution for manslaughter, evidence of threats alleged to have been made by defendant against decedent was not objectionable as available only to prove malice and deliberation, but was admissible to show who was the aggressor, and to corroborate the statements of the state's witnesses as to who began the difficulty; there being a conflict on that

point between the eyewitnesses for the state and those for the defendant.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. \Leftrightarrow 158.]

5. CRIMINAL LAW \Leftrightarrow 872½—TRIAL—VERDICT—NUMBER OF JURORS.

Where accused was indicted for murder, but was convicted of manslaughter and granted a new trial, on which he was subject at most to a conviction for manslaughter, such offense was within Const. art. 116, allowing a verdict to be found by nine of the jurors conferring in a case not capital, regardless of the fact that the new trial was on the original indictment.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. \Leftrightarrow 872½.]

6. CRIMINAL LAW \Leftrightarrow 858—TRIAL—EVIDENCE—ARTICLES TAKEN TO JURY ROOM.

Where the coat and gun worn by deceased at the time of the killing were introduced in evidence, the court should not have allowed the jury to take them into their room during deliberation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2056-2059, 2062; Dec. Dig. \Leftrightarrow 858.]

7. CRIMINAL LAW \Leftrightarrow 1163—APPEAL—PREJUDICE.

Where both counsel for accused and the state, during the argument, expressed willingness that the coat and gun worn by deceased at the time of the killing should be taken to the jury room, during the jury's deliberation, the fact that such course was improperly pursued was not available to accused for error, in the absence of proof that prejudice resulted therefrom.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3090-3099; Dec. Dig. \Leftrightarrow 1163.]

Appeal from Thirtieth District Court, Parish of Caldwell; George Wear, Sr., Judge.

Maud Wooten was convicted of manslaughter, and he appeals. Affirmed.

George Wear, Jr., and Francis E. Jones, both of Jena, for appellant. R. G. Pleasant, Atty. Gen., and S. L. Richey, Dist. Atty., of Jena (G. A. Gondran, of New Orleans, of counsel), for the State.

PROVOSTY, J. [1] The accused applied for a continuance on the ground of the absence of one of his witnesses; and the court refused it, because the testimony of the absent witness would bear upon an unimportant point and would be merely cumulative. The ruling was correct. Marr's Crim. Juris. p. 606; State v. Primeaux, 39 La. Ann. 673, 2 South. 423; State v. Hillstock, 45 La. Ann. 299, 12 South. 352; State v. Rodrigues, 45 La. Ann. 1044, 13 South. 802.

[2, 3] The indictment was for murder. A first trial upon it resulted in a verdict for manslaughter. This verdict, as has been frequently decided in like cases, had the effect of acquitting the accused of murder, and reducing the charge against him to manslaughter, and of precluding his ever being tried again on the same facts for murder. State v. Byrd, 31 La. Ann. 419; State v. Dunn, 41 La. Ann. 610, 6 South. 176. A new trial was granted from this verdict. The accused, before entering upon the second trial, moved

to strike out of the indictment the words "willfully, feloniously, and of his malice aforethought," together with the word "murder," which, he said, were no longer responsive to the charge against him, and therefore were unnecessary and surplusage, and yet might prejudice his case before the jury, since it would be informing them that the grand jury, after inquiry into the facts, had come to the conclusion that in killing the decedent he had acted maliciously and with deliberation. The court having refused to strike the words out, the accused, on the same grounds assigned in the motion, objected to their being read to the jury. This objection was overruled.

In *State v. Smith*, 49 La. Ann. 1515, 22 South. 882, 62 Am. St. Rep. 680, and cases there cited, it was held that an accused may be legally tried on an indictment that has thus been by a previous verdict reduced from murder to manslaughter, provided that full explanation of the legal situation be given to the jury (that is, that they be informed that the accused is no longer charged with having acted maliciously and deliberately); and the majority of the court think, therefore, that said motions were properly refused. The writer of this opinion, while concurring in the view that there is no ground for setting aside the verdict, thinks that the motions should have been granted, for the reasons set forth in the margin.

[4] The accused objected to any evidence being admitted of threats said to have been made by him against the decedent, as going to prove nothing more than malice and deliberation—an element not contained in the crime of manslaughter, now the only charge against him.

The evidence was admitted for the purpose of showing which one (the accused or decedent) was the aggressor on the occasion of the killing.

The learned counsel for accused argues that evidence of the previous relations of the parties is admissible only where there has been no eyewitness to the fatal affray; that it is admitted only ex necessitate, and is not admissible in a case like the present, where there were five bystanders who actually witnessed every detail of the occurrence and testified on the trial.

The *per curiam* of the trial judge is as follows:

"This testimony was admissible for the purpose of corroborating the statements of the state witnesses as to who began the difficulty; there being a conflict between the eyewitnesses for the state and the eyewitnesses for the defendant on this point. The same kind of testimony was offered by the defendant for the same purpose."

This ruling was correct:

"There is a certain class of cases in which uncommunicated threats on the part of deceased are sometimes received in evidence in favor of a party charged with murder when accused sets up self-defense. The evidence is not received for the purpose of showing that defendant's conduct was influenced by them (for a per-

son cannot, of course, be influenced by a thing of which he has no knowledge), but to enable the jury to form its own conclusions as to who was the aggressor in the encounter which resulted in the homicide, when there is doubt on the subject." *Marr's Crim. Juris.* § 63, p. 97.

See, also, *Wharton on Hom.* § 247, p. 407; *Johnson v. State*, 66 Miss. 189, 5 South. 95; *Wiggins v. People*, 93 U. S. 465, 23 L. Ed. 941; *Keener's Case*, 18 Ga. 194, 63 Am. Dec. 269; *Arnold's Case*, 15 Cal. 476; *Hawthorne v. State*, 61 Miss. 749; *Bell v. State*, 66 Miss. 192, 5 South. 389; *Prine v. State*, 73 Miss. 838, 19 South. 711; *Kendrick v. State*, 55 Miss. 436.

There is nothing opposed to this in the case of *State v. Lewis*, 133 La. 1095, 63 South. 597. The question of who was the aggressor did not arise in that case. What was there said must be read in connection with the facts of the case.

[5] The judge charged the jury that nine of them concurring could find a verdict. The accused excepted to this charge on the ground that, the indictment being for murder, all 12 of the jurors would have to concur.

True, the indictment as presented by the grand jury was for murder, but, as amended by the verdict of acquittal of murder on the first trial and the finding for manslaughter, it was reduced to one for manslaughter, and, as such, came squarely within the constitutional provision (article 116) allowing a verdict to be found by nine of the jurors concurring in a case not capital.

The next bill of exception has reference to the jury having been allowed to take into their deliberating room the coat worn by the decedent and the pistol carried by him at the time of the killing. The judge's *per curiam* on this bill reads as follows:

"During the argument of the case *M. Jones*, one of defendant's counsel, put the coat on and attempted to demonstrate to the jury how the testimony offered by defendant's witnesses as to the killing was reasonable, and stated that he wanted them to take the coat and pistol into their deliberating room with them. The district attorney, in his argument, also put the coat on in order to demonstrate to the jury that the testimony offered by the defendant relative to the killing was unreasonable and impossible, and also told the jury that he wanted them to take the coat and gun into their room when they went in to deliberate. When the jury started out one of them asked for the coat and gun, and, after they had got into their deliberating room, *M. Jones*, the same attorney who had told the jury that he wanted them to take the coat and gun into their room with them, made objection to their being permitted to have them. The coat and gun had both been offered in evidence."

[6, 7] The jury, undoubtedly, are to try the case upon the knowledge obtained by them in open court, when the accused may have an opportunity, by cross-examination or otherwise, of correcting any false impressions that might be derived from the evidence adduced; and hence the objects in question should not have been allowed to be taken by them into their room; but, from the fact that the counsel for the accused expressed willingness in

course of argument that this very thing should be done, we must infer, in the absence of all proof to the contrary, that no prejudice resulted therefrom to the accused. *State v. Williams*, 34 La. Ann. 959; *State v. Bradley*, 6 La. Ann. 554. It is not even shown that the jurors examined these objects after they had taken them into their room; and, even if they did, the probability that they could have viewed them in other aspects than those so fully presented to them by the counsel on each side in turn on the trial is very improbable. We find no good reason here for setting aside the verdict.

Finally it is contended that the appointment of the jury commissioners was invalid because it was made by the judge, and was not a judicial function, and entailed nullity upon all the subsequent proceedings. Whether these fatal consequences would follow is a question we need not consider, since we find no reason to reverse the recent ruling of this court to the effect that said function is judicial. *State v. Jackson*, 134 La. 599, 64 South. 481.

Judgment affirmed.

Note Annexed to Opinion.

If all the words asked to be stricken out of the indictment were stricken out the indictment would read that the accused did kill the decedent, and not that he did "unlawfully kill and slay" him, as it would have to read in order to comply with the requirement of section 1048, R. S., which prescribes the form of indictments for manslaughter. But I do not think that because this request to strike out could not be granted as made (that is to say, as a whole) was good reason for denying it altogether; or, in other words, for not granting it in so far as this could be done with no detriment to the prosecution and with benefit, perhaps, to the accused. The term "feloniously" includes unlawfully within its meaning (12 A. & E. E. of L. 1029); and the word "murder" includes the meaning of kill and slay. So that, by leaving these words in, the indictment would be sufficient without the words "and of his malice aforethought." The latter words are not only not descriptive of manslaughter, to which, as an effect of the previous verdict, the charge against the accused was reduced, but are to some extent contradictory of it, since manslaughter is defined to be a killing without malice aforethought. Wharton, *Crim. L.* (2d Ed.) p. 597. The sole effect of striking out these now useless words would be to make the indictment conform to the truth; and conformity to the truth is a good thing always, as much so for the state in dealing with prisoners in her courts of justice as for man in every day life. If avoidable, the officer of the state should not be required to read to the jury that the accused acted of his malice aforethought, when, on the contrary,

the real accusation is that he acted without malice aforethought.

As a reason for not thus purging the indictment of this now effete matter, the suggestion is made that, an indictment being the act of the grand jury, the court cannot amend it, except in so far as authorized by express statute to do so. But would a mere purgation of this kind be an amendment, in any proper sense of the term? In what respect would the indictment be different after this purgation from what it was before, in so far as concerns its sufficiency as an indictment for manslaughter? Was it not an indictment for manslaughter pure and simple before the purgation, and does it not continue to be such after the purgation? By the various statutes of jeofails and amendment (R. S. § 1047 et seq.) the court is now allowed to amend in favor of the prosecution in practically all matters not of substance. Would not the spirit of these statutes allow in favor of the accused an alteration of this kind, by which matter, which by operation of law has become effete, wholly useless, and yet may be prejudicial to the accused, is eliminated? I can see no good reason why not.

The practice under the old common law was for the courts to make amendments in mere matters of form. This practice was originally founded upon the express consent of the grand jury given beforehand in open court at the time they were sworn. 22 Cyc. 434. Whether the practice continued to be founded upon such consent, or grew to be founded upon a mere presumed consent, or to dispense altogether with this empty formality of a consent, I have not been able to ascertain. But why should such a consent be necessary? The indictment is not the property of the grand jury. It is but a means of bringing the accused to trial. In matters of substance it must be the work of the grand jury alone, because the Constitution so requires; but no good reason can be assigned why, in matters of mere form, the grand jury should be consulted. The truth and fact of the matter is that in all matters of mere form the indictment is the work of the district attorney who has prepared it, and not of the grand jury. To go through the ceremony of bringing the grand jury into court and obtaining its consent for the making of a change of this kind in the indictment would be worse than a useless formality; it would be a waste of time and a farce.

However, while I entertain these views, I concur with my colleagues in approving the learned trial judge in refusing the request, as he had no precedent for granting it, whereas he could reach approximately the same result by making full explanation to the jury—a course for which he had precedent. *State v. Smith*, 49 La. Ann. 1515, 22 South. 882, 62 Am. St. Rep. 680, and cases there cited. In these cases objection was made that the accused could not be tried for manslaughter on an indictment which, by a previous verdict, had been reduced, as in the present case, from murder to manslaughter; and the court held that he could, provided full explanation was made. These cases are authority for holding that, where full explanation has been made, there is not such prejudice to the accused as would justify the setting aside of the verdict.

(136 La. 535)

No. 20802.

SEGEN v. FABACHER.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)

(Syllabus by the Court.)

1. BANKRUPTCY — 257 — PROPERTY — TRANSFER OF TITLE.

Where a note becomes the property of a bankrupt estate, title thereto cannot pass except by sale made as provided by the United States Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. —257.]

2. BANKRUPTCY — 257 — SALE — PROPERTY INCLUDED.

A bankrupt sale of "open accounts and claims," without further description, cannot be construed as including a promissory note, inventoried as being in the hands of an attorney for collection, and which was never appraised for the purpose of the sale, and was never in the possession of the trustee or the auctioneer.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 356, 357; Dec. Dig. —257.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Jacob Segen against L. B. Fabacher. From judgment for defendant, plaintiff appeals. Affirmed.

Benjamin Y. Wolf, of New Orleans, for appellant. Woodville & Woodville, of New Orleans, for appellee.

LAND, J. Plaintiff sued as holder and owner of a promissory note of the defendant, of date December 8, 1910, for \$4,194, payable on demand, to his own order, and by him indorsed in blank.

Defendant in his answer admitted the execution of the note sued on, but denied that the same was due and owing by him; and for further answer showed that on May 8, 1910, the plaintiff requested the defendant to sign the note sued on, with the specific understanding that the plaintiff would negotiate the note upon his indorsement at a certain bank and let defendant have \$1,500 of the proceeds; that at the maturity of the note defendant would pay him \$1,500, with interest, and the plaintiff would pay the balance, with interest; that the plaintiff subsequently informed the defendant that he had been unable to discount or negotiate said note; that the defendant has received no consideration for the execution of said note; and that the plaintiff has never given any consideration for the same.

On the trial the plaintiff testified that the consideration of the note sued on was a balance of \$4,194 due for jewelry sold and delivered to the defendant; that plaintiff placed the note on his schedule of assets when he went into bankruptcy; and that after his discharge by the court he purchased the note

and other claims at a bankrupt sale for the price of \$75.

The trial judge held that the note was never appraised or sold in the bankruptcy proceedings. We think that the facts in the record sustain that conclusion.

[1, 2] The open accounts on the schedule were appraised at \$3,000.

The notes were listed, but were not appraised. At the foot of the list appears the following:

"N. B."—"The Notes of F. E. Johnson and L. B. Fabacher are in the hands of H. A. Moise for collection."

"The appraisers have included this item of notes in their inventory as a memorandum for the trustee, being unable to appraise accurately the same."

This is the first and last mention of the note sued on in the bankruptcy proceedings. Plaintiff's counsel argue that the court ordered the sale of the "open accounts and claims" belonging to the bankrupt estate, and that the word "claims" is broad enough to include notes.

This may be true as a general proposition, but in this case the meaning of the term must be determined from an examination of the proceedings relating to the subject-matter. In a motion made after the order to sell the open accounts and claims, the trustee referred to the order as one "for the sale of the open accounts that are uncollected," and stated that a reappraisal should be made so that "the said accounts may be disposed of." The court thereupon ordered "that the remaining open accounts in this matter be reappraised and advertised for sale at public auction, in accord with said reappraisal." Pursuant to said order, "one lot of uncollected open accounts belonging to the estate in bankruptcy of Jacob Segen" was appraised at \$100. The trustee in his final account charged himself with "amount realized from the sale of the open account, \$75," which sum represented the total proceeds of the bankrupt sale.

The attorney for the trustee testified that they considered the note in question as worthless, and that, Fabacher having gone into bankruptcy, they did not have the note inventoried and appraised for the purpose of sale as required by the Bankruptcy Act. It is admitted that the note was never in the possession of the trustee. We are satisfied from the record that the note sued on was not included in the bankrupt sale, and that it still remains the property of the bankrupt estate.

The general rules governing negotiable instruments have no application to such a case. A note belonging to a bankrupt estate is out of commerce, and title to the same cannot pass therefrom except by a sale made in accordance with the provisions of the United States Bankruptcy Act.

Judgment affirmed.

(136 La. 571)

No. 20854.

STATE ex rel. LOUISIANA TRUST & SAVINGS BANK v. BOARD OF LIQUIDATION OF STATE DEBT et al.(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 8, 1915.)*(Syllabus by the Court.)*

1. **STATES** ⇨191—**ACTIONS AGAINST—RIGHT.**
A state may not be sued in its own courts without its consent.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. ⇨191.]

2. **STATES** ⇨121—**FUNDS—OWNERSHIP—ADMINISTRATION.**

The funds of a state are the property of the state, and they are administered by the Legislature.

[Ed. Note.—For other cases, see States, Cent. Dig. § 120; Dec. Dig. ⇨121.]

3. **STATES** ⇨191—**"SUIT AGAINST THE STATE"—STATE FUNDS.**

A suit for the possession of the funds of a state, as depository or otherwise, is a suit against the state.

[Ed. Note.—For other cases, see States, Cent. Dig. §§ 179-184; Dec. Dig. ⇨191.

For other definitions, see Words and Phrases, First and Second Series, Suit Against the State.]

4. **STATES** ⇨67—**BOARD OF LIQUIDATION—NATURE OF DUTIES.**

The board of liquidation of the state debt is a servant of the state, charged, in part, with depositing the funds of the state; the deposits to be made under certain conditions and at its discretion. Its duties in that connection are discretionary to a certain extent. They are not ministerial.

[Ed. Note.—For other cases, see States, Cent. Dig. § 69; Dec. Dig. ⇨67.]

5. **ACTION** ⇨3—**BREACH OF STATUTORY DUTY.**

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action."

[Ed. Note.—For other cases, see Action, Dec. Dig. ⇨3.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; C. K. Schwing, Judge ad hoc.

Mandamus by the State, on relation of the Louisiana Trust & Savings Bank, against the Board of Liquidation of the State Debt and others. From a judgment for relator, defendants appeal. Reversed, alternative writ of mandamus recalled, and injunction dissolved.

See, also, 65 South. 745.

Harry P. Gamble, Asst. Atty. Gen. (Gustave Lemle, McCloskey & Benedict, and Howe, Fenner, Spencer & Cocke, all of New Orleans, Albin Provosty, of New Roads, Laycock & Beale, of Baton Rouge, Ott, Johnson & Ott, of Bogalusa, Bird & Bird, of Baton Rouge, and Hall, Monroe & Lemann, of New Orleans, of counsel), for appellant Board of

Liquidation of State Debt. Browne, Williamson & Browne, of Shreveport, Thomas M. Burns, of Covington, Merrick, Gensler & Schwarz, of New Orleans, and Charles A. Holcombe and Taylor & Porter, all of Baton Rouge, for appellee.

SOMMERVILLE, J. The relator bank alleges that it was solicited by the respondent board to bid, under the terms of Act No. 205 of 1912, p. 415, for the deposit of the public funds of the state of Louisiana for a limited term, and to thus become one of the fiscal agencies of the state of Louisiana; that it bid for the deposit of those funds, to the extent of one-fourth of the money to be deposited by the board of liquidation of the state debt, within the Sixth congressional district, which deposit would amount to about \$20,000 per annum; that, contrary to the terms of the statute, defendant board has awarded the contract for such deposit to other banks in said district, at a lower rate of interest than that bid by relator. And it asks that an injunction issue to prevent the respondent board from declaring certain banks located in said district to be—

"the successful bidders for any part of the funds of the state to be deposited by said board within the district, and from awarding a contract or contracts to said banks, or either of them, for any part of said deposit, or to any other bank or banks, except the highest bidders, within said district, found to be a safe depository in the sense of safely keeping and restoring the funds; and in case said board has already entered into a contract with said banks, or any of them, for any part of the deposits of the funds of the state of Louisiana to be made in the Sixth congressional district thereof, so bid for by relator, from executing and carrying out the same, or depositing any part of said funds in said banks."

"That an alternative writ of mandamus issue in this case directed to the said board of liquidation of the state debt of the state of Louisiana, through its proper officers, commanding said board to assemble and to pass upon the said bids from the Sixth congressional district on the face of the papers, and upon the reliability of the highest bidder or bidders in the Sixth congressional district, in the sense of safely keeping and restoring the funds, and further to declare the relator the successful bidder for one-fourth of all of the funds of the state of Louisiana to be deposited by said board within the Sixth congressional district of said state under the terms of said Act No. 205 of 1912, and upon the security required by said act to be furnished by the relator, to award to relator and execute with it the contract for the deposit of one-fourth of all of the funds of the state of Louisiana to be deposited by said board in the Sixth congressional district of the state of Louisiana, under the terms of said Act No. 205 of 1912, or show cause to the contrary on the day and date and at an hour to be fixed by this honorable court."

"That the said board of liquidation of the state debt of the state of Louisiana, through its proper officers, be duly cited to appear and answer this demand, and, after legal delays and proceedings had, that there be judgment in favor of relator, perpetuating the said injunction and declaring said mandamus absolute."

Relator made certain banks in the Sixth congressional district also parties defendant,

which had been declared the successful bidders by the respondent board, and asked for judgment against said banks.

The board of liquidation of the state debt appeared and excepted to the jurisdiction of the court "on the ground that exceptor is an arm, instrument, and agency of the state, and cannot be sued in the courts of the state without express legislative authorization and consent, which have not been given." The board answered further. The cause was tried and submitted. And there was judgment in favor of relator as prayed for, from which judgment all of the respondents have appealed.

[1-3] No principle is better established than that the state may not be sued in its own courts without its consent. If, therefore, this be a suit against the state, relator must show some authority from the Legislature under which the suit was brought, or its petition will be dismissed.

The state is not named on the record as a party to the suit. The board of liquidation of the state debt is named respondent. But the question whether the state is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which may be rendered.

The board of liquidation of the state debt was organized by Act No. 3 of 1874, p. 39, for the purpose of consolidating and reducing the floating and bonded debt of the state. It was composed of the governor, lieutenant governor, auditor, treasurer, secretary of state, speaker of the house of representatives, who, in section 2 of the act, were authorized or directed to elect a fiscal agent for the state, who should be a member of the board. Absolute discretion was given to the board in selecting this fiscal agent, until the passage of Act No. 23 of the Extra Session of 1907, p. 25, when the election or selection of fiscal agents for the state, parishes, municipalities, etc., was provided for after advertising for bids for the deposit of the funds of the state and of the different divisions of the state. It is not clear by the terms of that act that the funds of the state, in custody of the state treasurer, were to be adjudicated in this way. Be that as it may, the act was specially repealed by section 7 of Act No. 316 of 1910, p. 538.

The facts, briefly stated, upon which relief is asked by relator, are these:

That the Legislature, in Act No. 205 of 1912, p. 415, has made provision for the selection of a fiscal agency or agencies for the state, parishes, municipalities, public boards, etc., having the custody of public funds. That this fiscal agency or these fiscal agencies must be a bank or banks organized under the laws of the state or of the United States, and domiciled in this state; and they may be selected by the board of liquidation, or by

the proper authority of the parish, municipality, commission, or other body created by or under authority of the state, or of any parish or municipality thereof, as the case may be. This bank or these banks must give the security mentioned in the act. Section 3 of the act provides:

"That all funds belonging to or received in behalf of the state of Louisiana by the state treasurer shall be deposited by the board of liquidation of the state debt, one-half thereof in one or more banks in the city of New Orleans, and the remainder in one or more banks in each of the congressional districts of the state, exclusive of the first and second districts," etc.

Section 4 of the act provides, among other things:

"That the conditions under which the funds of the state of Louisiana [here leaving out reference to the parishes, municipalities, boards, etc.] shall be deposited, are as follows:

"(1) That all public moneys in charge of such authorities shall be let by the depositing authority to the bidder or bidders in the city of New Orleans and in the respective congressional districts as provided in paragraph one of section three of this act, offering the highest rate of interest for all or any part of the funds of such authority consistent with the safe-keeping and * * * return thereof," etc.

Other conditions were imposed upon the fiscal agent or agencies.

Section 6, in part, provides:

"All banks desiring to become fiscal agencies or depositories of the state of Louisiana * * * shall make application in writing to the board of liquidation. * * * Said applications * * * shall remain sealed until the date specified in the circular, at which time the same shall be opened in the presence of a quorum of the board of liquidation * * * and shall be examined, and the said fiscal agencies and depositories shall then be selected and notified of such selection."

Section 7 provides:

"That it shall be the duty of the board of liquidation * * * to use all reasonable and proper means to secure to the state the best terms and the highest rate of interest consistent with the safe-keeping and prompt repayment of the funds when demanded, and to let such funds to the highest bidder therefor consistent with the safety of such funds."

It further appears, from relator's petition, it made a bid to become the fiscal agent of the state for one-fourth of the funds of the state to be deposited in the Sixth congressional district, and that the contract was awarded by the respondent board to certain other banks in the district, although the bid of said banks for the whole of the fund was lower than that of relator for a portion of the fund.

It also appears that the banks selected by the board as fiscal agents were banks which were members of a combination of banks, aggregating twenty-two in number, which had made a combined bid for all of the funds of the state, embracing the several congressional districts.

Relator sets forth the illegality of the combined bid referred to, and complains of the action of the board of liquidation in considering and accepting it.

We are asked to decide that the board of liquidation has acted in an illegal manner in disposing of the funds of the state, by contracting for them to be deposited in certain named banks in the Sixth congressional district, rather than by contracting for a portion of them to be deposited with relator.

Relator admits and declares that the funds are the property of the state. Being state property, the state may, through the Legislature, administer upon them without interference by the courts. The Legislature has selected the board of liquidation of the state debt as its representative or servant to select the fiscal agency or agencies of the state. This board acts in the place and stead of the Legislature, with reference to this portion of the property of the state; it is the servant, not the agent, of the state; and when suit is brought against this fund, or concerning the disposition of it, the state is the real and necessary party defendant; it is the only party in interest. The disposition of the funds of the state is a political matter, reserved to the legislative and executive branches of the government. The judicial branch is not concerned with them, except under legislative authority.

[4] The settlement of questions as to when the judiciary will consider and determine political matters when its power is invoked is not free from difficulties. Decisions are to be found on both sides of the subject, even before one court.

Our attention has been called to the decision of the court in the case of *State ex rel. Bank of Franklinton v. Louisiana State Board of Agriculture and Immigration*, reported in 122 La. 677, 48 South. 148. That case was brought and decided while Act No. 23, p. 25, of the Extra Session of 1907, before referred to, was in force. It has since been repealed. The relator, in its petition in that case, declared the Louisiana State Board of Agriculture and Immigration to be "a municipal body," and it (the board) was represented in the proceeding by private counsel. It was treated as "a municipal body," "or a public board, commission, or body" not holding funds of the state "in the custody or possession of the state treasurer," throughout the trial of the case, although the Constitution (article 305) declares that it (the Louisiana State Board of Agriculture and Immigration) "shall be recognized as an integral part of the state government." The defense was not made there that the said board was a part of the state government, and that the state could not be sued without its consent, as has been made in this case. That decision does not control here.

The Act of 1910, No. 316, p. 538, which repealed the act of 1907, gives to the board of liquidation of the state debt fullest discretion in selecting a fiscal agent or agencies for the state funds, "provided the rate of interest to be allowed the state by such banks so

selected shall not be less than three per cent." But the act of 1910, has been repealed by section 7 of Act No. 205 of 1912, p. 415; and, as has been shown by the extracts from that act herein given, the selection of a fiscal agency or agencies, by the board of liquidation and other bodies, must be made on the condition, among other things:

"That all public moneys in charge of such authorities shall be let by the depositing authority to the bidder or bidders in the city of New Orleans and in the respective congressional districts as provided in paragraph one of section three of this act, offering the highest rate of interest to all or any part of the funds of such authority consistent with the safe-keeping and prompt return thereof, and no bid shall be accepted providing for a lower rate of interest, on such deposits, than three per cent. per annum."

The board of liquidation thus claims its right to "select" (that is, to elect, to prefer, to choose, to single out, to fix upon) the bidder or bidders offering the highest rate of interest for all or any part of the funds "consistent with the safe-keeping and prompt return thereof." And it argues that it is not its ministerial duty, as alleged by relator, to award the fiscal agency of the state to the highest bidder or bidders for the deposit of the state funds; and that the Legislature has given to the board certain discretion in the selection of this fiscal agency.

The act provides that there may be one or several bids, made for the whole, or for parts, of the funds to be deposited; and the board further argues that it must determine, in the exercise of a wise discretion, whether the one bid complained of by relator as having been accepted by the board, in preference to the bids made by it and others for parts of the deposit, contains "the best terms and the highest rate of interest consistent with the safe-keeping and prompt return of the funds when demanded."

It is not the purpose of the court to intimate any opinion upon the merits of the contentions thus presented. We have only stated the opposing views to enable us to decide whether the suit is or is not one against the state of Louisiana.

It may be, as alleged by relator, that it is willing to pay into the state treasury a higher rate of interest on the deposits which might have been made with it, than will be received by the state from the banks with whom the contracts of deposit have been made.

The act of the Legislature was passed clearly for the benefit of the state, by causing the fiscal agency to pay into the state treasury the highest rate of interest; and the board of liquidation must select such agency, offering such bid or bids, "consistent with the safe-keeping and prompt repayment of the funds when demanded." And the citizens and taxpayers are interested in having such bid or bids accepted; but relator has no such definite and distinct interest in having the courts to declare whether the rates to

be collected are too high or too low. A suit to review the official acts of the board of liquidation in the exercise of its judgment as to the rate of interest which should be collected under its construction of the act of the Legislature would operate to disturb the revenue system of the government, and affect the revenues which are to be derived therefrom. Such a suit would obviously, in effect, be a suit against the state. The duties imposed upon the board of liquidation in the selection of fiscal agents are not ministerial. They are political; and they require the exercise of judgment and discretion.

The facts show a situation in which the board was confronted with the necessity of construing the law, and then selecting the fiscal agency or agencies, under the provisions of the act of the Legislature of 1912.

[5] We have said that the act of 1912 was passed for the benefit of the state; and that the property holders and taxpayers of the state were interested in the matters embraced therein. The relator is not compelled to pay anything into the treasury of the state thereunder, inasmuch as it was an unsuccessful bidder. Its property will not have been injured by a violation of the provisions of the act, if they have been violated. So far as the purpose of the act is concerned, the relator is a stranger to the statute—one whose interests were not considered or intended to be conserved in its enactment. It is a mere bidder for funds of the state—a contractor, or one who desires to be a contractor. Its interests, and that of its stockholders, is to secure the deposit of the state's money at the lowest rate of interest. It is obvious that the statute was not enacted for their benefit. If it had been, the Legislature would have provided that the contract should be awarded to the lowest rather than to the highest bidder or bidders.

In reality, this suit is merely a contest against rival contractors for the patronage of the state. One of them has obtained the award of a contract from the state, and the other is in the courts asking that the state be enjoined from making a contract with its rival, and be compelled to make one with it, because some of the public officers of the state are alleged to have violated certain provisions of the act of the Legislature enacted for the sole benefit of the state, its property holders and taxpayers. It is plain that, in the absence of the provisions in the act before referred to, the state has the right to award this contract to any bidder, high or low, and the relator would then have had no cause for complaint. There is no doubt that these provisions were enacted for the benefit of the property holders and taxpayers of the state, and not in the interest or for the benefit of bidders for the deposits. A suit could not be maintained against any defendant for specific performance under such circumstances.

It will be soon enough to consider the effect of a violation of the act under consideration when some of those, for whose benefit the statute was enacted, complain of such violation. Until then, the courts must withhold their hands. The rule of law applicable here is stated by Johnson, J., in *Strong v. Campbell*, 11 Barb. (N. Y.) 135, 138, where he said:

"Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action."

It may be true that relator will not make the profits it hoped to make if its bid had been accepted; but it is also true that it has lost nothing that it did not willingly risk to the chance of its bid being accepted, and it has no cause of action, either at law or in equity, against the party to whom it made its offer. Since the relator cannot obtain this contract itself, the injunction which restrained the board from making a contract for the same deposits with its rival contractor can give it no relief, and the writ of injunction must be dissolved. *Colorado Paving Co. v. Murphy*, 78 Fed. 28, 23 C. C. A. 631, 37 L. R. A. 630.

In the case of *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204, three things, among others, were decided:

"(1) A circuit court of the United States, in a proper case in equity, may enjoin a state officer from executing a state law in conflict with the Constitution or a statute of the United States, when such execution will violate the rights of the complainant.

"(2) Where the state is concerned, the state should be made a party, if it could be done. That it cannot be done is a sufficient reason for the omission to do it, and the court may proceed to decree against the officers of the state in all respects as if the state were a party to the record.

"(3) In deciding who are parties to the suit the court will not look beyond the record. Making a state officer a party does not make the state a party, although her law may have prompted his action, and the state may stand behind him as the real party in interest. A state can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case." *Davis v. Gray*, 16 Wall. 203, 220, 21 L. Ed. 447.

And in the case of *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623, where the members of the board of liquidation of the state debt of Louisiana, and not the board itself, were defendants; and where *McComb*, the holder of "constitutional bonds," issued under the act No. 3 of 1874, enjoined the members of the board of liquidation from funding certain other bonds which were offered for funding, but were not included in the funding scheme, and the funding of which

would have injured McComb in his property rights, the court held:

"A state, without its consent, cannot be sued by an individual; and a court cannot substitute its own discretion for that of its executive officers in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and, when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other."

The Supreme Court reviewed the decision in the McComb Case in the suit of Louisiana v. Jumel, 107 U. S. 711, 725, 2 Sup. Ct. 128, 140 (27 L. Ed. 448). (There were two suits before the court: One for an injunction, and the other for a mandamus). After observing that the McComb Case had arisen under the funding act of 1874, the same as was involved in the Jumel Case, the court said:

"The board was there enjoined, at the instance of bondholders, from admitting to the privileges of the compromise proposed by the state certain persons other than those originally provided for and on different terms. And this clearly because the board was, by the very terms of the law, charged with the duty of exchanging the bonds specifically set apart by the contract for a particular purpose, and every bona fide bondholder, by accepting the compromise offered, became personally interested in securing the due administration of the trust which had thus been committed to the board. In fact, the board held the new issue of bonds in trust, and every one who gave up his old obligations and accepted the new in settlement became a beneficiary under the trust, and might act accordingly."

The court held that there was no such trust involved in the Jumel Case, although the same act of the Legislature was under consideration, and that the court was not authorized—

"when a state cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the state."

In that case the Supreme Court adopted the views of the circuit court in refusing to issue an injunction, and affirmed the judgments appealed from.

In the case of State ex rel. Guaranty & Indemnity Co. v. Jumel, 38 La. Ann. 337, where relator sought a mandamus to compel the auditor to perform what was termed a ministerial duty, as set forth in a certain act of the Legislature, the proceeding had for its object the collection of taxes for the payment of certain bonds held by the relator; and we hold there:

"As the object in view is the enforcement of a contract of the state, as the state is not directly or indirectly a party to the suit, as

the defendant has no authority to represent the state, we have no jurisdiction to hear the cause and determine whether or not the obligation of the contract has been impaired."

And the Supreme Court of the United States, in reviewing the opinion in that case (134 U. S. 230, 10 Sup. Ct. 511, 33 L. Ed. 891), held "that this is virtually a suit against the state"; and it affirmed the judgment appealed from.

In the case of State ex rel. Hope Co. v. Board of Liquidation, 42 La. Ann. 647, 7 South. 706, 8 South. 577, we had occasion to examine very fully into the question as to whether the board of liquidation of the state debt represented the state of Louisiana, and whether it might be sued without the consent of the state, as expressed by an act of the Legislature. There the question was as to the right of this court to issue a mandamus to the members of the board, ordering them to assemble, take action on the bonds held by the relator, and decide whether or not they were fundable into consolidated bonds of the state or not. In the course of our opinion it is said:

"It has long been a question of delicacy and great difficulty for the courts of this country, state and federal, of last resort, to determine where the exact line of demarcation is to be drawn between political and executive duties, for the performance of which mandamus will not go to a governor of a state, and purely ministerial duties, for the performance of which the writ will lie. * * * If it be, even, conceded that it is questionable whether the duties assigned to the funding board are purely ministerial, this court would 'open a wide margin for the exercise of judicial power,' in assuming that they are, and making the mandamus peremptory. * * *

"This extensive examination of and research into adjudicated cases has satisfied us of the correctness of the general proposition that whenever, by the Constitution and laws of a state, officers of the executive branch of the government are vested with discretionary functions, in the performance of civil duties, or political powers and responsibilities are devolved upon them, they are not answerable to judicial process, but that their acts are only examinable politically. From this proposition the supplemental one may be deduced that when such duties and powers devolve upon the executive branch or department of the state government, as a whole, as in this case, the members of the board thus constituted are likewise exempt from judicial control, and notwithstanding that some of the officers, respectively, are subject to judicial control, and can be coerced by mandamus to act, and to perform 'their ordinary official duties.'"

The last expression on the subject of when a public officer is called upon to perform an alleged ministerial duty, where the government is involved, is found in the decision of the Supreme Court in the case of State of Louisiana v. McAdoo, Secretary of the Treasury of the United States, 234 U. S. 627, 34 Sup. Ct. 938, 58 L. Ed. 1506. In addition to that which we have already taken from that opinion, the court say:

"Obviously such suits to review the official action of the Secretary of the Treasury in the

exercise of his judgment as to the rate which should be exacted under his construction of the tariff, acts would operate to disturb the whole revenue system of the government and affect the revenues which arrive therefrom. Such suits would obviously, in effect, be suits against the United States. * * *

"The duties imposed upon the Secretary of the Treasury in the collection of sugar tariffs are not ministerial. They are executive and involve the exercise of judgment and discretion. The facts show a situation in which the Secretary of the Treasury was confronted with the necessity of construing the law, and then instructing the customs officers as to whether the 20 per cent. preferential duty on Cuban sugar required by the convention and the act of 1903 confirming that treaty had been superseded or in any wise affected by the later provisions of the Underwood act."

And the court refused to permit the state of Louisiana to file a suit against the Secretary of the Treasury or against the United States.

Reference to Act No. 205 of 1912, p. 415, shows that the board of liquidation was empowered to "select" a fiscal agency or fiscal agencies, for the funds of the state of Louisiana, with whom said funds were to be deposited, and the words "to select" exercise a controlling influence over the performance of the duties by said board. These funds are to be let to the bidder or bidders offering the highest rate of interest on all or any part of the fund "consistent with the safe-keeping and prompt return thereof"; and it is further provided:

"It shall be the duty of the board of liquidation * * * to use all reasonable and proper means to secure to the state the best terms and the highest rate of interest consistent with the safe-keeping and prompt repayment of the fund when demanded, and let such funds to the highest bidder therefor consistent with the safety of such funds."

The decision of the board of liquidation is therefore decisive of the whole matter. Its action in the premises is clearly political, and not ministerial. The board belongs to the political department of the state government. It is the servant of the state in the matter under consideration; and it is not subject, in this case, to the control of the judiciary.

The funds, of which the board of liquidation has the disposal, are the property of the state, and are so declared to be by relator in its petition. The state is therefore a necessary party to the suit which seeks to dispose of those funds in any manner. And, as relator has no interest in the funds of the state, it cannot control, through the courts, the disposition of those funds, in the absence of permission from the Legislature to sue the state.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be reversed; that the alternative writ of mandamus issued herein be recalled; and that the injunction be dissolved—all at the cost of relator in both courts.

(136 La. 586)

No. 20925.

**STATE ex rel. COMMERCIAL NAT. BANK
v. BOARD OF LIQUIDATION OF
STATE DEBT et al.**

(Supreme Court of Louisiana. Jan. 11, 1915.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; C. K. Schwing, Judge ad hoc.

Action by the State, on the relation of the Commercial National Bank, against the Board of Liquidation of the State Debt and others. From judgment for relator, defendants appeal. Reversed, alternative writ of mandamus recalled, and injunction dissolved.

Harry P. Gamble, Asst. Atty. Gen. (Gustave Lemle, McCloskey & Benedict, and Howe, Fenner, Spencer & Cocke, all of New Orleans, A. Provosty, of New Roads, Laycock & Beale, of Baton Rouge, Ott, Johnson & Ott, of Bogalusa, Bird & Bird, of Baton Rouge, and Hall, Monroe & Lemann, of New Orleans, of counsel), for appellant Board of Liquidation of State Debt. Browne, Williamson & Browne, of Shreveport, Thomas M. Burns, of Covington, Chas. A. Holcombe and Taylor & Porter, all of Baton Rouge, and Merrick, Genaler & Schwarz, of New Orleans, for appellee.

SOMMERVILLE, J. For the reasons given in the case entitled State of Louisiana ex rel. Louisiana Trust & Savings Bank v. Board of Liquidation of the State Debt et al., 67 South. 370, No. 20854 on the docket of this court, this day decided—

It is ordered, adjudged, and decreed that the judgment appealed from be reversed; that the alternative writ of mandamus issued herein be recalled; and that the injunction be dissolved—all at the cost of relator in both courts.

(136 La. 587)

No. 20928.

**STATE ex rel. COMMERCIAL-GERMANIA
TRUST & SAVINGS BANK v. BOARD
OF LIQUIDATION OF STATE DEBT
et al.**

(Supreme Court of Louisiana. Jan. 11, 1915.)

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; C. K. Schwing, Judge ad hoc.

Action by the State, on the relation of the Commercial-Germania Trust & Savings Bank, against the Board of Liquidation of the State Debt and others. From judgment for relator, defendants appeal. Reversed, alternative writ of mandamus recalled, and injunction dissolved.

Harry P. Gamble, Asst. Atty. Gen. (Gustave Lemle, McCloskey & Benedict, and Howe, Fenner, Spencer & Cocke, all of New Orleans, A. Provosty, of New Roads, Laycock & Beale, of Baton Rouge, Ott, Johnson & Ott, of Bogalusa, Bird & Bird, of Baton Rouge, and Hall, Monroe & Lemann, of New Orleans, of counsel), for appellant Board of Liquidation of State Debt. Browne, Williamson & Browne, of Shreveport, Thomas M. Burns, of Covington, Chas. A. Holcombe, and Taylor & Porter, all of Baton Rouge, and Merrick, Genaler & Schwarz, of New Orleans, for appellee.

SOMMERVILLE, J. For the reasons given in the case entitled State of Louisiana ex rel. Louisiana Trust & Savings Bank v. Board of Liquidation of the State Debt et al., 67 South.

370, No. 20854 on the docket of this court, this day decided—

It is ordered, adjudged, and decreed that the judgment appealed from be reversed; that the alternative writ of mandamus issued herein be recalled; and that the injunction be dissolved—all at the cost of relator in both courts.

(136 La. 568)

No. 21008.

STATE v. RENFRO.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by the Court.)

BAIL \Leftrightarrow 94—FORFEITURE—APPEAL.

Appeals in criminal cases must be taken, by motion, verbally or in writing, in open court, within three days after sentence shall have been pronounced; otherwise, they will be dismissed. The rule applies to appeals from judgments forfeiting appearance bonds, which are criminal proceedings.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 418-423; Dec. Dig. \Leftrightarrow 94.]

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

E. A. Renfro, being charged with selling intoxicating liquors without a license, gave an appearance bond, and from a judgment thereon he appeals. Appeal dismissed.

Lewell C. Butler, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen. (W. A. Mabry, Dist. Atty., of Shreveport, and G. A. Gondran, of New Orleans, of counsel), for the State.

On Motion to Dismiss Appeal.

MONROE, C. J. This purports to be an appeal from a judgment condemning defendant and his surety for the amount of an appearance bond, given in a prosecution for selling intoxicating liquor without previously obtaining a license. The state moves to dismiss the appeal, on the ground that it was not applied for within three days from the date of the judgment. The judgment was rendered on October 10, and signed on October 12, and the motion for appeal was filed October 30, 1914.

The proceeding to forfeit an appearance bond is criminal in character. State v. Sam Burns, 38 La. Ann. 363; State v. Toups, 44 La. Ann. 896, 11 South. 524; State v. Alexander, 46 La. Ann. 550, 15 South. 361.¹ Appeals in criminal cases must be taken by motion, verbally or in writing, in open court, within three days after sentence shall have been pronounced. Act No. 108 of 1898, § 1; State v. Segreto, 124 La. 99, 49 South. 992; State v. Lawrence, 124 La. 379, 50 South. 406; State v. Rollins, 125 La. 297, 51 South. 204.

The appeal is dismissed.

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 46 La. Ann. 550.

(136 La. 569)

No. 20870.

STATE v. CLARY et al.

(Supreme Court of Louisiana. Nov. 30, 1914. On Rehearing Feb. 8, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \Leftrightarrow 1174 — APPEAL — GROUNDS FOR REVERSAL—MISCONDUCT OF JURY.

A verdict and sentence for manslaughter will not be reversed, where the court permitted the jury to attend a moving picture show in charge of the sheriff and several deputies, where the facts affirmatively show the absence of misconduct and prejudice. In a murder case, where the jury did not separate, a new trial will not be granted where it clearly appears that the defendant has not been enjoined or prejudiced by alleged irregularities or misconduct on the part of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3170-3178; Dec. Dig. \Leftrightarrow 1174.]

2. HOMICIDE \Leftrightarrow 342—VERDICT—HOSTILE PUBLIC SENTIMENT.

In a murder case, where, on the admitted facts, the defendants might have been convicted as charged, and the jury found them guilty of manslaughter, the verdict tends to show that the jury was not influenced by alleged hostile public sentiment against the defendants.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 722; Dec. Dig. \Leftrightarrow 342.]

3. CRIMINAL LAW \Leftrightarrow 868—MISCONDUCT OF JURY—OBJECTION—TIME.

Where alleged misconduct of the jury is known to defendants or their counsel, objection should be urged before verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2070; Dec. Dig. \Leftrightarrow 868.]

O'Niell, J., dissenting.

Appeal from Sixth Judicial District Court, Parish of Ouachita; Ben C. Dawkins, Judge.

Bob Clary and others were convicted of manslaughter, and appeal. Affirmed on rehearing.

Hudson, Potts, Bernstein & Sholars, of Monroe, and Dawkins & Dawkins, of Alexandria, for appellants. R. G. Pleasant, Atty. Gen., Fred M. Odom, Dist. Atty., of Bastrop, G. A. Gondran, of New Orleans (Carl H. McHenry, of Monroe, of counsel), for the State.

PROVOSTY, J. The sole point presented in this case is as to whether the jury was kept free from contact with the public and from improper influences, the case being capital.

The circumstances of the crime were of a nature to arouse strong public sentiment against the two accused. They had gone to their homes and armed themselves, one with a rifle and the other with a shotgun, and sought out the decedent, and set upon him unawares, and, while one of them was beating him on the head with the rifle, the other had shot him dead. The reputation of the accused having been already not of the best, considerable public excitement attended the trial, which lasted from the morning of Tues-

day, July 14th, to some time during the day of Tuesday, July 21st; and, as we gather, the courthouse was crowded during its progress.

While it was going on, a stranger stood near the jury and had conversed with one of the jurors before his presence was discovered. The jury were marched several times to and from the hotel and to and from the picture shows along the more or less crowded sidewalks, with no precaution taken against their contact with the public, except their being accompanied by two officers. At their meals at the hotel they seem to have been allowed to converse freely with the waitresses; and the situation was such that conversation at the other tables, even in an ordinary tone of voice, could easily be heard by them. Packages and valises with no, or simply more or less perfunctory, examination of their contents, were allowed to be given in to them. All this, of itself, leaves the impartial mind in doubt whether the rule for the segregation and isolation of the jury was not lost sight of fatally to the verdict, in a case of this kind, when the heinousness of the crime and aroused public sentiment against the accused made a strict and careful observance of the rule doubly to be desired; but one other imprudence which we now proceed to mention leaves no doubt that the said rule was fatally departed from. The jury were taken to the picture shows on two occasions at night, and sat there in the ordinary rows of chairs with the rows in front and back of them occupied, in the obscurity which usually prevails in places of that kind. Thereby an opportunity was afforded to the public for access to them, and this is fatal to the verdict. "They were accessible; misconduct is presumed." *State v. Warren*, 43 La. Ann. 828, 9 South. 559; *State v. Moss*, 47 La. Ann. 1514, 18 South. 507. See, also, *State v. Craighead*, 114 La. 84, 38 South. 28.

The verdict and sentence are therefore set aside, and the case is remanded for trial according to law.

On Rehearing.

LAND, J. The defendants were indicted for murder and convicted of manslaughter.

Counsel for the defendants admitted in his argument on rehearing that the jury was composed of intelligent and high-minded men, and that there was no separation of the jury.

The facts stated in the second paragraph of our original opinion in this case show that the verdict of manslaughter was favorable to the accused.

The third paragraph of the opinion states in general terms the defendants' numerous objections to the conduct of the jury and the bailiffs who had them in charge.

[1] The jurors were lodged and boarded at the Monroe Hotel, and were compelled to walk to and from the courthouse, situated in the next square, and were always in charge

of two or more bailiffs. They took their meals in a small room connected with the main dining room by an arched doorway. Their conversations with the waitresses had nothing to do with the case on trial, and the same may be said of all greetings and remarks between the jurors and other persons. During the long trial of eight days in the midst of July, the jurors were taken twice to picture shows with the permission of the judge below. No objection was made by defendants to the allowance of such recreation to the jurors. At neither of the shows was any communication shown to have taken place between outsiders and the jurors, except on one occasion, when the young daughter of Juror Speed told him how sorry she and her mother were for him, meaning his detention on the jury. As to packages and valises sent to certain jurors, each of them testified positively that they contained nothing but wearing apparel. A few notes sent to members of the jury were shown not to relate to the case on trial.

In *State v. Oteri*, 128 La. 939, 55 South. 582, Ann. Cas. 1912C, 878, this court held that a verdict and sentence would not be reversed because the court permitted the jury to attend a theatrical exhibition in charge of a bailiff, where the facts affirmatively established the absence of misconduct and prejudice.

The judge *a quo* in his *per curiam* carefully reviewed the evidence and found that the irregularities complained of in the motion for a new trial worked no injury or prejudice to the defendants.

The verdict of manslaughter tends to support the conclusion that the jury was not swayed by the alleged hostile public sentiment against the accused.

There was no separation of the jury, and in such a case, "as a general rule, a new trial will not be granted where it clearly appears that the defendant has not been injured or prejudiced by the misconduct." See *State v. Oteri*, supra, 128 La. 947, 55 South. 585, Ann. Cas. 1912C, 878, citing *State v. Kennedy*, 8 Rob. 590, where the court said that the presumption of misconduct does not arise where the jurors have been kept together, and the means thus provided for proving the precise nature of their irregularities, from which courts may determine whether the tendency of the acts has been to influence their verdict. See, also, 12 Cyc. 717, where it is said:

"On the other hand, as a general rule, a new trial will not be granted where it clearly appears that the defendant has not been injured or prejudiced by the misconduct."

In *State v. Garig*, 43 La. Ann. 371, 8 South. 936, the court said:

"It is not every irregularity that will vitiate a verdict; it must appear to have resulted injuriously."

See, also, *State v. Wiggins*, 45 La. Ann. 418, 12 South. 630.

In the instant case we concur in the opin-

ion of the trial judge that none of the acts of the jurors, and none of the communications made to them, had a tendency to influence their verdict.

[2] Failing to prove that any of the jurors were guilty of personal misconduct, or heard any comments unfavorable to the accused, their counsel have resorted to the argument that, in some unexplained way, the jurors, while passing along the streets or through the lobby of the hotel, or while taking their meals, or while looking at moving pictures, were inoculated with the alleged hostile sentiment entertained by the public against the defendants.

The verdict of the jury is the best answer to that argument.

The case of *State v. Warren*, 43 La. Ann. 828, 9 South. 559, cited in our original opinion, was one where eight of the jury were allowed to remain in the jury room, with no deputy in charge. The court said:

"They were accessible; misconduct is presumed."

In *State v. Moss*, 47 La. Ann. 1514, 18 South. 507, cited in the same opinion "there was at least one well-defined separation of the jury," to quote the language of the court. In *State v. Craighead*, 114 La. 84, 38 South. 28, also cited, five jurors who had been accepted and sworn were locked up with seven jurors unaccepted and unsworn.

[3] Defendants or their counsel must have known before verdict that the jury was being escorted through the streets, and one of the attorneys knew that, on one occasion, the jury had been taken to a moving picture show. Objections to exposing the jury to contact with the public should have been urged before verdict.

It is therefore ordered that our former decree herein be vacated, and it is now ordered that the verdict and sentence below be affirmed.

PROVOSTY, J., holds that when opportunity to communicate secretly with the jurors, so as to exercise an improper influence upon them if desired, is shown, the burden is shifted to the state to show that the opportunity was not availed of, and that this burden is not discharged by calling the jury up and asking them whether they have been improperly influenced. The influenced juror would, of course, never confess to the fact.

O'NIELL, J., dissents.

(190 Ala. 206)

FULLER v. LANETT BLEACHING & DYE WORKS. (No. 434.)

(Supreme Court of Alabama. Dec. 17, 1914. Rehearing Denied Jan. 21, 1915.)

1. MASTER AND SERVANT ⇨264—INJURY TO SERVANT—COMPLAINT—SUFFICIENCY.

A complaint in an action for injuries to an employé by the fall of a freight elevator, which alleges that the elevator and the machinery by

which it was hoisted were defective, separates the elevator from its hoisting machinery, and separately specifies the defectiveness of each, and the employé, to recover, must prove that each was separately defective.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. ⇨264.]

2. MASTER AND SERVANT ⇨259—INJURY TO SERVANT—COMPLAINT—SUFFICIENCY.

A complaint, in an action for injuries to an employé by the fall of a freight elevator, which alleges that the superintendent was negligent in ordering the employé, outside of his regular employment, to work on the defective elevator and at the machinery thereof, which was defective, does not state a cause of action under Code 1907, § 3910, subd. 2, making an employer liable for injury to an employé caused by the negligence of any superintendent while in the exercise of superintendence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 837-843; Dec. Dig. ⇨259.]

3. MASTER AND SERVANT ⇨286—INJURY TO SERVANT—NEGLIGENCE—FAILURE OF INSPECTION.

Whether a freight elevator was properly inspected for the safety of employes using it *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

4. MASTER AND SERVANT ⇨124—OBLIGATION OF MASTER—INSPECTION OF APPLIANCES.

The inspection of machinery by an employer must be such as a person of ordinary prudence would make under the circumstances, and a mere visual inspection of external conditions does not satisfy the obligation of the employer, where the employé's safety depends on the soundness of the material of which machinery is composed, or on the firmness of which the separate parts are attached to each other.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 235-242; Dec. Dig. ⇨124.]

5. MASTER AND SERVANT ⇨264—INJURY TO SERVANT—COMPLAINT—"ELEVATOR."

A complaint in an action for injuries to an employé by the fall of a freight elevator which alleges, in stating a cause of action, under Code 1907, § 3910, subd. 1, making an employer liable for injuries caused by any defective condition in the ways, works, machinery, or plant, that the "elevator" was defective, does not restrict the word "elevator" to the car, but includes the machinery to which the car is attached, and by which it is operated, and supports a recovery for any defect in the car or machinery.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. ⇨264.]

6. MASTER AND SERVANT ⇨286—INJURY TO SERVANT—DEFECTIVE MACHINERY—EVIDENCE—QUESTION FOR JURY.

Whether a freight elevator or the machinery connected with it was defective, so as to authorize a recovery for injuries to an employé by the fall of the elevator, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. ⇨286.]

Appeal from Circuit Court, Chambers County; A. H. Alston, Judge.

Action by John K. Fuller against the Lanett Bleaching & Dye Works. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

See, also, 65 South. 61.

Plaintiff, while engaged in the services of defendant, as a tender of its dry cans, was injured by the fall of a freight elevator used as part of defendant's dye works for the raising and lowering of bales of cotton to and from the first and second floors of its building. The elevator was a simple one operated by hand, and the car was hoisted on a weighted rope, hung on a pulley, with shafting and cogwheels. The wheel was fitted to the shafting by a metal key 2 inches long and three-eighths of an inch square, which was fitted in and driven through the shafting and the hub of the gear. One bale weighing about 500 pounds had been dumped on the elevator, and, while plaintiff was standing on the elevator floor, a second bale was dumped from the truck, dropping about 10 inches, upon the floor, whereupon instantly the elevator car broke from its fastenings above and dropped down to the first floor, a distance of about 12 feet. This occurred in the forenoon. The evidence is without dispute that the car fell because the key dropped out of its socket, and it appears also that the immediate or superficial cause of the key dropping out of its socket was the jar occasioned by the dumping of the second 500 pound bale on the floor of the car. The second count of the complaint is framed under subdivision 1, § 3910, and the specification is that the said elevator and the machinery by which said elevator was hoisted were defective. The third count is under subdivision 2 of section 3910, and the specification is that said superintendent, naming him, was negligent, in that he ordered, directed, and instructed plaintiff, outside of plaintiff's regular employment, to work upon said defective elevator, and at the machinery of said elevator, which was defective. The fourth count is under subdivision 3 of section 3910, and the specification is that said superintendent was negligent, in that he ordered plaintiff, when the said elevator and the machinery by which it was hoisted were defective, to work on or about said elevator; and also in that, with knowledge of the said defective condition, he permitted and allowed plaintiff to work on or about said elevator, and did not warn or instruct him as to the said defective condition. The fifth count is a common-law count, charging the use by defendant of defective machinery in its business, which, but for the want of reasonable care and diligence, would have been known to defendant; the specifications being that the wheel or casting surrounding the shafting was old and worn, and the pin by which said wheel was fastened was old and worn, and that both wheel and pin were of insufficient tensile strength to support said

elevator when loaded. The sixth count is under the first subdivision of section 3910, and the specifications of negligence are that said elevator was not securely fastened in its proper position; that the wheel or casting was old and worn; and that the pin was old and worn, and insufficient in strength to hold said elevator in place. The seventh count is framed under subdivision 2 of section 3910, and is similar to count 3, except a different superintendent is specified. The eighth count is under subdivision 1, and specifies that said elevator was defective. The trial court directed a verdict for defendant at its request.

Denson & Sons, of Opelika, for appellant. Strother, Hines & Fuller, of La Fayette, for appellee.

SOMERVILLE, J. [1] It was not necessary for the plaintiff to allege in the second count that both "the elevator, and the machinery by which said elevator was hoisted, were defective." But, having chosen to separate the elevator from its hoisting machinery, and to separately specify the defectiveness of each, it was incumbent upon him to prove that each was separately defective. There is nothing in the evidence suggestive of any defect in the elevator itself; and hence a material part of the case stated by the count is without support.

[2] The third count, which must be considered only with reference to its specification, obviously states no cause of action, and could not support a recovery; nor was there any evidence tending to show that the superintendent Holstun ordered plaintiff to work upon a defective elevator, and at the defective machinery thereof, as charged.

The fourth count is wholly without support in the evidence as to its material specification that the said Holstun permitted and allowed plaintiff to work on or about said elevator, with a knowledge (by Holstun) of its defective condition. There is nothing to suggest such knowledge by Holstun.

The fifth and sixth counts are also wholly without support in the evidence as to their conjunctive and cumulative specifications that the wheel or casting was old and worn; that the pin was old and worn; and that the pin was insufficient in strength to support the elevator. On the contrary, the undisputed evidence is that, though old in use, they were not worn; and also that the pin was in perfect condition and sufficient for its purpose.

The seventh count is without support in the evidence as to its main allegation; viz., that Bob Harrison was superintendent of the elevator.

As to all of these counts it is clear that the general affirmative charge for the defendant was properly given.

[3,4] The questions presented under the eighth count are more difficult of solution.

It appears without dispute that the pin and the wheel socket into which it fitted were without defect, and that the pin was properly driven in. It further appears that this pin had been in its place in this wheel for 14 years before this accident; that, about 3 months before, the master mechanic, Harrison, had inspected it closely, and found the pin in proper position and tight; and that the same pin was replaced after this accident in the same socket, and had held securely up to the time of the trial. It is therefore clear that, if the defendant has been guilty of any negligence covered by the specifications of the eighth count, it was only because the pin had finally worked itself loose in its socket, and the defendant's superintendent Kane, who had charge of the elevator, was negligent in failing to discover its condition before this accident.

The plaintiff's witness Collins, an expert machinist, testified that, if such a pin as this, used as shown, had become loose—

"in my opinion, that condition would have been apparent by reasonable inspection of the machinery of the elevator. It would have been apparent to inspection previous to the time it came out; you would have been able to detect it being loose. I could not say for how long before it came out. After it worked loose it may have worked out in five minutes, and it may have been a day or two coming out altogether."

Both of the plaintiff's expert witnesses, Collins and Cochran, testified to the effect that such a pin might be perfectly fitted properly driven, and still work loose in time from constant use; but they expressed the opinion that, if tight and well fitted, it would not jump out all at once by reason of a sudden jar.

The obvious tendency of this evidence is to show that the safety of the operation of this elevator, upon which defendant's servants frequently rode in the discharge of their employment, depended upon its proper and timely superintendence by the defendant's servant in charge of it, and, further, that such supervision might reasonably demand a frequent inspection of this part of the hoisting gear.

The defendant insists that it has fully met this inferable requirement, as shown by the uncontradicted testimony of its superintendent Kane, who said (omitting redundant phrases):

"I had that elevator under inspection. I see the elevator I suppose a dozen times a day, and I start a man to handling bales down on it in the morning, * * * and I go there and look at it. I did the same thing there that morning; I got there and looked at it. I would stand on the second floor * * * away from the hole of the elevator about six feet, and you see this hub and gear and pin all the time; it isn't ever out of sight. I did that that morning. When I looked at it it was just like it always had been in there in its place, I did not observe anything wrong with it; there was not anything wrong with it. I had inspected it prior to that time every day I see the elevator. I looked up at those works every day probably a dozen times, and could see if there was any-

thing the matter while I looked at them. I should say that I never missed a day without looking up there and looking at the works."

On cross-examination this witness said:

"I am not a mechanic or machinist; I am a bleacher, finisher, dyer, and work around chemistry some. * * * I said I went by there and looked at that elevator a dozen times a day. I did not go by the elevator just for that purpose; in passing through and going through about my business I always looked up there. There wasn't anything in the condition of that elevator that made it necessary to give it so much attention. I just looked at it; just a natural glance at it as I went by. I didn't have any such idea as that it was liable to get out of fix. With the exception of the rope, the machinery was exactly the same that had been there for 14 years."

So far as the frequency of Kane's inspection of the elevator is concerned, there can be no question of its sufficiency. See *1 Labatt on Master and Servant*, § 158, and cases cited. With respect to the nature of this inspection, Mr. Labatt epitomizes the law as follows:

"The character of the inspection which the master is bound to make is described by various epithets and phrases, all of which, as will be seen from the subjoined note, are essentially the logical equivalent of the proposition that the examination must be such as a person of ordinary prudence would have made under the circumstances. The question whether the examination to which the instrumentality which caused the injury was actually subjected before the accident was such as to satisfy the standard thus indicated is primarily one for the jury. * * * Whether or not the duty of a master with regard to proper inspection has been performed by the application of any given test is to be determined by considering whether that test will give indications as to the actual condition of the instrumentality in question. In the application of this principle the courts have usually proceeded upon the theory that a merely visual or ocular inspection of external conditions does not satisfy the full measure of a master's obligations, where the servant's safety depends upon the soundness of the material of which an instrumentality is composed, or upon the firmness with which the separate parts of an instrumentality are attached to each other, or upon the stability of some heavy substance." *1 Labatt on M. & S.* § 161.

We think that, under the law and the evidence, as above noted, it was a question for the jury to determine whether Kane's daily inspection of the elevator was equal to the requirements of the case for the detection of the loosened peg—a condition that might be expected to arise at any time after many years of use—and whether, if properly made, it would have discovered the defect in time to have avoided the accident. And hence we hold that the general affirmative charge was improperly given for the defendant on the eighth count.

[5] It would be too narrow a construction of the word "elevator," as used in this count, to restrict its application to the elevator car, and to exclude from its scope the machinery to which the car is attached, and by which it is operated. Very clearly, we think, the count is broad enough to support a recovery based upon any defect in car or machinery.

[8] We have considered with due care the arguments of defendant's counsel on the facts of the case with respect to this count. They insist that the evidence shows that the peg jumped out all at once, and that there is nothing from which the jury could infer that it loosened up and worked out by degrees. We think, however, that the testimony which we have quoted above may very well support a contrary conclusion, which would require its submission to the jury.

We deem it unnecessary to review the numerous assignments of error relating to rulings on the evidence. For the error noted, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and DE GRAFFENRIED and GARDNER, JJ., concur.

(190 Ala. 569)

POLLAK v. MILAM. (No. 962.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 14, 1915.)

1. TAXATION \S 615—TAX SALES—STATUTORY REQUIREMENTS—STRICT COMPLIANCE.

In the sale of land for taxes, great strictness is required, and every provision of the statute must be punctiliously pursued.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1264; Dec. Dig. \S 615.]

2. TAXATION \S 810—TAX TITLES—BURDEN OF PROOF.

The burden is on a party claiming under a tax sale to show that all the substantial requirements of the law have been complied with.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1605-1608; Dec. Dig. \S 810.]

3. TAXATION \S 623—TAX SALES—STATUTORY PROVISIONS—REPORT BY COLLECTOR.

Under Pol. Code 1907, \S 2268, authorizing the probate court of each county to order the sales of lands therein for the payment of taxes assessed on such lands or against the owners thereof when the tax collector shall report to the court that he was unable to collect such taxes, the collector's report is an essential prerequisite of jurisdiction, and where the tax assessor merely reported that the taxes on land assessed to an unknown owner were delinquent, due, and unpaid, without reporting that he was unable to collect them, the decree ordering a sale of the land was void.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1266, 1267; Dec. Dig. \S 623.]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Ejectment by Ignatius Pollak against W. K. Milam. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff claims under a deed received at a tax sale on May 30, 1906, deed of date June 16, 1908, and the suit begun on February 10, 1913. Plaintiff offered the deed and proceedings of the probate court, evidence tending to show that the property was taxable, but offered no proof that he had ever been in the prior, actual possession of the land sued for. This being all the evidence for plaintiff, the

court gave the affirmative charge for defendant.

Brown & Griffith, of Cullman, for appellant. George H. Parker, of Cullman, for appellee.

DE GRAFFENRIED, J. The decision of this case can be rested upon certain well-defined principles which have already been declared, in many decisions, by this court.

[1] "In the sale of lands for taxes, great strictness is required, and every provision of the statute must be punctiliously pursued." *Dane v. Glennon*, 72 Ala. 163.

[2] "The burden is on the party claiming under a tax sale to show that all the substantial requirements of the law have been complied with." *Oliver v. Robinson*, 58 Ala. 46; *Smith v. Cox*, 115 Ala. 503, 22 South. 78; *Roman, Trustee, v. Lentz*, 177 Ala. 64, 58 South. 438.

[3] "The probate court is empowered by statute to order the sale of lands for the payment of delinquent taxes assessed thereon 'when the tax collector shall report to the court that he was unable to collect the taxes assessed against such land or the owner thereof, without a sale of such land.'" Code 1886, \S 566; Code 1896, \S 4046; Code 1907, \S 2268.

"Its authority is purely statutory, and cannot arise at all except upon the collector's report that a sale of the land is necessary for the collection of the taxes. By the plain language of the statute, this report of the collector is made the essential prerequisite of jurisdiction, and an order of sale without it is merely a nullity. This, like all other jurisdictional facts in these proceedings, must be affirmatively shown by the record." *Lodge v. Wilkerson*, 174 Ala. 133, 56 South. 994.

In the instant case the tax assessor reported that the taxes on the land "are delinquent, due, and unpaid," and not that "he was unable to collect the taxes assessed against such land or the owner thereof without a sale of such land," as he was required, under section 4046 of the Code of 1896 (now section 2268 of the Code of 1907), to do; and, as this essential prerequisite of jurisdiction to an order of sale was lacking, the decree of the probate court ordering a sale of the lands for taxes was void. *Lodge v. Wilkerson*, 174 Ala. 133, 56 South. 994.

2. The cases of *Cary v. Holmes*, 109 Ala. 218, 19 South. 723, and *Gamble v. Andrews*, 65 South. 526, simply declare that when lands are assessed to owner unknown a sale of such land will not be avoided because of the failure of the tax collector to make the affidavit required by section 567 of the Code of 1886. That section was materially changed when it was brought forward into our subsequent Codes. See Code of 1896, \S 4047, and Code of 1907, \S 2269. The reasoning of the court in said cases of *Cary v. Holmes*, supra, and *Gamble v. Andrews*, supra, has no applicability to the facts of this case. While the lands here were assessed to owner unknown, that fact does not affect the essential prerequisite to jurisdiction which section 4046 of the Code of 1896 (now section 2268 of the Code of 1907) requires as a foundation upon which

all decrees of sale of lands for taxes shall rest. *Lodge v. Wilkerson*, supra.

3. It may be that the sale of the land for taxes, which we now have before us, was void for reasons other than the reason shown above. The defect pointed out was fatal, however, and the trial court committed no error in giving the affirmative instructions which were given by the court to the jury at the written request of the appellee.

The judgment of the trial court is affirmed. Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 346)

GWIN et al. v. HOPKINSVILLE MILLING CO. (No. 878.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. SALES — 378 — CONTRACTS — BREACH — PLEADINGS.

A plea in an action by a seller for breach of an executory contract of sale which sets up a resale by the seller without averring that the contract price was obtained or what price was realized is not a plea in bar, but goes only to the measure of damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1093; Dec. Dig. — 378.]

2. SALES — 332 — BREACH OF CONTRACT — REMEDY OF SELLER—RESALE.

Where a buyer repudiated the contract and refused to receive the goods, a resale was not necessary to fix the buyer's liability, but a resale could be made to ascertain the damages.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 914-917; Dec. Dig. — 332.]

3. SALES — 338 — CONTRACTS—BREACH—EVIDENCE—INSTRUCTIONS.

Where, in an action for a buyer's breach of contract, the evidence showed that the buyer was noncommittal as to whether he would accept the goods until a designated date, while the seller was at all times ready and willing to deliver under the contract, and a resale was not made until after the designated date, an instruction that the time within which the buyer was obliged to order the goods and the time the seller was bound to hold them extended to the designated date was not erroneous.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1108; Dec. Dig. — 338.]

4. SALES — 384 — BREACH OF CONTRACT — MEASURE OF DAMAGES.

Where a buyer repudiates the contract and refuses to receive and accept the goods, the measure of damages is the difference between the contract price and the market value of the goods at the time and place of delivery.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1098-1107; Dec. Dig. — 384.]

5. SALES — 79 — CONTRACTS—PLACE OF DELIVERY.

A contract under which the buyer bought goods at H., in Kentucky, at a fixed price, cost and freight, and which provided that the furnishing of a bill of lading issued by the carrier should be a delivery and completion of the sale, fixed the place of delivery in Kentucky.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 214-216; Dec. Dig. — 79.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Assumpsit by the Hopkinsville Milling Company against J. C. B. Gwin and others. From a judgment for plaintiff, defendants appeal. Transferred from Court of Appeals. Affirmed.

The action was for breach of an agreement to buy 1,000 barrels of flour, to be shipped at a reasonably postponed date to be selected by defendant. The market price of the flour at the date of the breach of the contract on May 24, 1911, is alleged to be \$4.40 per barrel delivered, and that the flour was sold in the market at \$4.05. The contract is set out. Plea 3 is as follows:

The contract sued upon and the basis of this action contain the following stipulations: "Failure to order out flour on demand of shipping instructions at the expiration of the maximum 90-day period, or to pay accrued carrying charges on demand, gives the seller the right to cancel contract, or resell the goods for buyer's account." And defendants aver that they failed to pay the carrying charges on demand, and failed to furnish shipping instructions on demand of plaintiff within the maximum 90-day period, and thereupon the plaintiff exercised its right to resell flour for defendant's account, and did resell said 1,000 barrels of flour for defendant's account; and by reason of plaintiff exercising its right to resell said flour, and having resold said flour for defendant's account, plaintiff should not and cannot recover under any count of the complaint each of which claimed damages for failure to order out flour or to pay the carrying charges therefor.

The following is charge C, given at plaintiff's request:

Under the law of, and the evidence in, this case the time within which the defendants were obligated to order out the flour and the time for which plaintiff was bound to hold the flour subject to the order of defendant extended to May 24, 1911.

The following is charge A, refused to defendant:

The measure of damages in this case is the difference between the contract prices of Perfection flour and reasonable market price of same flour at Bessemer and Ensley, on date of breach of said contract, if contract was breached.

The last two assignments of error are as follows:

Question by defendant to witness McLemore (objection of plaintiff sustained): "I will ask you if, according to the rules and regulations of the Southeastern Miller's Association, its members are allowed to make a contract for the sale of flour for a future delivery beyond a period of 90 days from date of contract."

Question by plaintiff to S. C. Johnson (defendant's objection overruled): "Did you ever have a contract with the Bessemer Grocery Company for future delivery of shorts or flour with the Bessemer Grocery Company, where they were not to give you shipping instructions?"

Perry & Bumgardner, of Bessemer, for appellants. London & Fitts, of Birmingham, for appellee.

GARDNER, J. This is the second appeal in the cause. *Hopkinsville Milling Company v. Gwin et al.*, 179 Ala. 472, 60 South. 270.

The suit is by the vendor (appellee) against the vendees (appellants) for recovery of damages for breach of an executory contract for the sale of 1,000 barrels of flour. A copy of said contract appears in the report of the case on former appeal, *supra*.

[1] Demurrer was sustained to plea 3, and this is the assignment of error first insisted upon by counsel. This plea purports to be in bar of the action and a full and complete defense thereto. The plea sets up a resale of the flour by the seller, but does not aver that the contract price was obtained, nor what price, in fact, was realized.

It seems to be the insistence of appellants that the plea shows an election on the part of the seller, and that therefore the present action cannot be maintained. We do not agree, but are of the opinion that the plea merely shows a resale as a method of proving the value and therefore that it goes only to the measure of damages.

Speaking to this subject, it is said in *Mechem on Sales*, vol. 2, § 1649:

"The remedy of the seller, where the title has not passed, being thus primarily a personal one for the recovery of damages, and those damages being, as already stated, ordinarily the difference between the contract price and the market value of the goods, it becomes material to show what that market value is. Two methods of proving this value are available to the plaintiff: (1) He may call witnesses familiar with the market to testify what the market value of the goods in question was at the time and place in issue; i. e., what, in their opinion, the goods would have sold for, if they had been put upon the market. (2) He may himself proceed to sell the goods in the market, and may then show what, in fact, they did sell for. The purpose of this sale by the vendor is to make evidence for himself of a matter of fact, rather than to rely upon what must otherwise be somewhat a matter of conjecture or opinion."

[2] And in *West v. Cunningham*, 9 Port. 104, 33 Am. Dec. 300, we find this quotation: "A resale was not necessary to fix the liability of the defendant for a breach of contract, and the action, in another form, could have been maintained, without showing a resale; it might be one mode of ascertaining the amount of damages, perhaps the best, but certainly not the only way of ascertaining the same."

The plea went only to the measure of damages, and did not traverse or confess and avoid the complaint, and was therefore not a plea in bar to the action, as it purports to have been. 2 *Mechem on Sales*, §§ 1692, 1647, 1678; *West v. Cunningham*, *supra*; *Hardwick v. American Can Co.*, 113 Tenn. 657, 88 S. W. 797.

[3] There was no error in sustaining the demurrer to this plea. When the case was here on former appeal it was held that refusal of the defendants to order out the flour on May 24th constituted a breach of the contract for which the vendor could sue. An examination of the transcript on that appeal

discloses that the evidence in the record then before the court was substantially the same as in the present transcript, and there appears no reason for this court to recede from the opinion on former appeal. The attitude of the defendants appears to have been non-committal as to whether they would accept the flour until the above date of May 24th; and a readiness and willingness on the part of the plaintiff, all along, to ship the flour under contract, also appears from the record.

Under the evidence in the case, and under former ruling in this cause, we find no reversible error in giving charge C at plaintiff's request.

We find no evidence of a resale of the flour, except that of the witness Yost, for the plaintiff, which shows that the flour was not sold until after May 24th, and therefore not until after the breach of contract by defendants. The letter referred to by defendants' counsel on page 31 of the transcript does not show any sale of the flour. Many of the charges asked by the defendants, based upon assumption of a resale, were inconsistent with the measure of damages fixed by this court on former appeal, and were properly refused.

[4] The general rule as to the measure of damages when the buyer repudiates the contract and refuses to receive and accept the goods is that the amount thereof is the difference between the contract price and the market value of the goods at the time and place of delivery. 35 Cyc. 592.

[5] The contract here under review shows that the defendants bought the flour at Hopkinsville, Ky., price \$5.10 c. a. f. (meaning cost and freight), Birmingham, Bessemer, or Ensley; and further provides that the shipment of the purchase, and the furnishing of a bill of lading issued by the common carrier, shall be considered as a delivery on, and a completion of, the sale. Under such contract, the place of delivery was Hopkinsville; and charge A, requested by defendants, was properly refused.

We have not considered it necessary to take up each assignment of error and each charge separately, but we have carefully considered those pressed upon us by counsel in brief. Many of the charges refused were based upon a time of the breach of the contract contrary to the ruling of the court on former appeal; and others, if not otherwise faulty, possessed in their wording a misleading tendency, and were properly refused.

Nor do we find any reversible error in the rulings on the evidence, disclosed by the last two assignments of error.

Finding no reversible error in the record, the judgment of the court below is affirmed. Affirmed.

McCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

(190 Ala. 494)

CARMICHAEL et al. v. POND. (No. 555.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. DISCOVERY — 19 — EQUITY — ADMINISTRATION.

A bill, alleging that complainant was the administrator of an estate, that certain promissory notes made by some of the respondents to his intestate, certain moneys, and certain muniments of title to the estate, were in possession of some one of the respondents, that complainant did not know, and without the aid of a court of equity could not ascertain, which one of respondents possessed the documents, that they deliberately concealed from him the identity of the person in possession to prevent him from administering the estate in the court of chancery, that he could not bring detinue because he did not know the person in possession of the documents, contained equity as a bill for discovery in aid of the administration of the estate.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 20-26; Dec. Dig. — 19.]

2. DISCOVERY — 3 — CHANCERY JURISDICTION — STATUTORY BILLS OF DISCOVERY.

The statutes authorizing parties to suits at law or in equity to file interrogatories to their adversaries, which practice is sometimes called statutory bills of discovery, do not deprive the chancery court of any of its original jurisdiction as to bills for discovery.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 3, 4; Dec. Dig. — 3.]

Appeal from Chancery Court, Coosa County; W. W. Whiteside, Chancellor.

Bill by Henry W. Pond, as administrator, against D. M. Carmichael and others, for discovery. Decree overruling demurrers to the amended bill, and respondents appeal. Affirmed.

The original bill sufficiently appears from the opinion. The bill was amended by the further allegation that the respondents have knowledge of the custody, or have the actual custody, of said paper writing and money above referred to, that the discovery herein sought is material, and that without such discovery orator is unable to maintain this suit because of facts elicited by the interrogatories hereinafter propounded, which cannot be proven otherwise than by respondents' answers to such interrogatories. The bill was further amended by the addition of certain interrogatories seeking to ascertain whether or not complainant's intestate had any money on its person at the time of his last visit to the Carmichaels, or at the time of his last sickness while there, and, if so, how much, and what became of it. The demurrers raise the point that there is no equity in the bill; complete and adequate remedy at law; no demand made for the money, deeds, and notes mentioned; fishing bill; no affidavit, and it is alleged on information and belief, and not on personal knowledge; and because it is not shown that complainant is entitled to the matters therein sought or interested therein.

Felix L. Smith, of Rockford, and Lackey & Rowland, of Ashland, for appellants. S. J. Darby, of Rockford, for appellee.

MAYFIELD, J. [1] This is a bill the sole equity of which is discovery. The case made by the bill is that complainant is the administrator of the estate of R. A. Lessly; that certain promissory notes made by some of the respondents to his intestate, and certain moneys, and certain deeds or conveyances forming the muniments of title to the estate of his intestate, are in the possession of some one of the respondents or their agents or confederates; that complainant does not know, and cannot ascertain without the aid of a court of equity, the particular one of the respondents, agents, or confederates who has the possession of the documents in question; that they will not inform him, but deliberately conceal from him the identity of the person in possession or control of the documents; that these respondents are withholding from him this information to prevent him from administering the estate in the court of chancery to which the administration of the estate has been removed; that he cannot properly administer the estate in the chancery court without this knowledge, information, or discovery; that he cannot bring an action of detinue to recover the specified chattels, because he does not know the particular individual who has the possession, custody, or control of the documents desired; that these defendants, one or all, have the documents, or know who has such possession or control; but that they deliberately conceal and withhold the information from the complainant to defeat his administration of the estate of his intestate. The chancellor sustained respondents' demurrer to the original bill, and complainant then amended his bill to meet the objection or defect pointed out by the chancellor in his opinion. The respondents then demurred to the amended bill, and the chancellor overruled the demurrer, and from this decree the respondents prosecute this appeal.

The amended bill was not subject to any of the grounds of demurrer, and we think it certain that it contains equity as a bill for discovery in aid of the administration of the estate in the chancery court. It is perfectly obvious, from the averments of the bill, that complainant is entitled to the custody and possession of the documents as alleged in the bill, and that his possession thereof is necessary to the proper and complete administration of the estate in the chancery court, and we think the bill sufficiently shows that he cannot acquire the possession or recover the same in a suit at law or equity, without the discovery of the information sought in this bill, and that he cannot obtain the information necessary from any other source, nor without the aid of the chancery court through this bill of discovery. This subject

was fully discussed by this court in an early case, that of *Alston v. Graves*, 6 Ala. 177, wherein it is said:

"Mitford lays down the rule in these words: The plaintiff may require this discovery, either because he cannot prove the facts, or in aid of proof to avoid expenses. Mitford on Plead. 207. Lord Hardwick, in 1741, in *Brownlow v. Gamal*, 2 Atk. 240, says a plaintiff is entitled not only to have discovery in matters which he cannot prove, but of such matters as may be of use and relief to him in recovering his title. Again, in 1751, in *Lord Montague v. Dudman*, 2 Vesey, 375, he says a bill of discovery lies here to aid the proceeding in some suit relating to a civil right in a court of common law. And, afterwards, in *Finch v. Finch*, Id. 392, he insists that every plaintiff is entitled to have a discovery from defendants, on two heads: To enable him to have a decree, and to ascertain facts material to his case, either because he cannot prove, or in aid of proof; for a man may be entitled to an answer of what he can prove to avoid expense."

In the case of *Continental Life Ins. Co. v. Webb*, 54 Ala. 697, it is said:

"In a bill for discovery only, it may not be necessary to disclose that the facts sought to be discovered are incapable of proof otherwise. A discovery may be had of mere cumulative evidence. Story's Eq. Pl. § 324. But if the bill is framed for discovery and relief, and seeks to withdraw from the jurisdiction of the courts of law matters of pure legal cognizance, it must be shown the discovery is indispensable to the ends of justice, and, because of the inability of a court of law to compel it, the jurisdiction of a court of equity arises, as it arises generally, because of the inadequacy of legal remedies."

[2] It has been uniformly decided by this court that our statutes authorizing parties to suits at law or in equity to file interrogatories to their adversaries, which practice is sometimes called statutory bills of discovery, do not deprive the chancery court of any of its original jurisdiction as to bills for discovery. In the case of *Nixon v. Clear Creek Lumber Co.*, 150 Ala. 608, 43 South. 806, 9 L. R. A. (N. S.) 1255, it is said:

"In a case where a party sought to discover as to the number and value of lots which it was claimed had been sold, and in which complainant had an interest, this court said: 'The well-established jurisdiction of a court of equity to compel a discovery from a party is not affected by the statutory provisions which permit an examination of the parties to a suit as witnesses in a court of law. The jurisdiction remains the same as before the adoption of the statute.' *Wood v. Hudson*, 96 Ala. 469, 471, 11 South. 530. This court, also, in a matter of account held that 'discovery is an acknowledged independent source of equitable jurisdiction and is not affected by statutory provision'; also, that the court, having obtained jurisdiction for discovery, 'will proceed to settle and adjudicate all the matters in controversy, granting complete relief, though it may involve the adjudication of purely legal questions.' *Va. & Ala. Mining & Mfg. Co. v. Hale & Co.*, 93 Ala. 542, 545, 546, 9 South. 256."

We find no error in the decree of the chancellor, and it is in all things affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 138)
BIRMINGHAM RY., LIGHT & POWER CO.
v. SIMPSON. (No. 753.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

DAMAGES ⇐208 — QUESTIONS FOR JURY —
FAILURE OF PROOF.

In an action for personal injuries, where it appeared that until plaintiff recovered or partially recovered from the injuries his business was conducted by his brother, but there was no evidence that his business suffered during his temporary absence, that it cost him anything to maintain its usual level of earnings, and no evidence of the value on a wage basis of the services he might have rendered had he not been injured, it was error to submit the question of damages for loss of time.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. ⇐208.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by J. A. Simpson against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Tillman, Bradley & Morrow and Frank M. Dominick, all of Birmingham, and T. T. Huey, of Bessemer, for appellant. Frank S. White & Sons, of Birmingham, and Mathews & Mathews, of Bessemer, for appellee.

SAYRE, J. We need not repeat the statement as to the general nature of this case which may be found in the report of a former appeal. 177 Ala. 475, 59 South. 213.

It was submitted to the jury to award plaintiff damages for time lost from his business by reason of his injuries. Plaintiff was a small retail dealer in coal, grain, and feedstuff. After his recovery—or partial recovery—he went back to his business, which in the meantime had been conducted by his brother, with reduced physical capacity to meet its demands upon him. It was held on the former appeal, citing authorities, that damage to plaintiff's earning capacity was not to be admeasured exclusively by the kind of work he was doing at the time of his injury, or by the amount of compensation he was then receiving, and that evidence of his experience and earning capacity in various kinds of work he had done was relevant, as going to show the extent to which plaintiff's earning capacity had been impaired. It is always more or less a speculation whether the permanent or future temporary loss of capacity will bring to the plaintiff in a case of this character any pecuniary loss which otherwise he would not have suffered, or how much, if any; but such damages are allowed and assessed as a necessary measure of approximate justice. If plaintiff has been cut off from one avenue of earning, he may resort to another, and, as a relief to defendant, by way of minimizing damages, he may be required to do so, if he reasonably can. Hence the relevancy of the evi-

dence considered on the former appeal as affecting the measure of recovery for loss of earning capacity. Now, however, the question is different. It concerns, not plaintiff's right to compensation for impaired future capacity, which, it may be assumed, the jury estimated in their assessment of damages, but the pecuniary loss he may have already suffered by reason of his inability to attend to his usual business during a certain limited time already past. There was no evidence that plaintiff's business had suffered during his temporary absence, or that it cost him aught to maintain its usual level of earnings, or the value, on a wage basis, of the services he might have rendered had he not been injured; in short, there was no evidence that he had suffered pecuniary loss by reason of his absence from his business. In this state of the case it was harmful error on the part of the court to give the jury to understand that they might assess damages against defendant on account of lost time. *Sutherland on Damages* (3d Ed.) § 1246.

We have found no other reversible error in the record. Other assignments of error present no questions of interest or merit, and need no special statement. For the error indicated the judgment is reversed, and the cause remanded.

Reversed and remanded.

MCCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 176)

BIRMINGHAM RY., LIGHT & POWER CO. v. DRENNEN. (No. 754.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. STREET RAILROADS §117—PERSONAL INJURY—QUESTION FOR JURY—NEGLIGENCE AND WANTON NEGLIGENCE.

In an action for the death of one killed by a street car, *held*, on the evidence, that defendant's negligence and wanton negligence were questions for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 230-257; Dec. Dig. §117.]

2. NEGLIGENCE §11—WANTON NEGLIGENCE.

Mere error of judgment or mistake in action or in omission to act under duty will not alone suffice to warrant a finding that the act or omission charged is a wanton or willful wrong.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 13; Dec. Dig. §11.]

3. TRIAL §194—INSTRUCTIONS—PROVINCE OF JURY.

In an action for the death of one killed by street car, an instruction that the distance within which an electric car could be stopped was a subject of expert testimony alone, and that the jury could not look to any other testimony, was properly refused, since it invaded the jury's province and denied their consideration of the distance in which the car was actually stopped.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. §194.]

4. EVIDENCE §471—OPINION EVIDENCE—EXPERT TESTIMONY—DISTANCE IN WHICH CAR WAS STOPPED.

Evidence as to the distance in which a street car was stopped related to a fact, and was not opinion evidence within the rule requiring qualification of a witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. §471.]

5. TRIAL §260—REQUEST FOR INSTRUCTIONS ALREADY GIVEN.

In an action for the death of one killed by a street car, where the court charged that if the motorman was not guilty of any negligence, and deceased jumped from his buggy through fear of a collision, defendant was not liable, refusal of defendant's requested charge that, if deceased was killed because he jumped from his buggy through fear of a collision not due to any negligence of the motorman, and that had he remained in his buggy he would not have been injured, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. §260.]

6. TRIAL §251—INSTRUCTIONS—APPLICABILITY TO PLEADING.

A charge that the fact that deceased jumped from his vehicle in fear of an impending collision would not prevent a recovery if such act was due to defendant's negligence did not improperly ignore contributory negligence, where there was no plea predicated contributory negligence in jumping from the vehicle.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. §251.]

7. STREET RAILROADS §90—OPERATION—CARE TO PREVENT COLLISION.

It is the duty of those in charge of a street car to keep a diligent look ahead and to promptly use due care to prevent a collision with a vehicle when danger of such collision appears.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 190-193; Dec. Dig. §90.]

8. STREET RAILROADS §99—VEHICLE ON TRACK—CONTRIBUTORY NEGLIGENCE.

A driver of a horse attached to a buggy is not necessarily guilty of any negligence in driving on, or not preventing his horse from shying on, a street car track on grade.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. §99.]

9. STREET RAILROADS §103—PERSONAL INJURY—CONTRIBUTORY NEGLIGENCE—AVOIDING INJURY.

Where the driver of a horse attached to a buggy was guilty of contributory negligence in driving on a track, but the motorman saw his peril in time to avoid collision by due care, and his negligent failure to exercise due care was the proximate cause of the driver's death, the contributory negligence was no defense.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. § 219; Dec. Dig. §103.]

10. WITNESSES §240—EXAMINATION—LEADING QUESTIONS.

In an action for the death of one struck by a street car, the allowance of plaintiff's question to a witness, as to whether he became aware of any stopping of the street car before it struck decedent's buggy, was not an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. §240.]

Appeal from Circuit Court, Jefferson County; C. B. Smith, Judge.

Action by Kate Drennen, as administratrix, against the Birmingham Railway, Light & Power Company, for damages for the death of her husband. Judgment for plaintiff, and defendant appeals. Affirmed.

The first count alleges the negligence as follows:

Plaintiff avers that said car ran upon or against said vehicle as aforesaid, and caused said intestate's death as aforesaid, by reason and as a proximate consequence of the negligence of defendant.

The second count charges negligence as follows:

That defendant's servant or agent in charge or control of the car, acting within the line and scope of his authority as such, being at the time conscious of his conduct, wantonly or intentionally caused the death of plaintiff's intestate, by wantonly or intentionally causing or allowing said car to run upon or against said vehicle at the time and place aforesaid, well knowing that to do so would likely or probably inflict great personal injury or death.

The following charges were refused the defendant:

(1) The court charges the jury that there is no evidence in this case that the motorman wantonly or willfully or intentionally injured plaintiff's intestate.

(4) The jury cannot even consider the question of damages in this case until they are first reasonably satisfied by the evidence that the injury was due to the negligence of the motorman.

(5) The court charges the jury that the distance within which an electric car can be stopped is a subject of expert testimony alone, and the jury cannot in this case look to any other character of the testimony to determine within what distance a car can be stopped.

(9) If the jury believe from the evidence in the case that Drennen, deceased, voluntarily jumped from the buggy to the ground and was killed solely on account of so doing, and that he jumped because of the fear and fright of a collision between the car and the buggy, and that had he remained in the buggy he would not have been injured, and that his fright and fear were not caused by or due to any negligence or wrong of defendant's motorman, you must find a verdict in favor of defendant.

Charge designated "X" given for defendant is as follows:

The court has charged you, at the written request of plaintiff, in substance that, even if Mr. Drennen jumped from the buggy, this fact, if it be a fact, would not prevent plaintiff from recovering a verdict in this case, if the jury are reasonably satisfied from the evidence that either count of the complaint is true. The court further charges you that if the motorman was not guilty of any negligence or wrong, and that Mr. Drennen, the deceased, jumped from the buggy through fear or fright of a collision, and was so injured that he died, you cannot find a verdict for plaintiff.

The following charges were given for plaintiff:

(2) Even if Mr. Drennen jumped from the buggy, this fact, if it is a fact, would not prevent plaintiff from recovering a verdict in this case, if the jury are reasonably satisfied from the evidence that either count of the complaint is true.

(3) It is the duty of those in charge of the car to keep a diligent lookout ahead, and to

promptly and diligently use due care to prevent a collision between the car and a vehicle on the street when danger of such collision appeared. A driver of a horse attached to a buggy is not necessarily guilty of any negligence at all in driving on, or not preventing his horse from shying on, a street car track on grade with and part of a public street.

(7) Even if Mr. Drennen pulled his horse on the track, and was guilty of contributory negligence in that regard, yet if the motorman saw the peril in time to avoid the danger by the exercise of due care, and negligently failed after discovering the peril to do what he could in the exercise of due care in the management and control of the car, and that such negligent failure, if there was such, proximately caused the death, then the previous negligence, if any, of Drennen in getting into danger, would be no defense to such subsequent negligence of the motorman, even if the motorman was not guilty of any wantonness, nor of any intentional wrong.

(8) Even if the jury are reasonably satisfied from the evidence that plaintiff's intestate negligently caused the horse and buggy to go on the track in dangerous proximity to the approaching car, yet if the jury are further reasonably satisfied from the evidence that defendant's motorman became aware of the peril, and after becoming aware of the peril negligently failed to do all he could with the means at hand to avert the peril, then the previous negligence of Drennen, if any, would be no answer to such subsequent negligence of the motorman, provided such subsequent negligence, if any, proximately caused the death of Drennen.

The seventeenth assignment of error was as follows:

The court erred in overruling appellant's objection to the following question to the witness Smith, asked by appellee: "I want to know if you became aware, as best you could see, of any checking or stopping at all on the part of the street car up to the time it struck the buggy."

Tillman, Bradley & Morrow and Charles E. Rice, all of Birmingham, for appellant. Harsh, Beddow & Fitts, Thompson & Thompson, and Guy M. Thompson, all of Birmingham, for appellee.

MCLELLAN, J. This is the second appeal in this cause. 175 Ala. 338, 57 South. 876, Ann. Cas. 1914C, 1037. The importance of the matter to both litigants has emphasized the care employed in the consideration of the subjects of errors urged. The evidence has not only been cautiously considered with the view to determining the support vel non accorded the material averments of the counts ascribing Drennen's death to simple negligence and to wanton or willful wrong, on the part of servants of the defending carrier, but also with that added degree of concern for a sound conclusion which exhaustive and able discussions in briefs naturally inspire in a reviewing tribunal.

[1, 2] Our opinion is that the issues made by both of the counts 1 and 2 could only, under established doctrine in this jurisdiction, be resolved and the truth pronounced by the jury. There was credible evidence tending to show the presence of Drennen, a traveler in a vehicle in a public street, in a position of peril before an on-coming street car;

that the motorman thereof was looking ahead over the point in which he was, if the car came on, imperiled; that the distance at which the car was when his peril became obvious to one in the motorman's position was sufficient to allow the car to be stopped, short of impact with the vehicle, by the prompt, orderly, and skillful action of a reasonably competent man in that station and under the circumstances existing; and that Drennen was killed as the immediate result of the impact. There is no positive testimony, usually presented in such cases, to the effect that the car could, under the circumstances, have been stopped, or checked in speed, within a specified distance; but there is testimony to the effect that this car was actually stopped within such space as that if the effort to stop the car had been made at the time Drennen's peril was first observable by the motorman, and he became obliged, by duty, to act to avert injury, the car could have been brought to a stop before impact with Drennen's vehicle. There was testimony positively opposed to the indicated phases of evidence; but this condition only served to institute conflicts that required the submission of the issues to the jury.

Given findings of fact favorable to the plaintiff upon these elements of the issues, it was, according to repeated decisions here, competent for the jury, under the evidence, to deduce the conclusion that the motorman did not perform his duty in the premises. Whether this breach of duty was of the aggravated character declared on in the second count, or was the result of simple neglect as declared on in the first count, were questions for the jury's consideration. If the jury credited the phases of the testimony tending to establish the conclusions of fact indicated, bases of liability were laid; and it cannot be said that, in determining these issues of fact as this jury did, there was such a departure from the line of rational reasonable deduction from the evidence before the jury, and the resolution of the issues to a state of pronouncement thereupon, as could be characterized as palpably opposed to the weight of the evidence. Whether the motorman, advised, as phases of the evidence tended to show he was, of Drennen's peril, failed or omitted to perform his duty, under the circumstances, with such conscious indifference to the probable consequences as amounted to a wanton disregard of Drennen's actually known danger and safety, or was the result of purpose, were matters for the jury to determine. *Id.*, 175 Ala. 338, 347-348, 57 South. 876, Ann. Cas. 1914C, 1037. While mere error of judgment, or mistake in action, or in omission to act under duty, will not, alone, suffice to warrant a finding that the act or omission charged is a wrong of a wanton or willful character, yet, whether that failure or omission to act, within duty, was characterized by a purpose to injure, or an indifference to probable con-

sequences, in the presence of known (to the operative charged) hazard surrounding the party injured, and means and ability are available to avert the injury, the question of the character of the omission or act is for the jury. Such is the established doctrine of this court. It is too late to now enter upon its consideration with a view to its revision. There was no error in refusing the general affirmative charge as to either of the counts, or in overruling the motion for new trial. From these conclusions it also results that the court did not err in refusing to defendant special charges 1 and 4.

[3, 4] Special charge 5, requested for defendant, would have denied consideration by the jury of that feature of the evidence which tended to show the distance in which the car, on this occasion, was actually stopped. The operation of stopping the car, when it was begun—at what distance the car was from the vehicle when the stopping appliances were employed by the motorman—and the distance the car moved thereafter, until it was stopped, were of the *res gestae* of the event, and served, as stated before, to show, if credited, within what distance the car could have been stopped. This was not opinion evidence, within the rule requiring qualification of a witness who would express an opinion as to the distance in which a car, under like circumstances, could be stopped. If accepted by the jury, the indicated testimony affirmed a fact, not an opinion. The charge invaded the jury's province, and was well refused.

[5] There was doubt raised by the evidence whether Drennen was thrown from the vehicle by the collision, or whether he jumped therefrom because of fear of the impending collision. The latter theory was pressed for defendant, in connection with the evidence that the car's impact with the vehicle was slight and itself wrought little damage to the vehicle. The defendant requested, and the court refused, charge 9, which will be set out in the report of the appeal. It was substantially covered, even without undue favor to defendant, by charge (we designate) X. Transcript, page 9. This charge will accompany 9 in the report of the appeal. The refusal of charge 9 was without prejudice to defendant.

[6] Charge 2 was not erroneously given for plaintiff. The effect of the charge was to advise the jury that Drennen's jumping from the vehicle would not prevent a recovery if that act of his resulted from the negligent or wrongful conduct declared on in the complaint. There is no plea predicated contributory negligence of Drennen's asserted action in jumping from the vehicle. Hence the charge was not subject to criticism, made in brief, that it improperly denied effect to a pleaded issue.

[7, 8] There was no fault in charges 3 and 5, given for plaintiff.

[9] Charges 7 and 8 given for plaintiff

were accurate and applicable statements of established doctrine; the former was specifically approved on previous appeal. The doctrine they applied to the case at bar is now too deeply grounded in our jurisprudence to admit of its reconsideration with a view to change. Its soundness is and must be finally accepted.

[10] The question set out in the seventeenth assignment of error doubtless evinced a strong case of pressure in the examination of a witness, but such matters are committed to the sound discretion of the trial court. That discretion does not appear to have been abused in this instance. The substance of the inquiry made of the witness bore immediately upon the issues under investigation. There is no merit in the assignment.

There is no error in the record. The judgment is therefore affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 75)

BOROK v. CITY OF BIRMINGHAM.

(No. 872.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCES — APPEAL.

Objection to the sufficiency of a complaint for violation of an ordinance cannot be made for the first time in the circuit court on appeal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. ¶ 642.]

2. MUNICIPAL CORPORATIONS — VIOLATION OF ORDINANCES — PROSECUTION — APPEAL.

Where an affidavit filed in recorder's court for violation of an ordinance was treated on appeal to the criminal court as importing the charge tried, and under it guilt was determined, whether the other count of the affidavit, or the statement filed in the criminal court, both attempting to charge a like offense, were sufficient or not, is immaterial on a further appeal.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. ¶ 642.]

3. CRIMINAL LAW — APPEAL — PRE-SUMPTIONS — VERDICT.

It will not be assumed that the verdict was rested on any act of which there was no evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. ¶ 1144.]

4. INTOXICATING LIQUORS — STATUTES — REPEAL — UNLAWFUL DRINKING PLACES.

There being no provision in the Smith and Parks Bills (Gen. Acts 1911, pp. 249-283, 28-31) defining what are unlawful drinking places, the provisions of section 5 of Act August 9, 1909 (Acts Sp. Sess. 1909, pp. 10, 11), defining unlawful drinking places, were not repealed, except in so far as regularly issued licenses to maintain drinking places afford the legal right to maintain such places.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 121; Dec. Dig. ¶ 111.]

5. MUNICIPAL CORPORATIONS — ORDINANCES — CONFLICT WITH STATE STATUTES.

It is no objection to municipal ordinances, under Pol. Code 1907, § 1251, giving municipalities full power to pass ordinances, that they afford additional regulations complementary to the end state legislation would effect, if they are not in contravention of any state enactment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1311-1314; Dec. Dig. ¶ 592.]

6. MUNICIPAL CORPORATIONS — ESTABLISHING RULE OF EVIDENCE.

A ordinance providing that certain circumstances, when established by evidence, should raise a prima facie presumption of guilt, which promulgates the same rule as the Fuller Bill (Acts Sp. Sess. 1909, p. 63), infracts no constitutional provision.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 245-256; Dec. Dig. ¶ 111.]

7. CRIMINAL LAW — PARTIES ENTITLED TO ALLEGE ERROR.

Motion to exclude an answer merely because not responsive can only be availed of by the interrogator.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3005, 3006; Dec. Dig. ¶ 1136.]

8. INTOXICATING LIQUORS — VIOLATION OF ORDINANCES — EVIDENCE.

Where the issue on a prosecution for violation of a municipal ordinance was whether defendant kept at his storehouse prohibited liquors with intent to sell same contrary to law, a question to a witness, whether he bought liquor at that location recently before the offense alleged and after the passage of the ordinance, was an evidential fact bearing on defendant's guilt.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. ¶ 233.]

Appeal from Criminal Court, Jefferson County; S. E. Greene, Judge.

R. A. Borok was convicted of violation of a city ordinance, and he appeals. Transferred from the Court of Appeals. Affirmed.

Samuel B. Stern, of Birmingham, for appellant. Joseph P. Mudd, of Birmingham, for appellee.

McCLELLAN, J. [1-3] On appeal to the circuit court, the defendant (appellant) was adjudged guilty of the violation of an ordinance of the city of Birmingham. No objection to the sufficiency of the complaint on which defendant was found guilty by the recorder having been made in the recorder's court, objection could not be made thereto in the circuit court on appeal. Mayor, etc., v. O'Hearn, 149 Ala. 307, 42 South. 836, 13 Ann. Cas. 1131; Aderhold v. Mayor, etc., 99 Ala. 521, 12 South. 472; McKinstry v. Tuscaloosa, 172 Ala. 344, 54 South. 629. The affidavit filed in the recorder's court contained in its first "count" every element with respect to probable cause that could be exacted in a criminal prosecution; and this "count" was treated on the trial in the criminal court of Jefferson county, after appeal, as importing the charge there tried; and un-

der it guilt was determined as of an offense against the municipal ordinance. So, whether the other "count" in the affidavit, or the statement filed in the criminal court—both directed to the purpose of charging a like offense to that set forth in the first "count" in the affidavit—were sufficient or not, is entirely immaterial on this appeal. There was no averment in the mentioned first "count" asserting the manufacture of forbidden liquors by the defendant, and there was no evidence tending in any degree to show that defendant manufactured forbidden liquors; whereas, there was evidence supporting the allegation of infraction of the ordinance by the forbidden traffic in intoxicants. It cannot be assumed that the jury's verdict was rested upon any act of which there was not the slightest intimation or evidence, namely, the manufacture of forbidden liquors, which was not condemned or inhibited in the ordinance 58-C, but which was alleged in the statement filed in the criminal court.

[4] It has been determined here that the Smith and Parks Bills (Gen. Acts 1911, pp. 249-288, 26-31), treating the manufacture, sale, etc., of intoxicants, did not operate the repeal of the Fuller and Carmichael Bills (Acts Sp. Sess. 1909, pp. 8, 63), except in the particulars the former laws are inconsistent with the latter laws. *Western Ry. Co. v. Capitol Brewing Co.*, 177 Ala. 149, 153, 59 South. 52; *Allen v. State ex rel.*, 181 Ala. 383, 61 South. 912-913. There being no provision in the Smith and Parks Bills defining what are unlawful drinking places, the provisions of section 5 of the act approved August 9, 1909 (Acts Sp. Sess. 1909, pp. 10, 11), defining unlawful drinking places were not repealed by the Smith and Parks Bills, except in so far as regularly issued licenses to maintain drinking places afford the legal right to maintain such places. Unless legally licensed under existing laws, every place defined in said section 5 as an unlawful drinking place is an unlawful drinking place and is subject to the provisions in that respect of the laws enacted at the Special Session of the Legislature held in 1909.

[5] By section 1251 of the Political Code (codifying what is known as the Municipal Code), the amplest authority was conferred on municipal governing bodies to enact ordinances to the ends therein defined. That section is as follows:

"Municipal corporations shall have power from time to time to adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this chapter, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars and by imprisonment or

hard labor not exceeding six months, one or both."

There is nothing in ordinance No. 58-C which appears to be in conflict with any state law on the subject. It is no objection to municipal ordinances, in which no contravention of a state enactment is undertaken or is effected, that they afford additional regulations complementary to the end state legislation would effect. *Turner v. Town of Lineville*, 2 Ala. App. 454, 56 South. 603, 605.

[6] Section 8 of the ordinance provided that certain circumstances, when established by the evidence, should raise a prima facie presumption of guilt of defined unlawful acts. This section was admitted in evidence over defendant's objection. The substance of this section (8) of the ordinance infracts no constitutional provision. *Ex parte Woodward*, 181 Ala. 97, 61 South. 295. Section 4 of the Fuller Bill (Acts Sp. Sess. 1909, p. 64), considered in *Ex parte Woodward*, supra, provides a rule of evidence of general application in state and municipal prosecutions for violation of laws pertaining to the liquor traffic. That rule of evidence was applicable to the appellant's prosecution and effected to make out the prima facie case under features of section 1 of Ordinance No. 58-C. Hence no prejudice could have resulted to the appellant in the admission of section 8 of the mentioned ordinance which but reiterated the substance of the pertinent rule of evidence provided in section 4 of the state statute.

[7] One of the issues on trial was whether defendant kept at his storehouse, in the city of Birmingham, prohibited liquors with the intent to sell the same contrary to law. The witness Flagg was asked whether or not he had bought any liquor from defendant on Fifteenth street near Avenue B in January, 1913. The question was not objectionable. The time referred to in the question was long after the ordinance had become effective. Motion to exclude an answer merely because not responsive can only be availed of by the interrogator. *Pope v. State*, 174 Ala. 63, 76, 57 South. 245. Whether defendant had sold liquors at that location, so recently before the particular occasion under investigation, contrary to law, was an evidential circumstance bearing one of the issues of guilt vel non as stated before.

The sentence imposed upon the defendant was within the penalty prescribed by section 1 of Ordinance No. 58-C.

There is no prejudicial error in the record. The judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(190 Ala. 200)

SEABOARD AIR LINE RY. CO. v. STANDIFER. (No. 879.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)1. CARRIERS \S 318—CARRIAGE OF PASSENGERS—FAILURE TO STOP AT STATION—NEGLIGENCE OF CONDUCTOR—SUFFICIENCY OF EVIDENCE.

Evidence held to show that conductor's failure to stop a train, as requested, constituted simple negligence, conclusively rebutting any idea of wantonness.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1270, 1307-1314; Dec. Dig. \S 318.]

2. CARRIERS \S 305—CARRIAGE OF PASSENGERS—FAILURE TO STOP AT STATION—NEGLIGENCE OF CONDUCTOR—SICKNESS—REMOTE RESULT.

In an action against a railroad for damages caused by failure to stop a train, where it appeared that the conductor sent the plaintiff home in an automobile, and that the plaintiff had an attack of typhoid fever later, the fever was not proximately caused by the conductor's negligence, so as to constitute an element of recoverable damages against the railroad, and the admission of any testimony on the point was error.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1132, 1136-1139, 1245-1246; Dec. Dig. \S 305.]

3. DAMAGES \S 33—AGGRAVATION OF ILLNESS—EXPOSURE—PROXIMATE CAUSE OF SICKNESS.

Where exposure to weather or cold results in further physical debility to a person already sick or feeble, damages for causing such exposure may be recovered in a proper case.

[Ed. Note.—For other cases, see Damages, Cent. Dig. \S 42; Dec. Dig. \S 33.]

Appeal from City Court of Birmingham; J. H. Miller, Judge.

Action by William Standifer, Jr., by next friend, against the Seaboard Air Line Railway Company. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals. Reversed and remanded.

Tillman, Bradley & Morrow, L. C. Leadbeater, and E. Crampton Harris, all of Birmingham, for appellant. Thompson & Thompson, Guy M. Thompson, and F. E. Blackburn, all of Birmingham, for appellee.

DE GRAFFENRIED, J. This suit was brought by William Standifer, Jr., by next friend, to recover damages for the negligent failure of the defendant's conductor to stop a train on which plaintiff was a passenger, at the point of his destination, and to allow him there to disembark from the train.

It seems that the plaintiff is a little boy, and that on the 4th or 5th day of October, 1912, he and his father and mother and another child took the defendant's train at Parsons, Ala., for Irondale, Ala. The plaintiff's father paid the conductor the fares to Irondale, and on the subject now under consideration testified as follows:

"We first went over to Parsons and waited there some little time; I don't know how long. When we got on the train and the conductor

came around for the fare, I said, 'How much is the fare for my wife and two children and myself to Irondale?' I told him I wanted to get off at Irondale, and asked him if he would stop, and he said he would. I asked him what the fare was for four of us, and he said \$1. I gave it to him, and he said, 'I will stop at Irondale.' We came on, and I didn't know we passed Irondale until Mr. Cox called my attention to it. I called the conductor's attention, and he says, 'Well, I am sorry.' He says, 'I have been used to running on the through train.' He said the reason that he made the mistake was on account of he was used to running on the through train, and they put him on the local that night, and he forgot the station. We came into town [Birmingham] and he [the conductor] said, 'I will get some conveyance and pay for it out of my own pocket.' We waited at the terminal [station waiting room] some time, and the conductor came out in his plain clothes. He procured an automobile and paid for it, and we went home."

On the same subject a witness for the plaintiff testified as follows:

"Why he told him [the father] that he was sorry [that he had carried him by the station], but he was a new man on that road, or being used to running on the fast train—I believe that is it—and he would do anything to get them back out there. He told them that he would hire a taxicab and pay for it out of his own pocket."

The mother of the little boy, on the same subject, testified as follows:

"The conductor paid for the automobile. The conductor was very nice about it—very pleasant all of the time. He was very gentlemanly all during the whole trip. He done all right, except he promised to put us off at Irondale and didn't do it."

The above evidence shows that the conductor, who had been accustomed to run on a fast train—a train which made but few stops, and which was not accustomed to stop at Irondale—simply forgot to stop his train at that point, and by inadvertence carried this family on into Birmingham. The plaintiff's evidence shows that the attention of the conductor was not called to this act of forgetfulness on his part until after he had passed Irondale. When the situation was called to his attention there was nothing left for him to do but to proceed to Birmingham with his train. *L. & N. R. Co. v. Cornelius*, 6 Ala. App. 386, 60 South. 740.

[1] The mere failure of the conductor to stop the train was, under the evidence in this case, an act of simple negligence. *L. & N. R. Co. v. Cornelius*, supra; *Yazoo R. R. Co. v. Hardie*, 100 Miss. 132, 55 South. 42, 967, 34 L. R. A. (N. S.) 740, 742, Ann. Cas. 1914A, 323.

In this case there was no circumstance indicating oppression, unkindness, ill will, insult, or reckless indifference. On the contrary, all the evidence shows that (to quote the plaintiff's mother) "he done all right, except he promised to put us off at Irondale and didn't do it." The evidence not only shows this, but it shows that so soon as the mistake was discovered this conductor did everything that the most kindly man could

have done under similar circumstances. The father said:

"The conductor acted very nicely. He said he was sorry. He paid for the automobile out of his own pocket."

It was eight miles from Birmingham to Irondale, and yet this conductor, whose act of forgetfulness is sought to be construed into one of wantonness or into reckless indifference, sent this family home—as the best method repairing his act of negligence—in an automobile at his own expense. There is not only no evidence of wantonness in this record, but the evidence conclusively rebuts such idea. *Wilkinson v. Searcy*, 76 Ala. 176.

[2] 2. The fact that the plaintiff, after the ride in the automobile above referred to, had an attack of typhoid fever, cannot be held to be so connected with the failure of the defendant to stop the train at Irondale as to constitute an element of recoverable damages in this case. The attack of typhoid fever was not the direct consequence of the negligence complained of. It was caused by a germ—a thing entirely independent of the defendant's negligent act.

A blacksmith pricks a horse by careless shoeing. The horse, by reason of his lameness, is delayed in passing through a forest, and a tree falls on him and kills him. "Such injury would not be the measure of the blacksmith's liability." *Jaggard on Torts*, p. 375.

[3] If, by reason of the defective shoeing, the horse had lost his leg, or if blood poison had set in and killed him, an entirely different proposition would be before us.

In the instance first supposed, the tree was the direct cause of the death of the horse. In the instance last supposed, the loss of the leg of the horse, or the loss of his life, is traceable directly to the defective shoeing. In the first instance supposed, the defective shoeing was the remote, and the falling of the tree the direct, immediate cause of the death of the horse. In the last case supposed, the loss of the leg or life of the horse is directly traceable to the defective shoeing as its immediate, not remote, cause. When a person is already sick, feeble, debilitated, or is lacking in physical strength, and, through the negligence of another, is caused to do some act which, as its direct result, increases such sickness, feebleness, or debility, or which causes him to do some act beyond his physical strength, and thus produces injury, such damages, in proper cases, may be recovered.

There are certain diseases, such as rheumatism, la grippe, etc., which common experience indicates are increased in intensity by exposure to cold; and such damages are frequently traceable, as its direct and immediate result, to an act of negligence. Typhoid fever is caused by a specific germ, and the germ is always the direct cause of the disease.

While in this case the testimony of the physician indicates that a person in a weakened condition is less likely to resist or throw off the germ of typhoid fever than is a strong and healthy person, common observation indicates that the strong and the healthy, as well as the weak and debilitated, are all subject to this disease. Indeed, the evidence of this physician shows that, in permitting testimony as to the typhoid fever with which plaintiff was attacked after the act of negligence complained of, the court opened wide the door of speculation and permitted the jury to consider testimony which, at best, could only produce doubt and uncertainty in the minds of the best trained medical men of the world.

The squib case, so frequently referred to in the books, has nothing to do with the facts of this case. In the squib case the squib did the injury. In this case a typhoid germ directly caused the fever. If, on the way to Irondale, the automobile had run over a bomb which an anarchist had left in the highway, and the bomb had exploded and injured the occupants of the automobile, the defendant would not be liable for that injury. The anarchist who left the bomb there would be liable.

We are not dealing here with a case where, through an act of negligence, a person is carried from a safe place into a dangerous place, and there suffers injury, or from a healthy locality into a plague stricken place, and there takes the plague. We are simply dealing with a case in which we know—in so far as human science can tell us—that a person has had a case of typhoid fever caused by the specific germ of typhoid fever. How or when the plaintiff got that germ into his system we do not know, neither can we—nor any other human being—truthfully say, under the evidence in this case, what caused the plaintiff to succumb to the attack. All that rests in pure speculation. This is but plain common sense which addresses itself to the plain understanding of the race.

The trial court erred in allowing any testimony as to the plaintiff's attack of typhoid fever. *L. & N. R. R. Co. v. Quick*, 125 Ala. 553, 28 South. 14; *Montgomery & E. Railway Co. v. Mallette*, 92 Ala. 209, 9 South. 363; *E. T. V. & G. R. R. Co. v. Lockhart*, 79 Ala. 815.

3. There are some other questions presented by this record, but, in view of what we have above said, we do not think it necessary to discuss them.

For the reason above set out, the judgment of the trial court is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 646)

BUTLER-KYSER MFG. CO. v. CENTRAL OF GEORGIA RY. CO. et al. (No. 567.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. DETINUE —5—RIGHT OF ACTION—TITLE TO PROPERTY.

Plaintiff in detinue, whose evidence at most shows only an equitable claim to some unidentified part of the cotton claimed, of which he had never been in possession, cannot recover, since to maintain that action he must show a general or special property in the cotton claimed or some identified part thereof and the right to immediate possession and, if he has never been in possession, must show a legal title.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9; Dec. Dig. —5.]

2. DETINUE —5—RIGHT OF ACTION—TITLE TO PROPERTY—EQUITABLE TITLE.

Code 1907, § 6039, allowing one claiming a legal or equitable title to property upon which an execution or attachment has been levied to assert his claim, does not change the rule that an equitable title will not support detinue even when a claim to the property was interposed by a third person.

[Ed. Note.—For other cases, see Detinue, Cent. Dig. §§ 5-9; Dec. Dig. —5.]

3. APPEAL AND ERROR —1029—HARMLESS ERROR—PLAINTIFF NOT ENTITLED TO RECOVER.

A plaintiff who could not recover under the evidence admitted or offered and excluded is not prejudiced by errors committed at the trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. —1029.]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Detinue by the Butler-Kyser Manufacturing Company against the Central of Georgia Railway Company, in which Weil Bros. intervene as claimants. Judgment for the claimants, and plaintiff appeals. Affirmed.

Riddle, Ellis & Riddle, of Goodwater, for appellant. George A. Sorrell, of Alexander City, for appellees.

MAYFIELD, J. Appellant sued appellee in detinue to recover 64 bales of cotton. Appellee railway company suggested Weil Bros. as claimants, who did interpose claims to the cotton sued for as is authorized by statute. Code 1907, §§ 3778-3792. The trial resulted in a judgment for the claimants, from which judgment plaintiff prosecutes this appeal.

The cotton in question was bought from various farmers who raised it, by a mercantile firm at Kellyton, Ala., and sold by this firm to a bank at Alexander City, Ala., and by the bank sold to Weil Bros., claimants, at Montgomery, Ala., and was in the possession of the railway company as a common carrier, when the plaintiff had it seized under its writ of detinue.

The plaintiff seems to base its sole claim and title to the property upon a contract which it had with O. D. Mitchell & Co. for the sale of commercial fertilizer, by which contract O. D. Mitchell & Co. were to sell the fertilizer to the farmers and take their

notes for the purchase price, which notes were to be the property of plaintiff until O. D. Mitchell & Co. had paid plaintiff in full the purchase price of the fertilizer; and O. D. Mitchell & Co. were to collect the notes as agents of plaintiff.

[1] The trial court properly gave the affirmative charge for the claimants. The plaintiff did not prove title to a single bale of the cotton, nor did it offer any evidence which was excluded, which, if allowed, would have proved title to a single bale of cotton. The most that plaintiff's evidence tended to show was an equitable claim to some part of the cotton, but as to which particular part or bale, there was no evidence to show, or tending to identify it. The burden was, of course, on the plaintiff to prove that it had a general or a special property in the cotton or some identified part thereof, and the right to the immediate possession, and, if it has never had the actual possession, it must show a legal title. Reese v. Harris, 27 Ala. 301; Stoker v. Yerby, 11 Ala. 322; Hensley v. Orendorff, 152 Ala. 599, 44 South. 869; Keyser v. Maas, 111 Ala. 390, 21 South. 346.

[2] An equitable title will not support an action of detinue. Jones v. Anderson, 76 Ala. 427; Ballard v. Mayfield, 107 Ala. 396, 18 South. 29. While the statute (Code, § 6039) has changed the rule as to statutory claim suits, it has not changed the rule as to actions of detinue, even where a claim is interposed by a third party. It is limited to cases where property is levied on under attachments or executions, and does not apply to detinue suits.

We do not intimate that the plaintiff in this suit showed any equitable title to the cotton in question. It is certain that it did not show any kind of valid claim, right, or title to some of the cotton; nor did the evidence show, or even tend to show, that part to which it had some kind of claim, and that as to which it did not have such claim. There was no attempt in the complaint to describe or identify any particular bale or bales of cotton.

The property is described in the complaint as follows:

"The plaintiff claims of the defendant the following personal property, to wit: Sixty-four bales of lint cotton in the possession of the defendant at Kellyton, Ala., part of same being in a car or two cars and the remainder on the platform of defendant's depot at Kellyton, and same being the cotton delivered to defendant by O. D. Mitchell & Co., or Weil Bros., or both of said parties, or by G. F. Parks for shipment."

The plaintiff having utterly failed to show title or right to the possession of the cotton sued for, or to any particular bale, it could not recover in this action. There was no room or place for the application of the doctrine of commingling of goods against the claimants. It was wholly immaterial in this case, so far as the plaintiff is concerned,

whether it had paid cash to the bank for the cotton or had bought it on a credit.

[3] It is wholly unnecessary to consider other questions raised on this appeal. If all should be decided in favor of appellant, still it would have shown no right to a verdict, and the error would be without possible injury to appellant.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 631)

STATE ex rel. CITY OF TUSKEGEE v.
COURT OF COMRS OF MACON
COUNTY. (No. 560.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. BRIDGES \S 5—HIGHWAYS \S 122—SPECIAL ROAD AND BRIDGE TAXES—STATUTES—VALIDITY.

Act August 26, 1909 (Acts 1909 [Sp. Sess.] p. 303), \S 2, in so far as it relates to special road and bridge taxes levied under Const. \S 215, subd. "a," is in conflict with the last clause thereof, and, as to such levies, is therefore void.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. \S 5; Dec. Dig. \S 5; Highways, Cent. Dig. \S 380, 393; Dec. Dig. \S 122.]

2. OFFICERS \S 107—EXERCISE OF POWER—STATUTES—DESIGNATION.

It is not necessary for public officers, in the exercise of their public powers, whether general or special, to expressly declare under what provision of law they are proceeding, but it is enough if any law, in fact, authorizes their action.

[Ed. Note.—For other cases, see Officers, Dec. Dig. \S 107.]

3. HIGHWAYS \S 127—TAXES—LEVY—ROAD AND BRIDGE TAX.

Where the commissioner's court levied first a general tax to the constitutional limit, and afterwards, without reference thereto, levied a special road and bridge tax under Const. \S 215, providing that any county, for the erection of necessary public buildings, roads, or bridges, may levy and collect such special taxes, not to exceed one-fourth of 1 per cent., as may have been or may hereafter be authorized by law, which taxes so levied and collected shall be applied exclusively to the purposes for which the same were so levied or collected, such special tax could not be construed as a mere amendment of the general levy already made whereby one-half thereof was devoted to roads and bridges; the full per cent. of each levy having been separately collected and separately kept and applied to its appropriate uses.

[Ed. Note.—For other cases, see Highways, Cent. Dig. \S 384; Dec. Dig. \S 127.]

Appeal from Circuit Court, Macon County; Lum Duke, Judge.

Mandamus by the City of Tuskegee directed to the Court of County Commissioners of Macon County to require them to pay over to the city a share of certain money derived from taxes levied by Macon county for road and bridge purposes for the years 1911-13. From an order denying the writ, petitioner appeals. Affirmed.

The answer of respondent to petition and the undisputed evidence shows that the taxes

in question were levied as follows: At the June term, 1911, of the commissioners' court of Macon county, shown by the record of said proceedings kept as required by law, the following tax levies were made, and the following order entered:

"On motion of M. E. Aiken it was ordered that one-half of 1 per cent. be levied and collected on the value of the taxable property in the county as shown by the book of assessment, and that 50 per cent. be added to all licenses collected for the state, for the use of the county, to be collected at the same time and in the same manner that state taxes and licenses are collected."

After and subsequent to the above order, the following appears of record:

"On motion of E. W. Harris, it was ordered that one-fourth of 1 per cent. be levied and collected for road and bridge purposes on the valuation of all taxable property in the county as shown by the book of assessment."

Like levies were made in like manner for the years 1912 and 1913, and for each year under said levies there was actually collected a general tax of one-half of 1 per cent., which was used for general purposes, and, in addition thereto, a tax of one-fourth of 1 per cent., which was set apart and used exclusively for the roads and bridges of the county.

O. S. Lewis, of Tuskegee, for appellant. R. H. Powell, of Tuskegee, for appellee.

SOMERVILLE, J. [1] The petitioner's claim is based upon the provisions of section 2 of the act of August 26, 1909 (Sp. Sess. Acts 1909, p. 303). It has been settled by our decisions that, in so far as that act relates to special road and bridge taxes levied under the authority of subdivision "a" of section 215 of the Constitution, it is in conflict with the last clause thereof, and is therefore, as to such special levies, inoperative and void. Board of Revenue v. State ex rel. Birmingham, 172 Ala. 138, 54 South. 757; Commissioners' Court v. City of Troy, 173 Ala. 442, 56 South. 131, 274, Ann. Cas. 1914A, 771; Commissioners' Court v. State ex rel. Tuscaloosa, 180 Ala. 479, 61 South. 431.

[2] The petitioner in this case insists, however, that the order levying a tax of one-fourth of 1 per cent. on all the taxable property in the county for road and bridge purposes was not a special levy under section 215 of the Constitution, but was a mere amendment of the general levy already made, whereby one-half thereof was devoted to roads and bridges.

We have given due consideration to this theory, but we can discover nothing in either the form or the relation of the two levies which in any way tends to support it. It is, of course, not necessary that in the exercise of public powers, whether general or special, the authorities should expressly declare under what provision of law they are proceeding, but it is enough if any law authorizes their action.

[3] On the face of the records it appears too clear for serious controversy that the commissioners' court levied first a general tax to the constitutional limit, and afterwards, without reference to this general tax, a special road and bridge tax under section 215 of the Constitution. And, if confirmation were needed, the undisputed evidence shows that the full per cent. of each levy was separately collected, and separately kept and applied to its appropriate uses.

It results that the rulings and judgment of the trial court were free from error, and the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(190 Ala. 499)

COMPTON et al. v. COLLINS et al.
(No. 558.)

(Supreme Court of Alabama. Nov. 7, 1914.
On Application for Rehearing,
Dec. 17, 1914.)

1. USURY \Leftrightarrow 18—DEFINITION.

Usury is the result of a covinous contract entered into by two or more parties, whereby one party is to receive and the other party is to pay, for the use of money loaned, more than the legal rate of interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 31-34, 36-38, 40; Dec. Dig. \Leftrightarrow 18.]

For other definitions, see Words and Phrases, First and Second Series, Usury.]

2. USURY \Leftrightarrow 78—FORFEITURE OF INTEREST—CREDIT TO PRINCIPAL.

Where defendants under a contract advanced money to complainant at a usurious rate of interest, the account between the parties would be restated, so that no interest should be allowed thereon, and so that the principal of the account should be credited with the payments made by the complainant as they were made.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 157; Dec. Dig. \Leftrightarrow 78.]

3. USURY \Leftrightarrow 92—EQUITABLE RELIEF—DISALLOWANCE OF SELLER'S PROFITS.

In a suit for an accounting, defendants, who under a usurious contract to furnish goods to complainants had charged complainants for mules sold to them, were entitled, upon the restated account, to charge only what they paid for them.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 191-193, 196; Dec. Dig. \Leftrightarrow 92.]

4. MORTGAGES \Leftrightarrow 117—PAYMENT OF DEBT OF MORTGAGOR—REBATE OBTAINED BY MORTGAGEE.

On a bill for an accounting under a mortgage executed in consideration of a usurious store account against the mortgagor and the payment of his debts, the mortgagee was entitled to charge the amount paid to a debtor in full of his debt with interest thereon; but, if the mortgagee misled the mortgagor as to the amount paid or to be paid to the debtor, he was not in a position to take advantage of any profit or rebate obtained from the debtor.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. \Leftrightarrow 117.]

5. TRUSTS \Leftrightarrow 101—MORTGAGEE AS TRUSTEE FOR MORTGAGOR.

Under a mortgage executed by one in embarrassed financial circumstances in considera-

tion of his usurious account with the mortgagee and the mortgagee's assumption of certain indebtedness, the mortgagee, on delivery of the mortgage and notes, became in equity the trustee for the mortgagor of the difference between the principal of the mortgage and the amount of the account, and if, in paying any of the assumed indebtedness, as agent for the mortgagor, the mortgagee made any profit, the mortgagor, as cestui que trust of such difference, was entitled thereto.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 152; Dec. Dig. \Leftrightarrow 101.]

6. MORTGAGES \Leftrightarrow 377—ATTORNEY'S FEE.

Under a mortgage note providing for the payment of an attorney's fee if it became necessary to employ an attorney to collect the amount due thereon, the assignee of the mortgage could not charge an attorney's fee for sending an attorney to Virginia to collect, where the mortgagor himself arranged the sale of the land, so that the collection could have been made through a bank in Virginia.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1133-1136; Dec. Dig. \Leftrightarrow 377.]

7. MORTGAGES \Leftrightarrow 304—PAYMENT—PURCHASE OF MORTGAGOR'S INTEREST OR EQUITY.

Complainant, in a suit for an accounting and to redeem from a mortgage, had executed a mortgage on practically his entire estate, consisting of large tracts of realty, in consideration of a usurious account against him by the mortgagee and the mortgagee's assumption of certain of his debts, and thereafter complainant, by arrangement with the mortgagee, sold his interest or equity in a tract supposed to contain about 2,200 acres, worth at least \$20 an acre, to a clerk in the employ of the mortgagee, whose information as to complainant's financial embarrassment had been acquired through dealings between the parties, for about \$15 an acre, and, when it was afterwards surveyed and found to contain only about 2,000 acres, the mortgagee who had loaned the purchase money to his clerk reduced the mortgagor's credit by about \$3,000 and credited the clerk, its purchaser, with that amount. *Held*, in view of complainant's financial condition, his dependency on the mortgagee, and the opportunity for pressure upon him in the transaction, that the mortgagee would not be allowed to exact such reduction.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 864, 872; Dec. Dig. \Leftrightarrow 304.]

8. USURY \Leftrightarrow 75—ACCOUNT—EFFECT.

In such case, the fact that the usurious account was brought into the mortgage and consolidated with the assumed debts of the mortgagor which were not themselves tainted with usury did not render such debts usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 148; Dec. Dig. \Leftrightarrow 75.]

On Application for Rehearing.

9. USURY \Leftrightarrow 75—TRANSACTIONS AFFECTED—INTEREST.

In such suit, where parts of the usurious account carried forward into the account of the succeeding year were not tainted with usury and were due and collectible on January 1, 1901, they were not tainted with usury, and the mortgagee was entitled to interest thereon from that date, treated as the first item of the account of that year, and to have payments made or credits applied to the account of that year applied first to that part of the account.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 148; Dec. Dig. \Leftrightarrow 75.]

Appeal from Chancery Court, Marengo County; Thomas H. Smith, Chancellor.

Bill by C. W. Collins and another against

J. F. Compton and the firm of Mayer Bros., to restrain the sale of certain lands, and for a discovery and an accounting, to relieve the indebtedness of any usury, and to redeem from a mortgage. Decree for complainants, and respondents appeal. Reversed and remanded.

Pettus, Fuller & Lapsley, of Selma, and Ben F. Elmore and Henry McDaniel, both of Demopolis, for appellants. George Pegram, of Faunsdale, and Allen & Bell, of Birmingham, for appellees.

DE GRAFFENRIED, J. Mr. Charles W. Collins, who is now over 80 years of age, was at one time owner of a plantation consisting of several thousand acres of land and which was situated in the lime lands of Hale county. These lands were fertile and productive of those crops which are accustomed to be grown in what is known as the "Canebrake Section" of Alabama. A good many years ago Mr. Collins found that his extensive farming operations, through the changes which new conditions had created, had heavily involved him in debt, and since that time his history, and the history of his lands, as shown by this record, have been the history of a section which is turning from large ownerships to small ownerships in land; the history, in short, of a section in which the large landowner is being eliminated and the small landowner is taking his place. In his efforts to extricate himself from his financial embarrassments, Mr. Collins began to make sales of parts of his lands, and this policy was pursued until there remains to him something over 1,000 acres. This is, of course, a large tract of land; but its size is modest when compared with his former holdings.

[1, 2] We gather from this record that during the period of his long embarrassment Mr. Collins was forced to become indebted to many people. Some of these creditors were mortgage companies to which he made mortgages on some of his lands; one, at least, of them was a lady who resided in New York, while some of them were his immediate neighbors and relatives. During this period, Mr. Collins began to do business with Mayer Bros., a large mercantile partnership which did business at Demopolis, Ala., and which, for the purposes of this opinion, was composed of two brothers, Morris Mayer and Ludwig Mayer, and one H. B. Pake. Morris Mayer and Ludwig Mayer are dead. H. B. Pake still lives, but he was not, when this bill was filed, a member of the firm, or in any way interested in it. We take it from this record that Morris Mayer and Ludwig Mayer were, when Mr. Collins opened up the account with the firm, men who, like Mr. Collins, were of advanced age, and we also take it that Mr. Collins and the members of the firm of Mayer Bros. had known each other for many years. While Mayer Bros. seem

to have been possessed of large means, we gather from the record that their business was, essentially, that of merchants, and not that of money lenders. The business of Mr. Collins was such that he required not only supplies from the store of Mayer Bros., but he also required some of their cash, and an arrangement was entered into, when Mr. Collins began to do business with them, whereby the account of Mr. Collins—and, when we say "account," we mean "store account"—became tainted with usury. The chancellor so found upon the evidence, and in that finding we sustain him. We do this with full recognition that "usury" is the result of a covinous contract entered into by two or more parties, whereby one party is to receive and the other party is to pay, for the use of money loaned, more than the legal rate of interest. While we doubt whether Mayer Bros. were desirous of advancing cash to Mr. Collins at even the usurious rate which they charged him—and which he agreed to pay—nevertheless the contract was made, and we are of the opinion that the chancellor properly held that the account which Mr. Collins had with Mayer Bros. from year to year should be restated, that no interest should be allowed on this account, and that the principal of the account should be credited with the payments which were made by Mr. Collins as they were made.

In this state the usurer is forbidden interest, and the payments made by the debtor are credited upon the principal, both in actions at law and in suits in equity, and without regard to who is the actor in the proceedings. This penalty was imposed by the Legislature upon contracts tainted with usury, and it is, of course, the plain duty of the courts to inflict the penalty.

[3] We are not disposed to think, however, that any of the items on the account of Mayer Bros. against Mr. Collins were falsely charged upon the account. On account of the financial embarrassment of Mr. Collins, his account was probably not so attractive to Mayer Bros. as was the account of an unembarrassed customer with unimpaired credit, and, as the opportunity thus presented by Mr. Collins' situation appealed to the cupidity of the members of the firm, an usurious arrangement was the result; but we are not of the opinion that the evidence sustains the argument that Mayer Bros., at any time, charged Mr. Collins on their store account with articles which he did not purchase from or through them. Through their usurious contract, Mayer Bros. attempted to make an unlawful—and, under the law, an unconscionable—profit out of Mr. Collins, on the cash advanced to him from their store; but, in our opinion, the articles charged upon the account were in fact obtained by Mr. Collins. This statement applies to the item of seven mules which appears upon the account. We are satisfied that Mr. Collins obtained

from Mayer Bros. the seven mules—not five—and that those seven mules should be charged upon the restated account at what Mayer Bros. paid for them. There are items upon the account, to which we make specific reference below, which should not be upon the account; but these items are in the nature of charges for interest or attorneys' fees, and are not charges for merchandise or property which Mr. Collins did not obtain from Mayer Bros. In so far as the store account is concerned, the items charged thereon as having been sold to Mr. Collins were, in all human probability, obtained by him. While there may never have been a technical statement of the account between Mayer Bros. and Mr. Collins, statements were from time to time rendered to him, and we are not inclined to think that items appeared upon those statements as representing things sold to Mr. Collins unless they were in fact sold to him. An error may have inadvertently crept into the statement, but we hardly think that an error so great as the value of two mules could have crept into the account.

1. After Mr. Collins had thus been dealing with Mayer Bros. for several years, his financial situation and pressure from creditors indicated to him the necessity of, so far as possible, consolidating his indebtedness and of arranging a long loan. To this end he employed an attorney to negotiate for him a loan for a large amount for a period of five years, the loan to be secured by a mortgage on his Alabama lands. Efforts were made to secure this money from some corporation engaged in the business of lending money, but these efforts were unsuccessful. Finally, Mayer Bros. agreed to lend Mr. Collins \$24,956.43 on five years' time, with interest at the rate of 8 per cent. per annum. To this end a mortgage was executed and delivered by Mr. Collins and his wife to Mayer Bros. This mortgage covered all, or substantially all, of the real estate of Mr. Collins in Alabama, and secured the following notes, viz.: An interest note of \$1,868.96, due December 1, 1904. Three interest notes of \$1,966.51, due, respectively, on December 1, 1905, 1906, and 1907. And one note for \$26,852.94, being for the principal, \$24,956.43, and \$1,966.51 interest, due December 1, 1908. The papers all bear date December 28, 1903, and the interest represented by the above notes on \$24,956.43 is 8 per cent. per annum.

The principal of \$24,956.43, of the above indebtedness, represented the following items: \$2,200 claimed to have been paid to Davies & Bro. \$2,600 claimed to have been paid to one Gage. \$902.47 claimed to have been paid to one Metzger. \$2,332 claimed to have been paid to one Marx. \$1,102.21 claimed to have been paid to Davies & Bro. \$660 claimed to have been paid to one Gilder. \$500 claimed to have been paid to one Gilder. \$751.81 claimed to have been paid to one Nelson. \$878 claimed to have been paid to one Ernst.

\$1,465.75 claimed to have been paid to R. H. & W. C. Agee. \$344.31 claimed to have been paid on a judgment. The balance of the \$24,956.43, viz., about \$11,219.88, was represented by the balance claimed by Mayer Bros. to be due them by Mr. Collins on his account with them, including usurious interest which had been charged to him by them and possibly one or two items which are not above enumerated as having been paid out by Mayer Bros. when this mortgage was made.

[4] 2. The item of \$2,200, to which we have above referred, claimed to have been paid Davies & Bro., was not paid to them on the day the mortgage was made. It was Mr. Collins' understanding either that it had been paid or that it would be paid in full. Some time later, however, Mayer Bros. paid to Davies & Bro. the sum of \$2,250 in full of said debt. In our opinion Mr. Collins is chargeable with that \$2,250 from the date of its payment and interest thereon at the rate of 8 per cent. per annum.

The members of the firm of Davies & Bro. were related to Mr. Collins, and if Mayer Bros. misled him as to the amount which they paid Davies & Bro.—or would in the future pay them—they are not in a position to take advantage of the rebate which they obtained from Davies & Bro.

[5] When Mr. Collins executed the notes and mortgage to which we have above referred, and delivered them to Mayer Bros., they became, in equity, his trustees of a fund which amounted to the difference between the principal of \$24,956.43, and the amount of their usurious account, and if, in paying any of the debts above referred to—they represent the debts which Mayer Bros. claim to have canceled with said sum—Mayer Bros. made any profit, then, *ex aequo et bono*, Mr. Collins, the cestui que trust of the fund, is entitled to the rebate. After the execution and delivery of the notes and mortgage, the sum left in Mayer Bros.' hands, over and above their account, was a sum in their hands which belonged to Mr. Collins and not to Mayer Bros. In paying off the above scheduled debts, Mayer Bros. were representing, not themselves, but Mr. Collins.

[6] 3. Under the evidence in this case, we think that the chancellor correctly found that Mr. Collins is not chargeable with the item of \$660 paid to Mr. E. J. Gilder. Mr. Collins perfected a sale of certain lands in the state of Virginia. Upon these lands Mr. Collins had made a mortgage to Mrs. Rachel Mayer, of New York, which had been assigned to Mayer Bros. After this sale of the Virginia lands had been arranged by Mr. Collins, Mayer Bros. saw proper to send Judge Gilder, who was then a practicing attorney, to Virginia, to collect the money due on the Rachel Mayer mortgage and to release the lands from the mortgage. The note which was secured by the Rachel Mayer mortgage provides for the payment of an attorney's fee if

it becomes necessary to employ an attorney to collect the amount due on it, and the mortgage provides for the payment of an attorney's fee in the event of a sale of the lands described in the mortgage, under the power of sale contained in the mortgage. There was no sale of the lands under the power contained in the mortgage, and Mayer Bros. were under no necessity to send an attorney to Virginia to collect their money out of the proceeds of the sale of the Virginia lands. It is evident that, as Mr. Collins himself arranged a sale of the Virginia lands, this collection could have been made through the medium of a bank in Virginia, and that Mr. Collins should not be required to pay the fee of an attorney employed by Mayer Bros., under the circumstances named. At the time of the employment of this attorney, Mr. Collins, with all of his property wrapped up in mortgages and covered by liens, was struggling to meet the just demands of his creditors, and while Mayer Bros. had the right, if they saw proper, under the circumstances named, to indulge in the luxury of sending an attorney to Virginia—and we do not question the fact that he earned his fee—they had no right, even under the letter of their bond, to employ one to go to Virginia at the expense of Mr. Collins. While we do not believe that this employment of an attorney grew out of any desire on the part of Mayer Bros. to inflict useless punishment upon Mr. Collins, it did grow out of a not well-grounded fear that something might happen to the proceeds of the sale of the Virginia lands if Mayer Bros. were not there on the spot when the sale was consummated. In other words, the employment of an attorney grew out of a lack of proper business trust on the part of Mayer Bros.; and for the result of this not well-founded business timidity Mr. Collins should not be required to pay.

4. There appears on the account of Mayer Bros. with Mr. Collins credited, as of November 8, 1901, a mortgage for \$2,000, and on December 4, 1901, he is charged with, "To cash from bills receivable," \$2,000. We are satisfied from the evidence that the truth of this matter is that these two items refer to the same thing, and that they offset each other. We are not of the opinion that Mayer Bros. intended to be dishonest with Mr. Collins, and we think that the testimony of Mr. Bley furnishes a reasonable and truthful explanation of this debit and credit. Mr. Bley testified, in substance, that Mr. Collins made this mortgage for the purpose of raising a sum of money to pay certain pressing debts. These debts amounted, it was thought, to \$2,000; but in reality they were, after the papers were executed and delivered, ascertained to be only \$1,750. Mayer Bros. paid these debts, and they appear as items on the account. The account had been credited with the mortgage for \$2,000, and, to make the books speak the exact truth, the mortgage

was charged back on the account, thus leaving the debt of Mr. Collins at what it really was, viz., \$1,750.

5. Mayer Bros., we think, with the approval of Mr. Collins, and at his request, paid to the attorneys of Metzger the sum of \$902.47, which we have listed above. This sum includes an attorney's fee and a large advertising bill; but Mayer Bros. had no interest in this matter, and we are satisfied that they, not only paid that money, but that there was no usury in that transaction. The evidence also satisfied us that the sums which we have above set out as having been paid to Gage, Marx, Nelson, Ernst, R. H. & W. C. Agee, \$1,102.21 judgment to Davies & Bro., and the \$344.31 noted as having been paid on a judgment, were in fact paid, and that there was no usury in any of those transactions. There is no dispute between the parties as to the correctness of the item of \$500 paid Judge E. J. Gilder as a fee for preparing the papers evidencing the loan of \$24,956.43.

6. We agree with the chancellor in his finding that Mr. Compton, who bought the mortgage for \$24,956.43 from Mayer Bros., is not in a position to claim that Mr. Collins is estopped from setting up usury in his transactions with Mayer Bros. We make this announcement without going into the reasons for this conclusion. We have arrived at this conclusion after a careful examination of all the evidence in the case, and a discussion of the subject would simply involve a discussion of the evidence. The parties to the cause are familiar with the evidence, and a mere discussion of it at our hands would serve no useful purpose.

[7] 7. On March 4, 1908, a sale of what is known as the Manning Place was arranged by joint agreement of Mayer Bros. and Mr. Collins, to James F. Compton. The Manning Place was supposed to contain 2,200 acres of land. It originally belonged to a tract of about 4,000 acres, which was bisected by Big Prairie creek. The lands lying north of this creek, several years before this time, had been sold to Ivey F. Lewis, and some part of the land had been sold to B. M. Allen. The land conveyed to Compton comprised the lands situated in certain sections bounded on the north by Big Prairie creek and on the south by the Prairieville and Laneville Road. The evidence all shows that the Manning Place was a well-known and reasonably well-defined plantation, and we think that the evidence shows beyond controversy that at the time of this conveyance to Compton the lands were worth at a minimum not less than \$20 per acre. In discussing this matter, we shall treat this purchase of the Manning Place as if it had been made by Mayer Bros. direct. Compton was a clerk in the employ of Mayer Bros., and he not only knew all about this matter, but he also knew all about the state of the account of Mayer Bros. with Mr. Collins; and we are also satisfied that he must

have known all about the financial situation of Mr. Collins. Indeed, through his deals with Mayer Bros. and Mr. Collins, he finally became possessed of Mayer Bros.' indebtedness against Mr. Collins, and also of the Manning Place, representing, in all, an investment by Compton of something like \$50,000. If the purchase of the indebtedness of Mayer Bros. against Mr. Collins, and the Manning Place, by Mr. Compton, were made by him for his sole benefit—if, in such purchase, he was not, in fact, Mayer Bros.—then Mr. Compton made this purchase of the indebtedness of Mayer Bros. and the Manning Place because he saw an inviting field in which to engage his attention and from which, as a business man, he could safely look for large returns. Undoubtedly, when this sale of the Manning Place was arranged, Mayer Bros. had been led, by their dealings from year to year with Mr. Collins, into arrangements which had locked up a large part of their capital in securities which were probably giving them grave concern, and which, from the standpoint of merchants who need quick assets, were not desirable; and we think that the record shows that, when the Manning Place was sold, Mayer Bros. had become timid of their dealings with Mr. Collins and were anxious to change at least the form of a large part of his indebtedness. If Mr. Compton made the purchase to which we have above referred—and we raise no point on that matter, and accept the statement that he did make the purchase for his own personal benefit as the truth—he bought the Manning Place under such circumstances as place him in Mayer Bros.' shoes, and that purchase must carry with it the same burdens as if Mr. Collins had conveyed his equity of redemption in the Manning Place direct to Mayer Bros. While Mr. Compton was not a member of the firm of Mayer Bros., he was in their active employ, and in this matter he became the beneficiary of the sale of a valuable plantation which was brought about by pressure from the firm of which he was an employé. The business precautions and fears of Mayer Bros., and not a wanton desire or intent to oppress, may have produced the pressure, but the pressure was there, and it is the business of courts of equity, when oppression, no matter from what cause it may arise, is shown, to see to it that no undue advantage is derived thereby. Courts of equity are watchful of releases by mortgagors to mortgagees, of their equities of redemption in lands, and, when there is a sale at a consideration which would be deemed unreasonable if the transaction were between other parties dealing with similar property in the vicinity, such a sale will not be upheld. In this case there was "power on one side and weakness on the other," and in our opinion the chancellor properly held that the account of Mayer Bros. should remain credited with the \$35,000, the amount with

which it was originally credited, as the price of the Manning Place. *Goree v. Clements*, 94 Ala. 337, 10 South. 906; *Stoutz v. Rouse*, 84 Ala. 309, 4 South. 170. When, through Mayer Bros., the sale of the Manning Place was effected, the place was supposed to contain 2,200 acres. Mr. Collins wanted \$35,000 for his Manning Place, and \$35,000 divided by 2,200 (acres) gives \$15.91 per acre. When the price was agreed upon, it was in writing, signed by Mayer Bros., Mr. Compton, and Mr. Collins agreed that the purchase price was \$15.91, per acre, and the writing continues as follows:

"In consideration of the purchase of what is known as the Manning Place in Hale county, Alabama, supposed to contain twenty-two hundred (2,200) acres, by Jas. F. Compton, from C. W. Collins at and for the price of \$15.91, per acre, as soon as a survey of said plantation is had and the number of acres ascertained, Mayer Brothers, agrees to release and discharge from their mortgage executed to them by C. W. Collins, said real estate upon a settlement to be then had with said Compton and to credit the indebtedness and mortgage of said C. W. Collins with the purchase price of said real estate when the acreage is ascertained, at \$15.91 per acre. The said C. W. Collins agrees and covenants to sell and does hereby sell said Manning plantation supposed to contain twenty-two hundred (2,200) acres to said Compton at the purchase price of \$15.91 per acre and said Jas. F. Compton agrees and covenants to settle and pay for said land at and for said sum of \$15.91 per acre."

When the above agreement was made, a conveyance from C. W. Collins and wife to James F. Compton, reciting a consideration of \$35,000 for the Manning Place, was prepared, and was signed and delivered by Mr. Collins to Mr. Compton. Thereupon Compton was placed in possession of the Manning Place and became its owner. Without making a survey as contemplated in the above agreement, Mr. Compton, according to the testimony, paid to Mayer Bros. \$5,000 on the purchase of the Manning Place and executed to them his notes secured by mortgage on the Manning Place for the balance of the purchase money. Something like a year after the above transaction had thus been apparently closed, Mayer Bros. or Mr. Compton had the Manning Place surveyed, and ascertained that it contained, not 2,200 acres, but about 2,000 acres. There was therefore some disappointment as to the acreage. Thereupon, through pressure from Mayer Bros. who still held mortgages on substantially all of Mr. Collins' property, and who, on that account, were the only people to whom Mr. Collins could look for financial assistance, Mr. Collins was induced to agree to an abatement of the purchase money of the Manning Place to the extent of \$3,336. Thereupon Mayer Bros. charged Mr. Collins with this \$3,336, and credited the same amount upon the debt of Compton to them. When Mr. Compton, through the efforts of Mayer Bros. obtained the Manning Place at \$35,000, he received a plantation which, upon a most con-

servative valuation, was well worth every dollar that he agreed to pay for it, and, were this court to uphold this reduction, it would, under the great weight of the testimony as to the value of the Manning Place, overturn the doctrines which were announced by this court in *Goree v. Clements*, supra, and *Stoutz v. Rouse*, supra. Mr. Collins was in no position to resist the demands of Mayer Bros. and while we do not believe that they, in their dealings with Mr. Collins, were actuated by dishonest motives, we do think that, under all of the testimony, they were not mindful, in making their trades with him, of the power which their position gave them over a man who was largely in their debt and who was faced with the constant necessity of providing methods of extending debts which he was unable to meet but which he was struggling to pay. In other words, Mayer Bros. being merchants, were traders, and this was one trade which, on account of their commanding influence over Mr. Collins, they had not, in equity, the right to make. To uphold this reduction would result in upholding a bargain which, under all the evidence as we read it, Mayer Bros. were in no position to exact. *Goree v. Clements*, supra.

8. That the store account of Mayer Bros. against Mr. Collins is tainted with usury is established by the case of *Meyer Bros. v. Cook*, 85 Ala. 417, 5 South. 147. In that case there was an agreement to pay more than the lawful rate of interest, and we think the same character of agreement pervades the account of Mayer Bros. against Mr. Collins.

[8] 9. The fact that this usurious account was, when the mortgage for \$24,956.43 was executed, brought into that mortgage and consolidated with debts not tainted with usury, does not render the debts not tainted with usury and which were brought into that mortgage usurious. *Smith v. Neeley*, 2 Ind. T. 651, 53 S. W. 451; *Eslava v. Crampton*, 61 Ala. 507; *Noble v. Moses*, 74 Ala. 604.

10. The record in this case is extremely voluminous, and in this opinion we have, after a careful examination of the record, undertaken to express our views as to each question which has been presented to us. We presume that the views above expressed will furnish the chancellor with a sufficient guide during the further progress of the cause.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

On Application for Rehearing.

[9] On this application for a rehearing our attention is called to the fact that no usurious interest was charged by Mayer Bros. to Mr. C. W. Collins in their store account for the year 1900. The usury appears in the store accounts for the years subsequent to the year

1900. There was a balance of \$3,859.61 carried forward from the above account of 1900 into the store account of 1901. This balance was not tainted with usury, and was due and collectible on January 1, 1901. The fact that it was carried forward into the account of 1901 does not subject that item to the taint of usury. This conclusion is shown by the above opinion and is sustained by the following authorities cited in the above opinion, viz.: *Smith v. Neeley*, 2 Ind. T. 651, 53 S. W. 451; *Eslava v. Crampton*, 61 Ala. 507; *Noble v. Moses*, 74 Ala. 604. It is our conclusion that, under the evidence contained in this record, Mayer Bros. are entitled to interest on this balance of \$3,859.61 from January 1, 1901, until, by payments made subsequent to that date, this balance was satisfied. This item of \$3,859.61 should be treated as the first item of the account of 1901, and the payments made or credits applied to the account of 1901 should be first applied to this particular item until that item is fully paid and satisfied. In this particular and in this particular only, the above opinion is modified.

The court is of the opinion that the appellee should be taxed with all of the costs of this appeal.

Opinion modified, and application for rehearing overruled.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 527)

JOHNSON v. JOHNSON. (No. 977.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. HUSBAND AND WIFE — 289 — SEPARATE MAINTENANCE — JURISDICTION OF CHANCERY.

Chancery courts have original jurisdiction to award alimony, without divorce, to a wife abandoned by her husband, or who has abandoned her husband through his fault.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 584; Dec. Dig. ¶ 289.]

2. HUSBAND AND WIFE — 296 — SEPARATE MAINTENANCE — SUFFICIENCY OF BILL — FAULT OF HUSBAND.

A bill for alimony without divorce, which alleged that defendant refused to allow plaintiff's daughter by a former husband to live with them as he agreed to do before the marriage, that he falsely accused her of improper conduct with other men, that the night before she left him he kicked her out of bed and told her he hoped she would leave, which were the first words he had spoken to her for more than three weeks, shows that the abandonment of the husband by the wife was due to the fault of the husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. § 610; Dec. Dig. ¶ 296.]

3. HUSBAND AND WIFE — 296 — SEPARATE MAINTENANCE — SUFFICIENCY OF BILL — PROPERTY OF HUSBAND.

A bill for alimony without divorce, which alleged that the wife had no property of her own, and was unable to do manual work because of impaired health, that the husband was able to support her, but had failed to do so, that he was engaged in the mercantile business as a copartner with another, from which he had an

income out of which the court could decree alimony and maintenance, while not so specific as to the amount of the husband's property as it might have been, disclosed what property the husband owned and a method by which the income could be ascertained, and was sufficient against demurrer.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 610; Dec. Dig. ¶296.]

Appeal from Chancery Court, Lamar County; W. H. Simpson, Chancellor.

Suit for alimony, without divorce, by Minnie Johnson against William J. Johnson. From judgment overruling demurrers to the bill, the defendant appeals. Affirmed.

Walter Nesmith, of Vernon, for appellant. Kelley & Young, of Vernon, for appellee.

DE GRAFFENRIED, J. [1] In this jurisdiction chancery courts exercise original jurisdiction to award alimony, independently of a bill for divorce, to a wife who has been abandoned by her husband, and also to a wife who has abandoned her husband through the fault of the husband. *Glover v. Glover*, 16 Ala. 440; *Murray v. Murray*, 84 Ala. 363, 4 South. 239; *Brindley v. Brindley*, 115 Ala. 474, 22 South. 448; *Brady v. Brady*, 144 Ala. 414, 39 South. 237; *Clisby v. Clisby*, 160 Ala. 572, 49 South. 445, 135 Am. St. Rep. 110.

[2] On the subject of the separation, the bill, as amended, contains the following averments:

"Your oratrix avers: That, as a part of the contract of marriage between herself and respondent, he agreed to take her daughter, by a former husband, in his home with oratrix, and keep and care for her as one of his own children. That soon after the marriage, without any just cause therefor, respondent forced her said daughter to leave his home, which greatly humiliated and worried your oratrix. That respondent has accused oratrix of improper conduct with other men, and made base and vile charges against her, without any foundation therefor. That his treatment toward her continued in such an unmerciful way that it became unbearable. That on the night of June 14, 1913, before oratrix left respondent on the following day, just after he had retired, she went to the bed and sat down on the foot of the bed and asked him why he treated her like he did, and that he answered her by turning his heels and kicking her out into the floor. That she got up and told him she could stand his treatment no longer. He then told her he hoped that she would leave. That this was the first time he had spoken to her in three weeks. That when daylight came, so she could do so, she left him, and has not since returned."

If the above allegations are true, the abandonment by the wife of her husband was due to the fault of the husband. *Murray v. Murray*, supra.

[3] 2. On the subject of alimony, the bill, as amended, contains the following allegations:

"Your oratrix avers that she has no property and no means of making her support, only by her daily labor, and that she is very unable to do manual labor; that her health was greatly impaired by doing the drudgery at respondent's home for him and his family of children by a former wife; that respondent is able to support her, but he has failed to do so."

"Your oratrix avers that the respondent, the said Wm. J. Johnson, is engaged in the mercantile business at Sulligent, Lamar county, Ala., as a copartner with his brother, Son Johnson; that from said partnership he has an income out of which the court could decree alimony and maintenance."

While the above quotations do not undertake to show the value of the husband's property or the amount of the income which he derives therefrom, they do show that he owns property, viz., that he is interested as a partner in a mercantile business at Sulligent, Lamar county, and that he derives an income from such business. The value of the interest of the husband in the partnership and his income therefrom can be ascertained on a reference before the register, and an appropriate basis for fixing the alimony of complainant can thus be placed before the chancellor. The amount which should be awarded complainant can then be fixed by an appropriate decree and the complainant's right thereto enforced under the rules declared in *Murray v. Murray*, supra. While the allegations of the bill, as amended, might well have been more specific as to the property owned by the husband, the allegations which we have above quoted show that the situation of the wife is such as to entitle her to alimony, and they also disclose what property the husband owns, and point out to the court a method whereby the value of the husband's property and his income therefrom can be ascertained. The bill, as amended, therefore, under the authorities above quoted, contains equity, and the chancellor committed no error in overruling the demurrers to the bill as amended.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 521)

JOHNSON v. SMITH. (No. 528.)

(Supreme Court of Alabama. Nov. 7, 1914.

Rehearing Denied Dec. 17, 1914.)

1. MORTGAGES. ¶616—REDEMPTION—PLEADING.

A bill to redeem from a mortgage, stating that the holder of the mortgage refused to furnish a statement of the amount due, alleges a sufficient excuse for not tendering the amount due and necessary to be paid on redemption before filing the bill.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1833-1844; Dec. Dig. ¶616.]

2. MORTGAGES. ¶605—REDEMPTION—EQUITABLE BILL.

Where a bill to redeem from a mortgage is an equitable bill, as distinguished from a statutory bill, compliance with the conditions or terms of the statute as to tender, demand, etc., need not be shown, as the requisites of bills to exercise the statutory right of redemption are materially different from those of bills to exercise the equitable right; the statutory right not existing until the equitable right is cut off.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1788-1794; Dec. Dig. ¶605.]

3. MORTGAGES — 345 — BILL TO REDEEM — RIGHT TO FORECLOSE — CROSS-BILL.

A mortgagee or his assignee cannot, after bill filed by the mortgagor to redeem, foreclose under the power and cut off the privilege to exercise the equitable right of redemption; and hence a cross-bill for such a foreclosure subsequent to filing the bill is properly dismissed, though a cross-bill for foreclosure may be filed, conditioned that the complainant fail in the suit.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1043; Dec. Dig. — 345.]

4. MORTGAGES — 617 — REDEMPTION — EVIDENCE — PROBATE PROCEEDING.

Where a widow seeks to recover land of her deceased husband from an assignee of a mortgagee, probate proceedings, setting apart the land to her as exempt, are admissible.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1845-1847; Dec. Dig. — 617.]

Appeal from Chancery Court, Elmore County; W. W. Whiteside, Chancellor.

Bill by Temple Smith against Dave Johnson to redeem land from mortgage, with cross-bill for foreclosure. From a decree granting the relief prayed in the original bill, and denying relief under the cross-bill, respondent appeals. Affirmed.

The bill alleges that Temple Smith was married in 1901 to Berry Smith, who was in possession of and owned 160 acres of land described in the bill, and that he continued to own the land until his death in 1909, and that he died seised and possessed of said lands and none other, and left surviving him oratrix as his widow, and no children; that she and her husband resided upon said above described land, and were using the same as a homestead at the time of Berry Smith's death, and that said land did not exceed 160 acres of land in area and \$2,000 in value at the time of the death of her said husband. She then sets up the probate proceedings leading up to a decree vesting title to the same in her absolutely and setting the said lands apart as a homestead. It is alleged that in February, 1908, Berry Smith executed a mortgage to W. T. Dozier, conveying said lands to secure an indebtedness of \$369.60, payable on October 1, 1908, and that oratrix joined therein; that some time during the fall of 1908 Berry Smith paid to said Dozier the greater amount of the indebtedness secured by the mortgage, and that after that time Dozier transferred the said mortgage to Dave Johnson and assigned to him the indebtedness secured thereby. It is alleged on information and belief that there was less than \$200 then due on said mortgage, and that after the death of Berry Smith in November, 1909, Dave Johnson took possession of a mule and wagon belonging to said Smith, and also a large quantity of cotton and other agricultural products sufficient in value to pay off said mortgage, all of which belonged to Berry Smith at the time of his death, and which was covered by said mortgage. Oratrix avers that in February, 1912, she requested Johnson to give her a statement of

the amount due on said mortgage and the credits which had been made on said indebtedness, but that he refused to do so, and still refuses, and threatens to foreclose unless oratrix pays him the sum of \$418, and has advertised the property for sale. Oratrix submits herself to the jurisdiction of the court, requests an accounting, and expresses a willingness to pay whatever may be found due.

C. H. Roquemore and E. T. Graham, both of Montgomery, for appellant. J. M. Holley and George F. Smoot, both of Wetumpka, for appellee.

MAYFIELD, J. Appellee, as mortgagor, filed this her bill against appellant as assignee of a certain mortgage. The sole purpose of the mortgagor is to redeem the land from the mortgage. The right of redemption sought to be exercised is the equitable right, and not the statutory right.

[1] The bill alleges a sufficient excuse for not tendering the amount due and necessary to be paid, on redemption, before the filing of the bill. It appears that complainant is an ignorant and uneducated negro woman, that she was ignorant of the exact amount due, that the respondent was claiming as due an amount largely in excess of the real amount, and that a tender of the true amount, if it had been known to complainant, or could have been ascertained by her upon an accounting for that purpose, would have been unavailing. What was said by Stone, C. J., in *Root v. Johnson*, 99 Ala. 92, 10 South. 294, is in exact point in the case at bar:

"The law does not exact the observance of a vain ceremony. The purpose of tender, in a case like the present, is to leave the seller without excuse for a noncompliance with his contract, and to cast on him the fault of its breach. When, before tender made, the party to whom money is due declares he will not receive it, or makes any declaration or demand which is equivalent to a refusal to accept the money, if tendered, then actual tender is dispensed with. 7 Wait's Act. & Def. 593. It was sufficient, in this case, to tender payment in the bill. This renders it unnecessary that we should pass on the weight or credibility of the conflicting testimony bearing on the question of the alleged tender made by Johnson of the whole amount due, before instituting this suit."

[2] This was not a bill seeking to exercise the statutory right, and therefore the bill need not show a compliance with the conditions or terms of the statute, as to tender, demand, etc. The requisites of bills to exercise the statutory right of redemption are materially different from those of bills to exercise the equitable right. The one right is a mere privilege conferred by the statute on the mortgagor and others mentioned in the statute, and the conditions imposed on the mortgagor or other persons by the statute must be complied with, or a good and valid excuse given for failure therein, else the bill is demurrable; while the other is a right created by courts of equity to protect the

mortgagor from the loss of his property, but secures to the mortgagee the full payment of his mortgage debt. The one is the creature of the statute; the other, of courts of equity. The one does not exist until the other is cut off. The foreclosure which cuts off and terminates the latter right gives rise to, and is the inception of, the former right. Both rights cannot, therefore, exist as to the same property and between the same parties at the same time and under the same conditions.

The respondent demurred to the original and amended bills, assigning 49 grounds of demurrer thereto. It is wholly unnecessary to notice each ground of demurrer separately; in fact, many of the grounds are not insisted upon in the argument. Many of the grounds of demurrer are inapt to a bill like this, which merely seeks to exercise the equitable right of redemption, but would be apt to a bill seeking to exercise the statutory right. It is sufficient to say that the chancellor did not err as to any of his rulings on the demurrers to the original and amended bills.

[3] The respondent answered the bill, and sought to make his answer a cross-bill, and by such cross-bill attempted to set up a foreclosure of the mortgage after the filing of the bill, with the cutting off of complainant's right to redeem. The chancellor ruled correctly in sustaining a demurrer to this cross-bill, in so far as it sought to set up a foreclosure after the filing of the bill. A mortgagee or assignee cannot, after bill filed by the mortgagor to redeem, proceed to foreclose under the powers, and thus cut off the privilege to exercise the equitable right of redemption. The mortgagee or assignee, by a cross-bill, or under the power, may have the mortgage foreclosed, if the mortgagor fails to pay, or to sustain his bill filed to redeem; that is, he may have a decree directing foreclosure in the event the complainant fails to sustain his bill to redeem, or fails to comply with the decree as to the terms of redemption; but he cannot defeat the bill to redeem by a foreclosure under the powers of the mortgage after bill filed to redeem, and pending the suit for such purpose. If the bill to redeem is successful, it is tantamount to a foreclosure. It therefore follows that there was no error in sustaining the demurrer to the cross-bill, which attempted to set up a foreclosure after bill filed and pending the suit. The same relief could be had under the original bill as was sought in the cross-bill.

There was a great deal of testimony taken by both parties, and many objections and exceptions were taken and reserved by both, to certain parts thereof. It would be useless to attempt to treat each in this opinion. It is sufficient to say that they have been carefully examined and considered, and that we find no reversible error as to any of such rulings. This case is distinguishable from the

case of *Presnall v. Burgess*, 181 Ala. 263, 61 South. 804.

We fully agree with the register and the chancellor as to the findings of fact, as to the amount due on the mortgage debt and necessary to be paid in order to redeem. In other words, the averments of the bill were proven, and the complainant was entitled to the relief prayed, and awarded by the decree. We find no error in this record of which the respondent can complain.

[4] There was no error in allowing proof of the proceedings in the probate court, setting apart the lands in question as exempt to the widow.

Finding no error in the record, the decree of the chancellor is in all things affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(190 Ala. 597)

BIRMINGHAM FUEL CO. v. BOSHELL.
(No. 841.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. EJECTMENT ¶16—TITLE OF PLAINTIFF—SUFFICIENCY.

A plaintiff in ejectment, or in the statutory action in the nature of ejectment, may recover against a trespasser on proof of prior possession, though not in the actual possession when the trespasser entered.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 30-41; Dec. Dig. ¶16.]

2. EJECTMENT ¶25—DEFENSES.

A defendant cannot defeat a recovery by plaintiff in ejectment, or in the statutory action in the nature of ejectment, by proving a prior possession by a third person to the possession of plaintiff, where he does not connect himself with the prior possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 99-106; Dec. Dig. ¶25.]

3. EJECTMENT ¶90—COMMON SOURCE OF TITLE—EVIDENCE.

Where defendant in ejectment denies that he claims from the common source, plaintiff may show that he does so claim by introducing in evidence deeds connecting him with the common source, though the evidence proves that defendant's title is worthless.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. ¶90.]

4. MINES AND MINERALS ¶55—SEVERANCE OF MINERAL RIGHTS—EFFECT.

After a severance of the minerals in situ from the surface, possession of the surface is not possession of the minerals, for the severance creates two closes adjoining but separate.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. ¶55.]

5. MINES AND MINERALS ¶55—CONVEYANCE OF MINERAL RIGHTS—ADVERSE POSSESSION.

Where minerals in situ have been severed by a conveyance from the title to the surface to acquire title to the mineral rights by adverse possession, there must be an actual taking or use under claim of right to the minerals for the necessary period.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. ¶55.]

8. EJECTMENT \Leftrightarrow 90—EVIDENCE—ADMISSIBILITY.

A defendant in ejectment may, for the purpose of showing that he and plaintiff claimed through a common source, introduce in evidence conveyances under which plaintiff claims, establishing the common source.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 254-277; Dec. Dig. \Leftrightarrow 90.]

7. EJECTMENT \Leftrightarrow 86—EVIDENCE—PRESUMPTIONS.

Where, in ejectment, there was evidence that in 1858 a patentee obtained a patent from the United States government, that in 1861 a third person conveyed by warranty deed the land under which one of the parties showed title, and the evidence showed that the patentee and the third person and his grantee were the only persons in possession, the court must presume that the patentee executed a deed to the third person, so as to form a complete chain of title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. 238-245; Dec. Dig. \Leftrightarrow 86.]

Mayfield, J., dissenting.

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action between the Birmingham Fuel Company and W. R. Boshell. From a judgment for the latter, the former appeals. Reversed and remanded.

Davis & Fite, of Jasper, and Percy, Ben-ners & Burr and W. H. Smith, all of Birmingham, for appellant. Bankhead & Bankhead, of Jasper, for appellee.

DE GRAFFENRIED, J. This suit involves the title to the mineral rights in the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 13, township 14, range 9, Walker county, Ala.

This opinion is written as expressive of the views of the members of this court who appear as concurring therein; and, as the case must again be tried, we deem it well to announce the following propositions of law, which appear to have applicability to the facts of the case as they are disclosed by the bill of exceptions in this record:

[1, 2] First. "As against a trespasser, a plaintiff in ejectment, or the statutory action in the nature of ejectment, may recover on proof of prior possession, although he was not in the actual possession when the defendant entered; and the defendant cannot defeat his right to recover by proof of an anterior possession by a third person, with which he does not connect himself." *L. & N. R. Co. v. Philyaw*, 88 Ala. 264, 6 South. 837.

[3] Second. "Where the defendant denies that he claims from the same source as the plaintiff, the latter may show that he does so claim, by introducing in evidence the various deeds connecting him with such alleged common source; and it is no objection to the exercise of this right that the evidence offered proves the defendant's title to be worthless." *Bradley v. Lightcap*, 201 Ill. 513, 66 N. E. 546; *McWhorter v. Heltzell*, 124 Ind. 129, 24 N. E. 743; *Warville on Ejectment*, p. 275, § 265.

In the case of *Vidmer et al. v. Lloyd*, 63 South. 947, this court said:

"It may be true that defendant announced that he did not claim through Adele Rabby; yet there was evidence from which the jury could infer that he did, * * * and, if such was the case, he is estopped from denying her title."

See further, on this subject, *Pendley v. Madison*, 83 Ala. 484, 3 South. 618; *Lewis v. Watson*, 98 Ala. 480, 13 South. 570, 22 L. R. A. 297, 39 Am. St. Rep. 82; *Ware v. Dewberry*, 84 Ala. 568, 4 South. 404; *Houston v. Farris*, 71 Ala. 570; *Tenn. & Coosa River R. Co. v. East Ala. Ry. Co.*, 75 Ala. 516, 51 Am. Rep. 475.

[4] Third. "After severance of the mineral in situ from the surface, the possession of the latter is not possession of the former. The effect of the severance is to create two closes adjoining but separate." *Hooper v. Bankhead*, 171 Ala. 632, 54 South. 549.

[5] In other words, after a severance of the minerals in situ from the surface, the acquisition of the title to the surface by adverse possession of the surface does not result in the acquisition of title to the mineral interests in the land. To acquire, by adverse possession, the title to the mineral interest so severed, there must be an actual taking or use under claim of right of the minerals from the land for the period necessary to effect the bar.

"Under the authorities, it is essential, to effect adverse possession of the minerals, after severance, in title, from the surface, that the adverse claimant do some act or acts evincing a permanency of occupation and use, as distinguished from acts merely occasional, desultory, or temporary—acts suitable to the enjoyment and appropriation of the minerals so claimed, and hostile to the rights of the owner." *Hooper v. Bankhead*, 171 Ala. 633, 54 South. 549; *Gordon v. Park*, 219 Mo. 600, 117 S. W. 1163; *Gill v. Fletcher*, 74 Ohio St. 295, 78 N. E. 433, 113 Am. St. Rep. 962; *Algonquin Coal Co. v. Northern Coal & Iron Co.*, 162 Pa. 114, 29 Atl. 402; *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991; *Armstrong v. Caldwell*, 53 Pa. 284; *Delaware & Hudson Canal Co. v. Hughes*, 183 Pa. 66, 38 Atl. 568, 38 L. R. A. 826, 63 Am. St. Rep. 743; *Plant v. Humphries*, 66 W. Va. 88, 66 S. E. 94, 26 L. R. A. (N. S.) 558; *J. R. Crowe Coal & Mining Co. v. Atkinson*, 85 Kan. 357, 116 Pac. 499, Ann. Cas. 1912D, 1196; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214, 72 Am. St. Rep. 216.

The proposition under discussion seems to be so well established that it appears needless to cite the above authorities to sustain it. The principle is, however, of importance in this state, and for that reason the writer of this opinion has above perpetuated some of the leading authorities upon the subject, and which are cited in the numerous briefs on file in this case.

[6] Fourth. The undisputed evidence in this case shows that J. O. Myers obtained a patent from the United States government to the lands in which the mineral interests are claimed by the defendant, on March 1, 1853. On December 13, 1861, John Manasco conveyed by warranty deed to Sarah Cox the said

lands. It appears that Sarah Cox was the daughter of John Manasco, and that he gave her the land, and that he put her in possession of it prior to the execution of his deed to her. On this subject the husband of Sarah Cox testified as follows:

"Sarah Cox and I were married before the above said deed was executed. My best judgment is that we moved on the place before the deed was made to the above-described land. My wife claimed to be the owner. My best judgment and recollection is we lived on this land as our home until 1862 or 1863, when I went to the war, when my wife moved down to her father's. After the close of the war, Sarah Cox, my wife, and I moved back on this land and lived there until 1867, when we again left the place and then we, after a year's absence, moved back home; that is, on the land you are questioning me about. We then lived on this land until 1874, when we moved to Jasper, Ala."

At the time John Manasco gave this land to his daughter, he was in possession of the land, and there was evidence that he bought the land from said John C. Myers, although the record fails to show that there was a deed from Myers to Manasco evidencing the purchase. On this subject J. K. P. Manasco, a brother of Sarah Cox, testified as follows:

"John Manasco raised me. I knew John C. Myers. He lived southwest of where I was raised prior to the Civil War. I went over the ground with Mr. Pill and pointed out the place where the house was, the old trees, and the farm. There was more than one field; one was this side of where the old house was, in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 13, of about eight or ten acres. I am older than Dr. John Manasco. I helped plow the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, section 13, when it was being cultivated by John Manasco. He first took possession, my recollection is, about 1853 or 1859. I could not swear to the date; it was so long ago. Sarah Cox moved on some part of the land before the war. Prior to the time she moved on it, the land had been in cultivation by John Manasco. There were ten acres said to be inclosed. There was a little piece of woods in there that was not cultivated. Sarah Cox moved back on the land after the close of the war. I was gone eight years, but Sarah lived on that land after the war. I don't know how long, because I was away. I had a favorite mule they let go in part payment for the land purchased by John Manasco from J. C. or John C. Myers. I don't exactly remember the date. We tended it about three years before Sarah Cox moved on it, and that would make it about 1856 or 1857. We cultivated it the next year. John Myers moved to Moss Creek."

The evidence further shows that Sarah Cox and her husband, J. E. Cox, sold the mineral interest in the said land to the Georgia Pacific Railway Company, by a deed dated May 2, 1883, and that, by an unbroken chain of title, the defendant claims and owns the mineral interest in the land which was derived by said Georgia Pacific Railway Company by the deed made to said company by said Sarah Cox on May 2, 1883. The evidence further shows that on the 21st day of January, 1888, the heirs of said Sarah Cox filed their petition for a sale of said S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$, section 13, township 14, range 9, Walker county, except the coal, iron ore, and other minerals therein, for division,

and that D. J. Townley appeared at the sale and bought the land. The decree of sale was dated the 6th day of February, 1888, and the sale was made the 5th day of March, 1888, and was so reported and confirmed. The report showed the relinquishment by J. E. Cox, the surviving husband of Sarah Cox, of all his interest in said lands, so that the same might be sold, and showed a receipt by the heirs of said Sarah Cox, deceased, of their respective portions of the purchase money.

The above being the undisputed testimony, the defendant, for the purpose of showing that the plaintiff and the defendant claimed through a common source of title, viz., Sarah Cox, offered in evidence the following:

(1) A deed from C. L. Cunningham, commissioner appointed by the probate court to convey the title of the heirs of Sarah Cox to said land to the said D. J. Townley, the purchaser at said sale for division. This deed bears date October 2, 1889, and was duly recorded in record of deeds of Walker county on October 2, 1889.

(2) A deed from D. J. Townley and wife to R. M. Townley to said land, dated January 3, 1890, and acknowledged in December, 1890. The plaintiff claimed title to the land through a deed which was made to him by said R. M. Townley, dated March 21, 1896.

Under the authorities cited under subdivision 2 of this opinion, the above deeds were relevant for the purposes for which they were offered, and the trial court committed reversible error in sustaining the objection of the plaintiff to their introduction in evidence.

Fifth. In addition to the above, the evidence in this case shows, without dispute, that Manasco bought this land from J. C. Myers in 1858, probably about the time Myers obtained his patent to the land from the federal government. Manasco then went into its possession, claiming it as his own, and finally gave it to his daughter, who, so far as the record discloses, was in possession of the land until she died. It is true that during a part of that time she did not actually cultivate the land or live on it, but a part of it was under her fence, and she paid taxes on it, and in 1883 she sold the mineral interest in it to the Georgia Pacific Railroad Company. After her death it was sold as the land of her heirs.

[7] If there was, prior to the purchase by D. J. Townley of the surface rights to these lands at the partition sale of the lands by her heirs on March 5, 1888, any person who, at any time, was in possession of this land other than J. C. Myers, Manasco, Sarah Cox, and, after her death, her heirs, or if, at any time during those years, a foot in hostility to the rights and possession of these parties was placed upon this land, the record fails to show it. This being true, it would seem that the law will, under the evidence in this record, presume that Myers made a deed to Manasco to this land in 1858 when Manasco

obtained possession of said land from Myers. *Bolen v. Hoven*, 150 Ala. 448, 43 South. 736; *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454, 39 Am. St. Rep. 45; *Wilson v. Holt*, 83 Ala. 529, 3 South. 321, 3 Am. St. Rep. 768; *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 6 South. 197, 13 Am. St. Rep. 73.

For this reason, as well as for the reasons set forth in the first subdivision of this opinion, in our opinion the defendant, under the evidence as it exists in this record, was entitled to affirmative instructions in its behalf.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, SAYRE, SOMERVILLE, and GARDNER, JJ., concur in the opinion and conclusion.

MAYFIELD, J., concurs in the reversal of the judgment, but does not concur in the opinion.

MAYFIELD, J. (dissenting). This record was originally assigned to me, and I wrote an opinion affirming the judgment. On application for a rehearing by the whole court, the judgment of affirmance was set aside, and one of reversal entered; and Mr. Justice DE GRAFFENRIED was appointed to write an opinion for the majority.

I concur in the reversal. I have become convinced, on further consideration, that it was reversible error to decline to allow the defendant to introduce the commissioner's deed to D. J. Townley and the deed of D. J. Townley to R. M. Townley. While the trial court evidently acted on the theory that plaintiff did not claim title through Mrs. Cox, and it was not shown that Mrs. Cox had title when she conveyed the mineral right to the Georgia Pacific Railroad Company, and therefore her deed did not operate as a severance of the minerals from the surface, I now think that each of these questions was for the jury, and not for the court, and that the defendant was entitled to have the jury consider these deeds in connection with all the other evidence.

I cannot, however, agree to the proposition that the evidence in this case shows that Mrs. Cox had title to the lands when she conveyed. The evidence conclusively and without dispute shows that, if she acquired the title, it was by adverse possession, and not by deed. The evidence likewise fails to show that her possession was continuous, but, on the contrary, shows that there were several breaks therein, and that at no time was there ten years' continuous possession. The evidence, as I read it, is in dispute as to whether her grantor, her father, was ever in possession of the land or was in possession when he conveyed to her.

How there is any reason for the application of the doctrine of the presumption of a deed from the patentee to Manasco, I cannot understand. If Manasco had been in possession for 20 or 30 years, under his contract of sale, the execution, or the existence

of a deed, might then be presumed; but the evidence is without dispute that he was not so in possession for the length of time necessary to raise the presumption of a deed. If a deed from the patentee to any one is to be presumed, it is either to Mrs. Cox or to the plaintiff. The evidence, however, affirmatively shows that he did not convey to Mrs. Cox nor to her father.

If it be conceded that Mrs. Cox had title to the land when she attempted to convey the mineral right to the Georgia Pacific Railroad Company, then, of course, this worked a severance of the two estates; and, if plaintiff claimed through Mrs. Cox, his possession of the surface was not possession of the mineral, and of course was not adverse; but, if Mrs. Cox had no title, her deed did not and could not operate as a severance. A stranger to a title cannot create a severance by conveying the mineral or surface right. It requires the owner of the title to convey in order that his deed may operate as a severance. Moreover, when there is such a severance, it is binding only on the parties to the conveyance and their privies. It is not binding or effective upon strangers to the title of the owner who severed; but of course there must be adverse possession of both estates, to defeat the title of the true owner who severed the two estates. The two estates, after severance, are as distinct and separate as if the grantor had owned an 80-acre tract and conveyed one 40 to A. and the other to B. Possession of one 40 after this severance would not be possession of both. But if the owner should convey one 40 to A., and then convey both to B., and B. should take possession of one of the 40's under his deed and hold the possession adversely to A. for 10 consecutive years, B. would acquire title to the 40 theretofore conveyed to A., although he had no actual possession of the 40 conveyed to A. Surely the severance of the mineral from the surface cannot be more complete than would be the severance as to the two 40's, as stated above.

In my judgment, under the holding in the above case, one who has no title may convey a title to the mineral, against the true owner, by conveying the minerals to one person and the surface to another, if the grantee of the surface should ever thereafter convey to the owner or to any one in his chain of title, and even though the owner did not claim under such chain of title but claimed against it. I cannot make a man claim title through me by conveying his own land to him, even though he accept the deed and put it on record. This is only a circumstance tending to show that he does claim title through me.

There was no proof in this case that the plaintiff or his grantor claimed title or right through Mrs. Cox. It was only shown that the grantor of plaintiff's grantor bought at a judicial sale, which sale passed the title of Mrs. Cox to the surface. I do not see how

the court can say, as a matter of law, that Mrs. Cox had title to the land when she conveyed the minerals or of the surface when she died. If she had such title, it was a question of fact for the jury and not of law for the court.

I likewise cannot see how the court can say, as a matter of law, that plaintiff claimed title through Mrs. Cox, when he, his counsel, and the trial court say he did not so claim title; and the only evidence to the contrary is the circumstance of the two deeds which the trial court excluded. Surely these deeds ought not to conclude the plaintiff, who is not a party to either, and when he swears he does not claim under or through them.

Of course I recognize the proposition that prior possession alone will support or defend an action of ejectment; but it will only do so against a mere naked trespasser or one who cannot show a better title; it will not be effective against the true owner nor even against one, claiming under color of title, having held adversely for ten years. The evidence in this record is without dispute that plaintiff had acquired title to the land in question, surface and mineral, by adverse possession, if there was no severance of the two estates, or if the plaintiff was not bound by the severance. I cannot agree that the record in this case shows conclusively that Mrs. Cox had any title to the surface or mineral when she attempted to convey the minerals. I think it is conceded that her grantor had no legal title, and that title only can prevail in this suit. I think it also clearly appears (but not conclusively) that her possession was not continuous, so as to ripen into title. If she did not have the legal title when she conveyed to the Georgia Pacific Railroad Company, then her deed could not operate as a severance. Unless the plaintiff claimed title through her, he was not estopped from disputing her title. These questions were, in my judgment, for the jury, and not for the court; and the record shows that the jury found the facts in favor of the plaintiff.

The case most relied upon by appellant is that of *Canal Co. v. Hughes*, 183 Pa. 66, 38 Atl. 568, 38 L. R. A. 826, 63 Am. St. Rep. 743. It is probable that this case may uphold the contention of the appellant; but it is, at best, an extreme case; and, while it has been often cited, it has not been followed in a concrete case, and has been criticized by courts and text-writers as carrying the doctrine of severance too far.

Mr. Lindley, in his recent edition of his work on *Mines* (volume 3, § 812, pp. 2002, 2003), says:

"The doctrine of severance of title has been carried by the Supreme Court of Pennsylvania to what seems an unwarrantable conclusion."

"We submit that severance of title, as known in the law, cannot exist where the surface and mineral title reside in the same individual. It would be, on its face, a contradiction of terms."

"The decision of the Pennsylvania court would therefore seem to have the effect of allowing an actual possession to be overcome by a constructive possession."

It would be an anomaly to allow strangers to a good chain of title to make the holders under that chain claim under another and an imperfect title by making deeds to them and having the same recorded, against the wish or will of the holders of the good title. So far as this record shows, that might be the result of making Boshell claim under the Cox chain of title. Surely a stranger to a title cannot create a severance by conveying that which he has not, and thereby defeat the title of the true owner and his grantees.

I desire to say that I do not disagree to any proposition of law announced in the opinion. Each of these I consider well settled and well stated; but I cannot agree to the application of the principles to the case made by this record, for the reason above stated.

(190 Ala. 184)

THOMPSON v. ALEXANDER CITY COTTON MILLS CO. (No. 549.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 21, 1915.)

1. NEGLIGENCE — 32 — LICENSEE — CHILDREN.

A child of an employé of a cotton mill, killed by falling into a drain into which the mill discharged the hot waters from the boilers when cleaning them, was a licensee, where the drain was situated in an open square, made by the buildings and employés' tenement houses, in which the employés and children were wont to congregate, though the drain was obscured by slag and briars.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. — 32.]

2. NEGLIGENCE — 39 — ATTRACTIVE NUISANCE — DRAIN.

A drain to take off the hot water of the boilers of a cotton mill, the waters being discharged only once a day for two hours, difficult to approach at its head by reason of slag and briars, and greatly obscured, though situated in a square in which employés' and other children were wont to congregate, was not an attractive nuisance.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. — 39.]

3. NEGLIGENCE — 39 — TURNABLE DOCTRINE — PLACES ATTRACTIVE TO CHILDREN.

Though a dangerous thing may not be an attractive nuisance, yet where it is left exposed, so that children are likely to come in contact with it, and where their getting in contact with it is obviously dangerous to them, the persons exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them, and is bound to take reasonable pains to guard it, so as to prevent injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 55; Dec. Dig. — 39.]

4. NEGLIGENCE — 134 — OPEN DRAIN — INJURY TO CHILD — EVIDENCE.

In an action for injuries to a child, killed by falling into a drain into which the hot water of boilers of a cotton mill was discharged, evidence held sufficient to sustain a verdict for defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-270, 272, 273; Dec. Dig. — 134.]

5. APPEAL AND ERROR ¶1033—PARTIES ENTITLED TO ALLEGE ERROR.

On plaintiff's appeal, error in overruling a demurrer to the complaint will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. ¶1033.]

6. WITNESSES ¶240—EXAMINATION—LEADING QUESTIONS.

In an action for death of a child from falling into a ditch containing pools of hot water, questions to witnesses as to whether children habitually played about the pool are leading and too general.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 795, 837-839, 841-845; Dec. Dig. ¶240.]

7. APPEAL AND ERROR ¶1048—HARMLESS ERROR—QUESTIONS TO WITNESSES.

Error cannot be predicated on sustaining objection to question asked witness, where the witness answered the question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. ¶1048.]

8. TRIAL ¶240—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

In an action for death of a child, caused by falling into a drain, into which was discharged hot water from the boilers of a cotton mill, an instruction that it was not necessary to prove that the pool of water was not of itself attractive to children was properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. ¶240.]

9. TRIAL ¶250—INSTRUCTION—APPLICABILITY TO EVIDENCE.

In an action for death of a child from falling into a drain, into which the hot water from mill boilers was discharged, an instruction that the necessity for having the blow-off pipe in the operation of the mill was not an excuse for negligence in not having the place of discharge properly guarded was properly refused as abstract and misleading, where there was no attempt to show that such necessity of a blow-off pipe was an excuse for negligence, and there was no showing that the place of discharge, as distinguished from other places in the drain, was guarded or not.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

10. TRIAL ¶250—INSTRUCTIONS—APPLICABILITY TO CASE.

Charges intended to answer argument of counsel, or based on a defense not involved on a trial, are properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 584-586; Dec. Dig. ¶250.]

11. NEGLIGENCE ¶139—DEATH OF CHILD—OPEN DRAIN—INSTRUCTION.

In an action for death of a child from falling into a drain into which the hot water from mill boilers was discharged, an instruction that it was not necessary that plaintiff prove that defendant actually knew that any child ever actually went or played in any part of the open space in which the drain was situated, nor that defendant actually knew that such open place was attractive to children, *held* properly refused as misleading.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 371-377; Dec. Dig. ¶139.]

12. TRIAL ¶240—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTIONS.

In an action for death of a child from falling into a drain, into which the hot water from mill boilers was discharged, a charge that plain-

tiff was not required to prove the nature of children, as the jury is presumed to know such nature as well as witnesses, is properly refused as argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. ¶240.]

13. EXCEPTIONS, BILL OF ¶51—STRIKING OUT INSTRUCTIONS.

Where no objections are interposed to the oral charge, and no exceptions are reserved to it as a whole, or to any part thereof, and it is, as a whole, incorporated into the bill of exceptions by the party taking the plea, it is not error for the trial judge to strike it out of the bill before signing it.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 74, 78; Dec. Dig. ¶51.]

14. NEW TRIAL ¶39—TRIAL ¶258—CONDUCT OF TRIAL—DUTY OF JUDGE AS TO INSTRUCTIONS.

It is not reversible error or ground for new trial for the trial court to fail to call the attention of counsel to typographical errors or misprisions in requested charges, when they are refused on that ground alone.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 57-61; Dec. Dig. ¶39; Trial, Cent. Dig. §§ 646, 647; Dec. Dig. ¶258.]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Action by Mrs. L. H. Thompson, administratrix, etc., against the Alexander City Cotton Mills Company. From a judgment for defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

The action is to recover damages for the wrongful death of plaintiff's child, a boy eight years of age. The boy was killed by falling into a ditch or drain that at the time contained hot water. The ditch was used by the defendant for carrying off the hot water from its boilers. During a long-continued use for this purpose the water had washed out holes in the bottom of the ditch, into which the hot water would collect when the boilers were washed out. There was a discharge pipe from the boilers, which emptied the water into this ditch, through which it flowed off from the mill. This ditch was estimated to be from 1 to 3 feet wide, and from 1 to 2½ feet deep; and the water which collected in these holes, or pools, as they are sometimes called, was estimated to be from 6 to 18 inches deep, when the water was discharged from the boilers, through the discharge pipe, into this ditch. This hot water was thus discharged about once a day, usually from 1 to 3 o'clock in the afternoon, when the boilers were cleaned. At the head of this ditch into which water was discharged, one side or bank of the ditch had grown up in briars, which hung over the ditch, and on the other side slag or cinders, from the boiler, had been dumped out, thus forming heaps or dump piles, making the head of the ditch not easily accessible by pedestrians. It could be approached, however, as was done by the deceased, by coming up the ditch and thus avoiding the barriers and other obstructions.

This ditch, or drain, as it is more accurately described, some 25 or 30 feet from its head, crossed a road which was used by the defendant and its employes and others having occasion to use the defendant's premises. The defendant's premises, on which the ditch or drain was located, formed a hollow square, two sides of which were dotted with tenement houses occupied by the defendant's employes, one of whom was the father of the unfortunate boy. The other two sides of the square were occupied by the cotton mill buildings, machinery, etc., of the defendant. Within this square, near the center, was a water tank into which cold water was pumped, and from which it was used by defendant and its employes for domestic purposes, and from it had formed a small drain through which overflow and waste water, flowing to a point several yards below, united with the hot water mentioned as flowing in the other ditch or drain. The space around this tank or standpipe was open, as was most of the hollow square above described, which covered two or three acres, and in this square the children of the employes, including the unfortunate boy, were accustomed to play. While the evidence showed that children habitually played in this square and around the water tank, it did not show without dispute that they habitually played around the head of this ditch or drain into which the hot water was discharged from the drain, or blow-off pipe. The evidence all showed that the hot water was difficult of approach, and was so obscured and shut off from view that the existence of such holes or pools was not known by those who lived near it, and who constantly used water from the cold water tank or standpipe.

The evidence of the father and the mother of the unfortunate child shows that it was a secluded spot, and anything but attractive to either children or grown persons. From the very nature of things, it could not have been at all dangerous, except for 20 or 30 minutes, at most, during each day. In fact, it appears that on this occasion neither the deceased nor his companions knew of the presence of the hot water. They were engaged in boyish sport, trying to see who could throw the most stones into the end of the exhaust pipe, when the deceased slipped and fell into one of the pools or holes of hot water.

The evidence, therefore, wholly fails to show that they were attracted there by the pools or holes of hot water, but rather shows that it was the end of this pipe, which formed the target at which they were throwing stones, that attracted them. It would have been just as attractive if it had discharged cold water or had discharged none at all.

This defendant, so far as this evidence shows, would have been just as liable for an injury, had there been no water in the ditch, and the boy had broken his neck, leg, or arm,

in falling, instead of being scalded, as he was. That is to say, it was not the hot water which attracted him to the spot where he received the injury.

Harsh, Beddow & Fitts, of Birmingham, and P. O. Stevens, of Alexander City, for appellant. George A. Sorrell, of Alexander City, for appellee.

MAYFIELD, J. The question in this case which underlies all others is this: Did the defendant owe a duty to its employes or their children, using its grounds, to fence or otherwise safeguard the ditch or drain which carried off the hot water from its boilers, so as to prevent accidents like the one which befell plaintiff's son in this case? It is not disputed that the discharge or blow-off pipe was a necessity in defendant's lawful business, nor that hot water of necessity had to escape therefrom and be carried off; the acute question is: Should the ditch or drain in which the holes or pools had formed, and into which the deceased fell, have been fenced or otherwise safeguarded, so as to prevent or render less probable accidents like the one in question to the children of its employes?

[1, 2] We think it is safe to say that the alleged dangerous agency here complained of cannot be truly classed as an "attractive nuisance." Nor can the deceased be classed as a trespasser. His relation to the premises upon which he was injured was that of a licensee. The liability of the defendant, in this case, if such there be, must depend upon the doctrine of the turntable cases. This doctrine was first announced in the United States in the familiar case of *Sioux City R. R. Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745, and was subsequently followed by the same court in the case of *Union Pacific R. R. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434. An examination of Rose's notes to the report of these cases shows that the state courts are divided in opinion as to the correctness of the doctrine announced in *Stout's Case*. This court, however, is committed to the correctness of the doctrine, and has followed it in a turntable case—that of *Alabama Great Southern Railroad Co. v. Crocker*, 131 Ala. 585, 31 South. 561.

While this is not a turntable case, but a "pool," "pond," or "hole of water" case, yet the liability in the two classes of cases largely, but not entirely, depends upon the same doctrine. A number of this last class of cases will be found reported in the various state reports; and here, as in the turntable cases, there is a lack of harmony in the decisions. There is a very valuable note in 7 Ann. Cas. p. 200 et seq., appended to the report of the case of *Sullivan v. Huidekoper*. In most of the reported cases, the injured child was a trespasser, and not a licensee, as in this case. In all the cases in which defendants have been held liable under this

doctrine, whether the injured person was a trespasser or a licensee, it was shown that the defendant either had actual knowledge, or was chargeable with knowledge, both of the dangerous character of the particular premises or agency and of the fact that the same was attractive to children, and that they were in the habit of trespassing, or would form the habit, if licensees, of playing in, upon, or with the dangerous agency. The strongest cases, fixing liability, which we have found, are the cases of *Pekin v. McMahon*, 154 Ill. 141, 39 N. E. 484, 27 L. R. A. 206, 45 Am. St. Rep. 114, *Donk Bros. v. Leavitt*, 109 Ill. App. 385, and *Brinkley Co. v. Cooper*, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216. In each of these cases it was held that the defendant, to be liable, must know, or be chargeable with notice, that the premises are dangerous, and are attractive to children, and that injury to children will probably result. None of the cases makes the owner of the premises absolute insurer against such injuries to children, whether licensees or trespassers. In none of the turntable or water pool cases is the owner held liable, except for injuries which a reasonably prudent person so situated ought to have anticipated and provided against.

[3] The rules of law applicable to this case are well stated by Mr. Thompson in his valuable work on Negligence, as follows (section 1030):

"We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises, where they are accustomed to come with or without license. These decisions proceed on one or the other of two grounds: (1) That, where the owner or occupier of grounds brings, or artificially creates, something thereon, which, from its nature, is especially attractive to children, and which, at the same time, is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That, although the dangerous thing may not be what is termed an 'attractive nuisance' (that is to say, may not have especial attraction for children by reason of their childish instincts), yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it, so as to prevent injury to them."

In 1 Street's *Foundations of Legal Liability*, pp. 160, 161, the reason for the liability in the turntable cases is thus stated:

"Liability in the turntable cases is frequently put upon the ground of implied invitation to children to come upon the premises in order to play there; the invitation being supposed to arise from the attractive nature of these dangerous engines. This hypothesis is hatched up to evade the obstacle which arises from the fact that the plaintiff is a trespasser. But it is as unnecessary as it is inadequate and artificial. Liability is to be ascribed to the simple fact that the defendant, in maintaining a dan-

gerous agent from which harm may, under particular conditions, be expected to come, has the primary risk, and must answer in damages, unless a counter assumption of risk can be imposed on those who go there to play."

While the unfortunate child in this case, as before stated, was not a trespasser, yet he was not at the particular place at which he received his injuries, at the request or invitation, express or implied, of the defendant. His relation to this particular spot was, at best, that of a mere licensee.

[4] As the jury found in favor of the defendant, and we find no reversible error in the record, it is not necessary for us to decide whether there was any evidence sufficient to authorize the jury to find for the plaintiff under the count based on simple negligence.

[5] There was no error in sustaining the demurrer to the original complaint. It was clearly subject to some of the grounds of demurrer interposed. We do not desire to be committed to the proposition that the amended complaint was not subject to the demurrer interposed; but, as the demurrer to it was overruled, we will not consider the question on this, the plaintiff's appeal.

[6, 7] There was no error in sustaining the objection to the question asked the witness as to whether children habitually played about the pool. The question was both too general and leading, and moreover the record shows that the witness did answer the question.

There was no error in giving the affirmative charge for the defendant as to the wanton count. There was no evidence of wantonness.

The charge given limited the finding to the second count, which was the wanton count, and it was not bad in form. It read as follows:

"If the jury believe all the evidence, they cannot find for the plaintiff as to the second count."

There was no error in refusing any one of plaintiff's requested charges 1, 2, 3, or 4, which were as follows:

(1) "In order to recover a verdict in this case, it is not necessary for plaintiff to prove that the pool of water, if there was such a pool, was in and of itself attractive to children."

(2) "The necessity for having the blow-off pipe in the operation of the mill is not excuse for negligence, if there be such in not having the place of discharge properly fenced or otherwise guarded, if the jury believe from the evidence that he did not have such place properly fenced or otherwise guarded."

(3) "In order for the plaintiff to recover a verdict, it is not necessary that the plaintiff prove that the defendant actually knew that any child ever actually went or played in any part of any open space referred to in the complaint, nor that defendant actually knew that such open place was attractive to children."

(4) "The plaintiff is not required to prove to the jury the nature of children, for the jury is presumed to know such nature as well as witnesses could know it."

[8] Charge 1 was argumentative, and possessed misleading tendencies as applied to the pleadings and the proof.

[9] Charge 2 was in a sense abstract. While there was proof that a blow-off pipe was a necessity, there was no attempt in pleadings or in proof to show that such necessity was an excuse for any negligence. There was neither allegation nor proof as to whether the place of discharge, as distinguished from the pools of hot water, was fenced or guarded, or was exposed, or whether it should have been so guarded.

[10] Charges intended to answer argument of opposing counsel, or based upon a defense not involved on the trial, are properly refused. *Green v. Brady*, 152 Ala. 507, 44 South. 408. The charge also possessed misleading tendencies.

[11] Charge 3 was well calculated to mislead the jury, and was properly refused.

[12] Charge 4 was a mere argument. If the jury know as much about the nature of children as do the witnesses, then they know as much about the subject as does the judge, and it is not necessary for him to so instruct them.

Charges 5 and 6 evidently contain typographical errors, which destroy their sense and meaning. However, if these charges read as appellant contends they should read, they were properly refused, as being argumentative and misleading—tending to confuse the jury—as applied to the pleadings and the proof. While charge 6 was evidently attempted to be copied from the opinion in *Crocker's Case*, 131 Ala. 590, 31 South. 561, it does not follow that it was error to refuse it in this case. Many things are often properly said in opinions and decisions which are not proper to be embraced in a requested charge, as was attempted in this case. This principle has been frequently stated by this court. *Matthews' Case*, 142 Ala. 298, 39 South. 207; *Holmes' Case*, 97 Ala. 332, 12 South. 286.

[13] Where no objections are interposed to the oral charge, and no exceptions are reserved to it as a whole, or to any part thereof, and it is as a whole incorporated into the bill of exceptions by the party taking the bill, it is not error for the trial judge to strike it out of the bill before signing it. Whether it could be properly allowed to remain, we do not decide, because the question is not before us.

[14] We are not willing to hold that it is reversible error or ground for a new trial for the trial court to fail to call the attention of counsel to typographical errors or misprisions in requested charges, when they are refused on that ground alone. While the trial court may properly do so if he chooses, we are unwilling to hold it error to fail so to do. Our statute not only authorizes, but requires, the trial judge to give or to refuse charges in the language in which they are requested. The uniform practice in this court has been to uphold trial courts in refusing charges which

contain such typographical errors as render the charge bad or tend to mislead.

There was no error in denying the motion for a new trial. The evidence falls far short of proving the complaint without conflict.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 19)

AGEE et al. v. STATE. (No. 529.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW \S 991—JUDGMENT—CONVICTION WITHOUT TRIAL.

A judgment of conviction of both, on trial of one only of two jointly indicted, is a nullity as to the one not tried.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2518, 2525, 2528; Dec. Dig. \S 891.]

2. CRIMINAL LAW \S 1175, 1177—APPEAL—HARMLESS ERROR—VERDICT AND JUDGMENT.

As to the one of two jointly indicted, who alone was tried, it was harmless that the name of the other was also inserted in the verdict and judgment of conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3179-3188; Dec. Dig. \S 1175, 1177.]

3. CRIMINAL LAW \S 1186—APPEAL—DECISION.

The judgment of conviction of two jointly indicted, when only one of them was tried, will be affirmed as to him and reversed as to the other.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 3215-3219, 3221, 3230; Dec. Dig. \S 1186.]

Appeal from Circuit Court, Chilton County; W. W. Pearson, Judge.

Scrapp Agee and Leon Kitchen were indicted for murder. From a judgment of conviction, they appeal. Affirmed in part, and in part reversed and remanded.

The defendants were jointly indicted for murder in the first degree. After arraignment and plea of not guilty, they moved for a severance of their trial, which was granted, and a certain day was fixed for the trial of this cause. With respect to the trial, the judgment entry is as follows:

"And now again, on this the 22d day of May, it being the day heretofore fixed and set for the trial of this cause, comes the state of Alabama, by its solicitor, and also comes defendant Scrapp Agee into open court in his own proper person and attended by his counsel, and the demurrer to the indictment is overruled, and the motion for a continuance is overruled. And the court having ascertained that all of the former orders of this court in this cause had been complied with, the state by its solicitor and the defendant in person and attorney proceeded to select a jury for the trial of this cause. And the said jury being selected as required by law, and the indictment being read to the jury, the defendant renewed his plea of not guilty, and an issue being joined upon this plea of not guilty, thereupon came a jury of good and lawful men, * * * who upon their oaths say: 'We the jury, find defendants Scrapp Agee and Leon Kitchen guilty of murder in the first degree,

and fix their punishment in the penitentiary for life.' It is therefore considered by and it is the judgment of the court that the defendants Scrapp Agee and Leon Kitchen are guilty of murder in the first degree, and that they be imprisoned in the penitentiary of the state of Alabama for the remainder of their natural life; and now on May 24th defendants, said Scrapp Agee and Leon Kitchen, being asked by the court what they have to say why the judgment and sentence of the court and law should not now be pronounced upon them, say nothing."

Then follows the usual finding and sentence of the court against both defendants. Both defendants appeal on the record, and seek a reversal of the judgment on the ground that they were unlawfully tried jointly, instead of severally, as they allege.

Middleton, Denson & Reynolds, of Clanton, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

SOMERVILLE, J. [1, 2] The record in this case exhibits the anomaly of a severance of the trial of two jointly indicted defendants, a trial of one of them, a verdict of guilty and judgment of conviction as to both of them, and a sentence upon both of them to life imprisonment.

Taking the judgment entry at its face value, it conclusively appears that Scrapp Agee was tried alone, and that Leon Kitchen was gratuitously and unlawfully declared guilty by the jury, and gratuitously and unlawfully adjudged guilty and sentenced by the court.

It is obvious that the judgment of conviction is a nullity as to Kitchen, and equally obvious that it is without error as to Agee, who could not have been prejudiced by the gratuitous interjection of Kitchen's name into the verdict and judgment.

[3] As to Kitchen the judgment will be reversed, and the cause remanded; and as to Agee the judgment will be affirmed. Chaney et al. v. State, 4 Ala. App. 89, 58 South. 685.

Affirmed in part, and reversed and remanded in part.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(190 Ala. 283)

WESTERN UNION TELEGRAPH CO. v. APPLETON. (No. 886.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. TELEGRAPHS AND TELEPHONES — 68—DELIVERING MESSAGE — DELAY — DAMAGES — MENTAL ANGUISH.

In an action in tort for delay in delivery of a telegram, plaintiff cannot recover for mental pain and anguish, unless there is a right of recovery aside from such injuries.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 69, 70; Dec. Dig. ¶ 68.]

2. TELEGRAPHS AND TELEPHONES — 65—DELAY IN DELIVERY OF MESSAGE—PLEADING.

A complaint alleged that defendant did not promptly deliver a death message sent to plaintiff, but the same was delayed for one day, and as a proximate consequence of said negligence plaintiff was deprived of paying the last rites of respect to the body of her mother, was deprived of the privilege of being present at the funeral, suffered great mental pain and anguish, and lost the sum paid to defendant as aforesaid. The second count was based on the same state of fact, and the negligence alleged was the wanton or intentional negligence of the servants and agents, acting within the line and scope of their authority. Held to show loss of the toll-aside from mental anguish, and that it was not demurrable.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 54-60; Dec. Dig. ¶ 65.]

3. TELEGRAPHS AND TELEPHONES — 66—DELAY IN DELIVERY OF MESSAGE—EVIDENCE.

Evidence held sufficient to entitle plaintiff to recover damages for mental pain and anguish from the failure of a telegraph company to deliver a message telling of the death of her mother.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. ¶ 66.]

4. TRIAL — 150—TAKING CASE FROM JURY—STRIKING OUT EVIDENCE — DEMURRER TO EVIDENCE.

Where plaintiff had introduced relevant evidence tending to establish at least some, if not all, of the material allegations of her complaint, it would not be deemed error to refuse defendant's motion at the conclusion of plaintiff's testimony to exclude all the evidence, on the ground that plaintiff had failed to make out a case; the better practice being to demur to the evidence, or to offer evidence and ask for a directed verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. ¶ 150.]

Appeal from City Court of Birmingham; J. H. Miller, Judge.

Action by Lucinda Appleton against the Western Union Telegraph Company for damages for delay in delivery of telegram. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals. Reversed and remanded, because of failure of plaintiff to file remittitur of damages as required.

The complaint claimed for damages for a delay of one day in the delivery of a death message filed with defendant by an agent of plaintiff, who paid the charges thereon for such service, and the allegation is that defendant so negligently conducted itself in that regard that it did not promptly deliver said message, but the same was delayed for one day, and as a proximate consequence of said negligence plaintiff was deprived of paying the last rites of respect to the body of her mother, was deprived of the privilege of being present at the funeral, suffered great mental pain and anguish, and lost the sum paid to defendant as aforesaid. The second count was based on the same state of fact, and the negligence alleged was the wanton or intentional negligence of the servants and

agents, acting within the line and scope of their authority. The demurrers were that the damages claimed were not proper elements, and that no recoverable damages are claimed; the relation between plaintiff and defendant is not averred with sufficient certainty; complaint is bad for a misjoinder, as the first count is *ex contractu* and the second count *ex delicto*. There was judgment for plaintiff in the sum of \$750.

George H. Fearons, of New York City, and Forney Johnston and W. R. C. Cocke, both of Birmingham, for appellant. Harsh & Fitts, of Birmingham, for appellee.

DE GRAFFENRIED, J. [1] The count upon which this case was tried is in tort. It is well settled that in this form of action for damages for delay in the delivery, or for the nondelivery, or for negligence in the transmission or delivery, of a telegram, the sendee cannot recover for mental pain and anguish, unless there is a right of recovery aside from such injuries. *Western Union Telegraph Co. v. Blocker*, 138 Ala. 484, 35 South. 468; *Western Union Telegraph Co. v. Jackson*, 163 Ala. 9, 50 South. 316; *Western Union Telegraph Co. v. Brown*, 6 Ala. App. 339, 59 South. 329.

[2] The complaint in this case shows that the telegram in question was sent by the plaintiff's agent to her, and we think shows with sufficient clearness the loss to her of the 40 cents which was paid to the defendant as its toll for transmitting the telegram. The complaint was not subject to the demurrer which was interposed to it by the defendant. Authorities *supra*.

[3] 2. The evidence in this case we think conclusively establishes: That the plaintiff's agent delivered to a telegraph agent of the defendant, at Athens, Ga., a telegram in the following words: "Come at once. Mother is dead. Answer when coming." That the telegram was properly addressed to the plaintiff at New Castle, Ala. That the agent of the plaintiff paid the defendant 40 cents for transmitting and delivering the telegram, and that New Castle was the *only* address of the plaintiff. In other words, we think that there was *no* evidence that the address of the telegram to the plaintiff was an insufficient address. We also think that there was evidence from which the jury had the right to infer that the plaintiff, by reason of the unnecessary delay of the defendant in delivering the telegram to her, was denied the privilege of attending her mother's funeral, and that if the telegram had been delivered to her with reasonable dispatch she could and would have been present at her mother's funeral. Under the evidence in this case, if it was believed by the jury, the plaintiff was entitled to recover damages for such mental pain and anguish as was suffered by her because of her failure to be present at her mother's funeral. Indeed, it seems to us that

all of the questions which are presented to us by appellant have been determined adversely to it in the following cases: *Western Union Tel. Co. v. Jackson*, *supra*; *Western Union Tel. Co. v. Blocker*, *supra*; *Western Union Tel. Co. v. Brown*, *supra*; *Western Union Telegraph Co. v. Anniston Cordage Co.*, 6 Ala. App. 351, 59 South. 757; *Western Union Telegraph Co. v. Boteler*, 62 South. 822; *Western Union Telegraph Co. v. Wright*, 169 Ala. 107, 53 South. 95.

[4] 3. When the plaintiff concluded her testimony, the defendant moved the court to exclude all of the evidence, upon the ground that the plaintiff had failed to make out her case. The plaintiff had introduced relevant evidence tending to establish at least some—if not all—of the material allegations of her complaint. This being true, the trial court will not be put in error for refusing this motion of the defendant. *McCray v. Sharpe* (present term) 66 South. 441. If the defendant had, when the plaintiff closed her case, *demurred* to the testimony, or had refused to offer testimony in its behalf, and had *then* asked for affirmative instructions in its behalf, a different question would be before us. *McCray v. Sharpe*, *supra*.

4. This record and the briefs of counsel have been painstakingly examined. Under the authorities above cited this case was a case for the determination of a jury.

In our opinion there is reversible error in this record, however, because of the refusal of the trial court to grant the motion for a new trial on the ground of excessiveness of the verdict. Under Acts 1911, p. 587, we think that a verdict of \$400 is sufficient, and if the plaintiff will remit all in excess of said amount the judgment will be corrected and affirmed, unless the defendant's counsel object thereto under the proviso of said act. Counsel for appellee are given 10 days within which to file their acceptance or rejection of the verdict as reduced. Counsel for appellant are given 10 days within which to file an acceptance or a rejection of the reduction in the verdict, after the acceptance by the appellee, if there be an acceptance. The clerk will mail a copy of this order to Harsh & Fitts, and a copy to George H. Fearons, Forney Johnston, and W. R. C. Cocke, and will record the original on the minutes of the court, together with the acceptance of the reduction, in which event the case is corrected and affirmed.

Corrected and affirmed conditionally.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

Supplemental Opinion.

DE GRAFFENRIED, J. The appellee not having consented to the reduction of the amount of the judgment as indicated in the above opinion and within the time allowed by law, the judgment of the court below is

reversed, and the cause is remanded for further proceedings in the court below.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

(190 Ala. 241)

ILLINOIS CENT. R. CO. v. S. M. AVERY & SON. (No. 887.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. PARTNERSHIP ⇨197—ACTIONS—PARTIES.

A partnership may sue in its partnership name, if the names of the members are set out in the summons and complaint.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. ⇨197.]

2. CARRIERS ⇨159—CARRIAGE OF GOODS—LIMITATION OF LIABILITY—VALIDITY—NOTICE OF CLAIM.

A special contract that a claim for damages must be presented to the carrier within 10 days was void.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 668-671, 699-703½, 711-714, 718, 718½; Dec. Dig. ⇨159.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by S. M. Avery & Son, a partnership, composed of S. M. Avery and Will Avery, against the Illinois Central Railroad Company, for damages to cattle while in transportation. Judgment for plaintiff, and defendant appeals. Affirmed.

Davis & Fite, of Jasper, for appellant. J. J. Ray, of Jasper, and W. V. Mayhall, of Haleyville, for appellee.

MAYFIELD, J. [1] A partnership may sue in its partnership name, provided the names of the members thereof are set out in the summons and complaint. In the case of Hatcher v. Branch, Powell & Co., 141 Ala. 413, 37 South. 690, it was said:

"While the suit appears to have been brought in the name of the partnership as plaintiff, still the individual names of the partners composing the firm were set out in the complaint. On the authority of Foreman v. Weil Bros., 98 Ala. 496 [12 South. 815], the trial court properly overruled the demurrer to the complaint on the ground that the suit was brought in the name of the partnership."

The demurrer to the complaint on the ground that the suit was in the name of the partnership was properly overruled.

[2] The special contract attempted to be set up as a defense to the suit, that the claim for damages was not presented to the carrier within 10 days, was void under a long line of decisions in this state. The special pleas, therefore, setting up a breach of the provisions of the contract of shipment, presented no defense, and the trial court properly sustained demurrers thereto. The authorities on the validity of similar provisions in contracts of shipment and in contracts as to the delivery of telegrams were reviewed in the

cases of Louisville & Nashville Railroad Co. v. Price, 159 Ala. 213, 48 South. 814, and Nashville & Chattanooga & St. Louis Railway v. Long & Son, 163 Ala. 165, 50 South. 130.

Haralson, J., in the case of Broadwood v. Southern Express Co., 148 Ala. 17, 41 South. 769, speaking of a similar stipulation or provision in a contract of shipment of common carriers limiting liability to 90 days, had this to say:

"The reasonableness vel non of the stipulation of the kind under consideration is one of law for the determination of the court. Whatever may be the decisions of the courts of other states and of the Supreme Court of the United States, this court is committed to the proposition that a contract fixing 30 days as the time within which such claims must be presented is not reasonable."

If 30 days is not a reasonable time, then 10 days is clearly not so, in the absence of some facts going to show that it was reasonable in the particular case; none such being alleged in any of the pleas in the case at bar.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(190 Ala. 126)

HENDERSON v. TENNESSEE COAL, IRON & R. CO. (No. 959.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MINES AND MINERALS ⇨118—INJURY TO INVITEE—FALL OF ROOF—PLEA.

Where plaintiff alleged that his intestate, while in defendant's mine at its invitation, was killed by a portion of the roof falling on him, and that his death was proximately caused by the negligence of defendant's servants, in causing such portion of the roof so to fall, a plea that intestate knew of the defect or negligence which caused his injury and death, and failed to give information thereof to defendant, or to some person superior to intestate, engaged in defendant's service, was demurrable for failure to aver that intestate was charged with any duty to give such information, etc.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 240; Dec. Dig. ⇨118.]

2. MINES AND MINERALS ⇨118—PLEADING ⇨8—MINES—NEGLIGENCE—FALL OF ROOF.

In an action for the death of an invitee in a mine by the fall of a portion of the roof, a plea that intestate was negligent in failing to examine the working place under the part of the roof that fell on him, before commencing to work thereunder, which proximately caused his hurt, and that it was his duty to examine the place, was demurrable for failure to aver that such an examination would have disclosed the defect and danger, and because the allegation that intestate's failure to examine the working place was the proximate cause of his injury, was but a conclusion of the pleader.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 240; Dec. Dig. ⇨118; Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. ⇨8.]

3. APPEAL AND ERROR ⇨549—REVIEW—ERRORS RELATING TO PLEADINGS—PREJUDICE.

Where the error complained of relates to pleading alone, and the appeal is only on the record, and there was no nonsuit, but the trial

was had on the facts and merits, there should be a bill of exceptions showing that the errors complained of as to the rulings on the pleadings were involved on the trial, and were among the issues on which the case was decided, in order to justify a reversal for error therein.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2441-2451; Dec. Dig. § 549.]

4. APPEAL AND ERROR §1170—RULINGS ON PLEADINGS—REVIEW—PREJUDICE.

Where the court erred in its rulings on the pleadings, but there was no nonsuit, and a trial was had to the merits, and though there was no bill of exceptions, the instructions were sent up as a part of the record proper, and these indicated that the rulings were prejudicial, the judgment would be reversed, notwithstanding Supreme Court rule 45 (175 Ala. xxi, 61 South. ix), providing that judgment shall not be reversed for error in matter of pleading, unless the court is of the opinion, after an examination of the entire case, that the error probably injuriously affected the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4082, 4086, 4075, 4098, 4101, 4454, 4540-4545; Dec. Dig. §1170.]

Appeal from Circuit Court, Jefferson County; El. C. Crowe, Judge.

Action by Mutual Henderson, as administrator, against the Tennessee, Coal, Iron & Railroad Company, for the death of her intestate, Nathaniel Henderson. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The third count declared that plaintiff's intestate, while in the mine of defendant at the invitation and request of defendant, was killed by a portion of the roof of the mine falling upon him, and that his death was proximately caused by the negligence of defendant's servants or agents, while acting within the line and scope of their employment, in that they negligently caused a portion of said roof to fall upon plaintiff.

Plea 9 is as follows:

Intestate knew of the defect or negligence which caused his injury and death and failed, in a reasonable time, to give information thereof to defendant, or to some person superior to said intestate engaged in the service or employment of defendant.

The forty-eighth ground of demurrer is that the plea does not aver that intestate was charged with any duty to give information to defendant or to some person superior to intestate in the service or employment of defendant as to such defect or negligence.

Plea 6 was as follows:

Intestate was guilty of negligence which proximately contributed to cause his injuries in this: That plaintiff's intestate did not examine his working place under the rock or place that fell on him before commencing work thereunder, and proximately caused the hurt. It was the duty of plaintiff's intestate, before commencing to work, to examine his working place, and his injury was the proximate result of his failure to perform that duty.

Plea 8 was practically the same as plea 6.

W. A. Denson, of Birmingham, for appellant.

ANDERSON, C. J. [1] It is not necessary to pass upon the sufficiency of plea 9, as an answer to a complaint by a servant under the Employers' Liability Act, as count 3 of the complaint, the only one submitted to the jury, is not by a servant, but a licensee, and the plea places no duty upon the plaintiff to inform the defendant of the defect. Said plea, as an answer to count 3, was subject to ground 48 of plaintiff's demurrer and perhaps other grounds.

[2] Plea 6 was bad and subject to the plaintiff's demurrer thereto. The averment that the failure of the plaintiff to examine the working place under the roof before commencing to work proximately caused his injury is but a conclusion of the pleader. The plea fails to aver that an examination of the roof would have disclosed the defect, as well as the danger of going to work at the place in question. *Mascott Coal Co. v. Garrett*, 156 Ala. 297, 47 South. 149; *Southern Ry. Co. v. McGowan*, 149 Ala. 452, 43 South. 378. This second alternative averment of plea 8 possesses the same vice as is dealt with in discussing plea 6.

The appellee has suggested the application of rule 45 (175 Ala. xxi, 61 South. ix) in avoidance of a reversal of this case, upon the idea that, while the appeal is upon the record alone, there was no nonsuit; and it appears that the case was tried by a jury upon the merits; and, from aught that appears, the plaintiff may have failed to offer evidence in support of his count 3, or the defendant may not have offered any proof in support of the pleas in question. In other words, that the appellant has not shown probable injury resulting from the error in overruling his demurrer to the special pleas to count 3. It is no doubt true that rule 45, which is as follows:

"Hereafter no judgment will be reversed or set aside, nor new trial granted by this court or by any other court in this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless, in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties"

—was intended to obviate previous rulings as to reversing cases upon the mere presumption of injury, whenever error was shown, and makes it incumbent upon an appellant to not only show error but also that he was probably injured thereby.

[3] It is also true that in cases where the error complained of relates to pleading alone, and the appeal is only upon the record, and there was no nonsuit, but a trial was had upon the facts and the merits, there should probably be a bill of exceptions showing that the errors complained of as to the ruling

upon the pleading were involved upon the trial and were among the issues upon which the case was decided. For instance, error may be assigned by a defendant as to overruling a demurrer to a certain count of the complaint, or to a special plea to said count, when, if a bill of exceptions is taken, it might appear that there was no proof offered in support of the complaint, and the general charge was given for him as to said count. It would thus be an absurdity as well as a miscarriage of justice to reverse a case which had been tried by a jury, upon points relating to a count in the complaint or a plea which was eliminated from the jury, by instructions in favor of the appellant, or it would be equally as absurd to reverse the case in favor of the plaintiff appellant in overruling demurrers to special pleas when there was no proof offered in support of the counts to which they were interposed, or when the defendant offered no evidence in support of said special pleas, and they were or could have been charged out in favor of the plaintiff.

[4] As heretofore suggested, when appeals are had upon the record alone in cases where there is not a nonsuit, but a trial upon the merits, it is safer for the appellant to take a bill of exceptions, sufficient to show that the errors upon the pleading were probably prejudicial, and it will be noted that circuit court rule 32 (175 Ala. xxi), as it appears in the Code of 1907, has been amended so as to permit an appellant to set out enough in his bill of exceptions to meet the requirements of rule 45, so as to show, not only error, but probable injury. See new rules upon front pages of the 175 Ala. (61 South. vii). This court, however, will look to all of the record before it for the purpose of ascertaining whether or not the errors shown were probably prejudicial, and even in cases of this kind, where no bill of exceptions is taken, if the given and refused charges are sent up in the record proper, we will look to them for the purpose of ascertaining whether or not the errors were probably injurious. The charges in this case have been sent up as a part of the record, and we find that the general charge requested by the defendant as to count 3 was refused, and which would indicate, in the absence of a bill of exceptions, that there was some proof in support of said count 3, else the charge would have been given. We also note the refusal of a charge requested by the plaintiff, which would prima facie indicate that there was some proof in favor of the defendant's special pleas made the basis of the errors involved. We therefore hold that the appellant has not only shown error, but an examination of the entire record as presented to us, also discloses that said errors were probably prejudicial. We do not wish to be understood as departing from the old rule of considering assignments of error only when properly present-

ed, or that we will reverse cases for giving or refusing charges not presented by a bill of exceptions, but we will in the future, as we have done in the past, look to charges, whether in the bill of exceptions or not, for the purpose of ascertaining whether or not the errors shown were prejudicial. *Gambill v. Fuqua*, 148 Ala. 448, 42 South. 735. The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

SOMERVILLE, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 610)

RANDOLPH v. HUBBERT. (No. 859.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. EJECTMENT — MAINTENANCE OF ACTION — PARTIES.

While each may separately maintain ejectment, the heirs and personal representatives of a deceased owner cannot join in a single action of ejectment.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. § 137; Dec. Dig. —43.]

2. PARTIES — AMENDMENTS.

Where the heirs of a decedent joined in ejectment, and thereafter the complaint was amended by striking therefrom the names of all of the heirs except one, who had been appointed administrator, leaving him suing as administrator, there was not an entire change of parties plaintiff, as one of the original plaintiffs was still a party, though he was suing in a different capacity.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 100-107; Dec. Dig. —65.]

3. EXECUTORS AND ADMINISTRATORS — RIGHT TO MAINTAIN EJECTMENT.

There can be no recovery in ejectment by one styling himself administrator, which fact was denied by defendants, where he did not then hold that position.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 535, 537-540; Dec. Dig. —130.]

4. EVIDENCE — PRESUMPTIONS — DISCHARGE OF ADMINISTRATOR.

Where the records preserved merely showed plaintiff's appointment as administrator about 35 years before, and he testified that he took possession of the personalty and applied it to the payment of the debts of the estate, but did not do anything in respect to the realty, there is a conclusive presumption that he had made final settlement and was discharged, and now he cannot in his representative capacity maintain ejectment for the lands of his intestate.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 106; Dec. Dig. —84.]

Appeal from Circuit Court, Fayette County; Bernard Harwood, Judge.

Action by R. F. Hubbert, as administrator, against T. U. Randolph. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Bankhead & Bankhead, of Jasper, and Beasley & Wright, of Fayette, for appellant. R. F. Peters, of Fayette, and Ray & Cooner, of Jasper, for appellee.

DE GRAFFENRIED, J. [1] The action of ejectment cannot be jointly maintained by the heirs and the personal representatives of the deceased owner of the land. "True, each may maintain (separately) an action of ejectment, to recover the possession of the lands; but their several rights over the lands when recovered are fundamentally unlike." *Tarver v. Smith*, 38 Ala. 135; *Wilson et al. v. Kirkland*, 172 Ala. 72, 55 South. 174.

[2] 2. This suit was originally brought by the heirs of a deceased person, who, it is claimed, owned the land. One of the heirs of said deceased was the administrator of the estate of said deceased, and against the objection of the defendant the complaint was amended by striking from—

"the original complaint the names of all the plaintiffs except the name of R. F. Hubbert (the heir who was the administrator), and to proceed in the name of R. F. Hubbert, above, as the administrator of the estate of said S. A. Reeves, deceased, and to amend the caption of said original complaint, so that the same may read as follows: 'R. F. Hubbert, Who Sues as the Administrator on the Estate of S. A. Reeves, Deceased, Plaintiff.'"

The result of the above amendment was to strike from the complaint all of the original plaintiffs except one. As this one was left in the complaint, there was not an entire change of parties plaintiff, and the fact that the complaint was so amended as to change the capacity in which the one original plaintiff who was left in the complaint sued did not work an entire change of the parties plaintiff within the meaning of the law. *Lucas v. Pittman*, 94 Ala. 616, 10 South. 603.

[3] 3. The question which we consider below must be treated by us as if this suit had been brought originally by the plaintiff, R. F. Hubbert, as the administrator of the estate of S. A. Reeves, deceased. This proposition needs no citation of authority to sustain it. While, under our statutory system, an administrator may, under many circumstances, maintain an action of ejectment to recover the possession of the lands of his intestate, in this case there was a plea of ne unques administrator, and if, when the complaint was amended, the plaintiff was not the administrator of the estate of S. A. Reeves, deceased, then there should have been, in this case, a verdict for the defendant.

[4] 4. The lands sued for in this case are situated in Fayette county. In the county seat there have been two fires since the year 1880, which, on each occasion, destroyed the courthouse of the county. The records of the probate court were destroyed by fire on these occasions, but some of the original papers pertaining to matters pending in said court were saved. In the matter of the estate of S. A. Reeves, deceased, a few of the original papers were saved, and these papers show that on the 16th day of February, 1880,

the plaintiff was appointed administrator of said estate. This is all that is shown by the original papers with reference to said estate. The administrator of the estate testified that after his appointment as administrator he took possession of the personal property and applied it or its proceeds to the payment of the debts of the estate, but that he had done *nothing in the last 30 years relating to the administration of the estate*. As this fact was proven by the plaintiff, and was *without dispute*, the plaintiff was not, at the time this suit was brought (the suit was brought in March, 1914), the administrator of the estate. The fact that he had made a final settlement of the estate and had received his discharge as administrator is conclusively presumed. The reasons for this holding are well stated in *Snodgrass v. Snodgrass*, 176 Ala. 276, 58 South. 201.

It follows from the above that the heirs of S. A. Reeves, deceased, are the only parties who can maintain a suit for the recovery of the possession of this land.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 461)

WHEAT et al. v. WHEAT et al. (No. 510.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. PARTITION \Leftrightarrow 12—PROPERTY AND ESTATES
SUBJECT—ESTATES IN REMAINDER AND RE-
VERSION.

Where complainant, in a bill for partition, owned a present interest and was entitled to immediate possession and enjoyment, he was entitled to partition, as a matter of right, although it involved the setting apart of interests in reversion or remainder, although no partition can be awarded where the complainant has only an estate in reversion, with no present right of occupancy.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 38-51; Dec. Dig. \Leftrightarrow 12.]

2. PARTITION \Leftrightarrow 55—SUFFICIENCY OF COM-
PLAINT—NECESSITY FOR SALE.

A complaint in partition, alleging that complainants and respondents jointly owned all the land described in the bill, that it could not be equitably divided or partitioned among them without a sale, because of the location of improvements, and because two parties held only a $\frac{1}{98}$ interest each, three parties a $\frac{15}{98}$ interest each, two parties a $\frac{22}{98}$ interest each, and one party a $\frac{1}{7}$ interest, subject to the life estate of her husband, sufficiently showed the impracticability of an actual partition and the necessity for a sale, which was not destroyed by further averment of particulars from which different conclusions might be drawn, as the pleader is allowed to draw his own reasonable conclusions.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. \Leftrightarrow 55.]

3. PARTITION \Leftrightarrow 55—BILL—DESCRIPTION OF PARTIES.

A bill for partition, alleging that a certain named person during her life was the owner of an undivided one-seventh interest, that she left a surviving husband entitled to an estate by curtesy, made a party defendant, that he

had not been heard of for ten years or more, and claimed no interest, was not objectionable as incorrectly describing the interest of the parties, since the interest of the surviving husband, if any, might be preserved and determined on final hearing.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 148-159, 182; Dec. Dig. ¶55.]

4. TENANCY IN COMMON ¶15—ADVERSE POSSESSION—POSSESSION OF ONE COTENANT—RECEIPT OF RENTS AND PROFITS.

The possession by one cotenant is presumed to be for the benefit of all, which presumption continues until there is a disseisin by a clear repudiation and denial of the rights of the other cotenants, brought home to their actual knowledge either by express notice or by acts of such open, notorious and hostile character as to constitute notice in themselves, nor does the exclusive receipt of rents and profits by a cotenant, whose possession is not hostile to his cotenants constitute an adverse holding against his cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 42-52; Dec. Dig. ¶15.]

5. TENANCY IN COMMON ¶28—RECEIPT OF RENTS—ACCOUNTING.

On a bill for partition of certain land by sale, averring that one of the cotenants had received rents and profits in part paid over to other cotenants who had previously received their share of the rents and profits as tenants in common with the other owners, such cotenants were accountable to their cotenants, and were also accountable for cotton collected as rent, although two of them had conveyed their interest to the third, reserving a remainder, and none of them were living on the land, as the rights and equities of the parties should be settled in one proceeding.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 76-88; Dec. Dig. ¶28.]

6. PARTITION ¶59—CLAIM FOR ATTORNEY'S FEE—DEMURRER.

On a bill between cotenants for partition by sale, there was no error in overruling a demurrer in respect to an attorney's fee sought to be charged against defendant's interest, since that could be more properly raised on final hearing.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 165; Dec. Dig. ¶59.]

Appeal from Chancery Court, Macon County; L. D. Gardner, Chancellor.

Bill by Moses H. Wheat and others against Jessie L. Wheat and others, for partition of certain land. Decree on demurrer for complainants, and respondents appeal. Affirmed.

It is alleged that complainants, jointly with the respondents named herein, own certain lands described in the bill located in Macon county, Ala., and that complainants and respondents together own all of said land in the proportions set forth in the bill. Complainants allege that the real estate cannot be equitably divided or partitioned among the joint owners thereof without a sale, because of the inequality of interest, location of improvement, and the very small interest belonging to some of the heirs, as the property must be divided between two parties who hold a $\frac{1}{8}$ interest each, three parties who hold a $\frac{15}{32}$ interest each, two parties who hold a $\frac{22}{32}$ interest each, two parties

who hold a $\frac{1}{8}$ interest each, one party a $\frac{1}{7}$ interest, and the $\frac{1}{8}$ interest of Mrs. Cook, which is subject to the life estate of her husband, W. T. S. Cook, although he has never claimed said interest, and his whereabouts are at present unknown. The bill also alleges the receipt of rents, income, and profits of the land by Jessie L. Wheat, but that the amounts and disposition of same are unknown, and other matters not necessary to be here set out. The demurrers raise the question discussed in the opinion.

J. M. Chilton, of Montgomery, for appellants. R. H. Powell and O. S. Lewis, both of Tuskegee, for appellees.

SAYRE, J. [1] It is urged for appellants, on the authority of *Wilkinson v. Stuart*, 74 Ala. 198, that there can be no partition or sale for division of the land in question because some of the parties own interests in remainder. In the case relied upon, the parties—all the parties—had only an estate in reversion. In that case, there being no present right of occupancy, it was held in consonance with the authorities generally that no partition could be awarded. But our cases also hold that, where the party complainant owns a present interest and is entitled to immediate possession and enjoyment, partition is awarded on his prayer, as matter of right, although it may involve the setting apart of interests in reversion or remainder. *Fitts v. Craddock*, 144 Ala. 437, 39 South. 506, 113 Am. St. Rep. 53; *Fies v. Rosser*, 162 Ala. 504, 50 South. 287, 136 Am. St. Rep. 57; *Letcher v. Allen*, 180 Ala. 254, 60 South. 828; *Clements v. Faulk*, 181 Ala. 219, 61 South. 264; *Kidd v. Borum*, 181 Ala. 144, 61 South. 100. Complainants in this case being entitled to the present use and enjoyment of an interest in the land, it is no objection to their bill that some of the parties defendant claim in remainder only.

[2] On the authority of *Smith v. Witcher*, 180 Ala. 102, 60 South. 391, and *Trucks v. Sessions*, 66 South. 79, we hold that the bill in this case sufficiently shows the impracticability of an actual partition and the necessity for a sale. Such is, in effect, the general averment of the bill; and the ruling of the cases cited is that the sufficiency of such averments is not destroyed by the further averment of particulars from which different conclusions may be drawn. The pleader is allowed to draw his own not unreasonable conclusion.

[3] We are not advised by the bill that it incorrectly describes the interest of the parties, as the demurrer asserts. It is alleged that Estelle C. Cook, during her lifetime the owner of an undivided one-seventh interest in the land, on her death, which occurred 15 years ago, left surviving her a husband, W. T. S. Cook, who thereby became entitled to an estate by curtesy; that complainants

have not heard of him for ten years or more, and on these facts it is averred that he claims no interest in the land. However, he is made a party defendant, process by publication has been had against him, and, whether he claims an interest or not, in either case the extent of the interest of each of the other parties complainant and defendant is stated correctly in each alternative, so far as we are able to perceive. It may be that on the final hearing, if relief is awarded under the bill, it will be necessary to preserve the interest of Cook, and to apportion the interests of the parties on the basis of his participation, in the proceeds of the sale, but, if so, that is a matter which will then be correctly determined, and for it the decree will make such provision as may then seem to be necessary and proper.

[4] It is averred in the bill that for the past ten years or more the defendant Jessie L. Wheat has had control and management of the land to be sold for partition or division; that during said time she has taken rent notes in her own name and has collected and received the rents, and has sold and collected for wood, timber, and other things of value belonging to the alleged tenants in common. On this averment defendants' demurrer invokes, as appearing upon the face of the bill, the defenses of laches and the statute of limitation against complainants' ownership and the remedy sought. It is said that the bill shows that defendant Jessie L. Wheat has been and is now holding and claiming adversely to complainants and the other parties defendant. This contention must be denied on familiar principles which hardly call for extended argument. The possession of one cotenant is presumed to be for the benefit of all, and this presumption continues until there is a disavowal by a clear repudiation and denial of the rights of the other cotenants brought home to their actual knowledge, either by express notice or by acts of such an open, notorious, and hostile character as to constitute notice in themselves. *Ashford v. Ashford*, 136 Ala. 631, 34 South. 10, 96 Am. St. Rep. 82; *Palmer v. Sims*, 176 Ala. 59, 57 South. 704. Mere possession by one cotenant does not operate as an ouster of another. Nor will the exclusive receipt of rents and profits by a cotenant, in connection with a possession not otherwise characterized by hostility, suffice to constitute an adverse holding, as matter of law. 38 Cyc. 81. We think the bill does not disclose a title in defendants by adverse holding, and that the demurrer asserting the contrary is not well taken.

[5] It is further averred in the bill that Jessie L. Wheat has received rents and profits, and that they have in part been paid over to her codefendants C. R. A. E. Wheat and Laura L. Wilson. It is thereupon argued, upon the separate assignments of error by the named parties, that they cannot be held to an accounting for the rents and

profits received by them. A reasonable interpretation of the bill is that these parties, prior to 1912 at least, were in the receipt of a share of the rents and profits in virtue of their tenancy in common with the other owners, and that, such being the case, they must account to their co-owners as an incident to the partition sought. If complainants were seeking to charge defendants for the mere friendly use or occupation of the land, that would afford material for another story. *McCaw v. Barker*, 115 Ala. 543, 22 South. 131.

As for the rents of the year 1912 in particular, alleged to have been received by the defendant Jessie L. Wheat and in part turned over to her mother, Mrs. C. R. A. E. Wheat, and her sister, Laura L. Wilson, after said Jessie and Laura had conveyed their interest to their mother for her life, reserving to themselves an estate in remainder—in which said rent (cotton), the bill hence alleges, said Jessie L. and Laura L. had no interest whatever—the separate demurrers filed by these three defendants question their accountability for such rent in this proceeding specifically on the ground that they did not collect or receive it as tenants in common with complainants. These three defendants were not living upon the land, but this rent was collected specifically as rent, so that, if the title to the land out of which this rent issued was as the bill avers it was, they are accountable to their co-owners in whatever capacity or by whatever title they claimed the right to collect or receive it. *Sanders v. Robertson*, 57 Ala. 465. The parties all still own an interest in the property either in present or in futuro, and their rights and equities should be settled in one proceeding. The bill is not multifarious, as multifariousness is defined by the statute, nor, for that matter, is any objection taken on that ground. Code, § 3095. It occurs to us that the underlying question and the only question of any doubt in this feature of the case is whether the amounts collected from the rent of 1912, and for which these defendants may be found accountable to their cotenants, should be charged in the decree for partition as a lien upon their interests. This precise question is not presented by the demurrers, nor is it argued in brief of counsel for appellant—the only brief we have—though the argument has been such as to lead us to a statement of what appears to be the real difficulty of the case. Possibly this is not the question that disturbs appellants, and was not raised in this form because it was a matter of indifference to them, if they had to account at all. In this state of the case, it seems proper, if not necessary, to leave the primary disposition of this question to the chancellor, who will have all the facts before him when he comes to the rendition of his final decree on pleadings and proof.

[6] Question as to the attorney's fee sought to be charged against defendant's interest in

the land will also be more properly raised upon final hearing. There was no error in overruling the demurrer on this account. *Smith v. Witcher*, supra.

We think we have said enough. Our judgment is that the decree as for anything settled by it should be affirmed. Let appellants have 30 days, or such other time as the chancellor may fix, in which to answer over.

Affirmed.

McCLELLAN, MAYFIELD, and DE GRAF-FENRIED, JJ., concur.

(190 Ala. 463)

WHEAT et al. v. WHEAT et al. (No. 509.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

Appeal from Chancery Court, Macon County; L. D. Gardner, Chancellor.

Bill by Moses H. Wheat and others against Jessie L. Wheat and others. Decree for complainants, and defendants appeal. Affirmed.

J. M. Chilton, of Montgomery, for appellants. R. H. Powell and O. S. Lewis, both of Tuskegee, for appellees.

SAYRE, J. The decree of the chancery court is affirmed on the authority of *Wheat v. Wheat* (5th Div. No. 510) 67 South. 417, decided at this term.

Affirmed.

McCLELLAN, MAYFIELD, and DE GRAF-FENRIED, JJ., concur.

(190 Ala. 675)

MILLITELLO v. B. F. RODEN GROCERY CO. (No. 819.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. **ESTOPPEL** \S 110—PLEADING—NECESSITY.

Where estoppel is relied on as a defense, it must be specially pleaded, unless the case is such that it cannot be.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 300; Dec. Dig. \S 110.]

2. **EXECUTION** \S 192 — CLAIMS BY THIRD PERSONS—PLEADING—ESTOPPEL.

In the trial under Code 1907, \S 6039, of the claim to property upon which an execution had been levied, the only proper issue is whether the property levied on is subject to the process, and under that issue any evidence bearing thereon, including evidence of estoppel, may be introduced, so that the claimant is not prejudiced by the sustaining of demurrers to his pleas setting up an estoppel.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 567-570; Dec. Dig. \S 192.]

3. **ESTOPPEL** \S 68—GROUNDS — CHANGE OF POSITION IN JUDICIAL PROCEEDINGS.

Where a summons and complaint against J. M. had been served on V. M., who appeared and filed special pleas, which were stricken on the statement by plaintiff's attorney that he was not suing V. M., and the court, in the presence of plaintiff's counsel, stated that, if execution of the judgment therein entered were levied on the property of V. M., the officer would be liable in damages, plaintiff was estopped to assert, when V. M. claimed the property levied on to satisfy a judgment, that V. M. and J. M. were the same person, since estoppel, which is the rule that, where a fact has been asserted or an

admission made through which an advantage has been derived from another or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the parties from rebutting such representation from afterwards denying the truth of the admission, applies to the conduct of causes in courts and the results thereby obtained (citing Words and Phrases, *Estoppel*).

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. \S 165-169; Dec. Dig. \S 68.]

4. **EXECUTION** \S 182—CLAIM BY THIRD PERSONS—ISSUES—REGULARITY OF JUDGMENT.

In the statutory suit to claim property upon which execution was levied, where the process is not void on its face, the claimant cannot question the regularity of either the judgment or the execution.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 547; Dec. Dig. \S 182.]

5. **EXECUTION** \S 182—CLAIM BY THIRD PERSONS—ISSUES—ESTOPPEL.

A contention that by his assertion before obtaining the judgment that the judgment debtor and claimant were not the same person plaintiff had estopped himself from claiming that they were not, the statutory suit to try the claim to property upon which the execution had been levied, is not an attack upon the regularity or validity of the judgment, and evidence to sustain such a contention is admissible.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. \S 547; Dec. Dig. \S 182.]

Sayre, J., dissenting.

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Claim by V. Millitello to property upon which an execution was levied in aid of a judgment in favor of the B. F. Roden Grocery Company. Judgment for the plaintiffs, and claimant appeals. Transferred from Court of Appeals. Reversed and remanded.

James A. Mitchell, of Birmingham, for appellant. Thompson, Thompson & Bachrach, and Guy M. Thompson, all of Birmingham, for appellee.

GARDNER, J. The B. F. Roden Grocery Company obtained a judgment against one Jim Millitello, in the Birmingham court of common pleas, an inferior court with the jurisdiction of a justice of the peace, upon which judgment execution was issued and levied upon certain property claimed by V. Millitello; and, upon such claim being interposed, a trial of the right of property was had in said court as provided by statute (section 6039 et seq. of the Code of 1907), resulting in judgment for the plaintiff, and the claim suit was removed by appeal to the city court of Birmingham, where the trial of the claim suit again resulted in judgment for the plaintiff, from which judgment the claimant prosecutes this appeal.

The cause was transferred to this court under the provisions of Acts of 1911, p. 449.

Plaintiff in the court below tendered what might be termed a "special issue" in the cause, to the effect that the property levied on as the property of Jim Millitello, and which is claimed by V. Millitello, is the property of Jim Millitello, in this, that V. Mil-

Millitello is the same person as Jim Millitello, and that the claimant, V. Millitello, held himself out to plaintiff as being Jim Millitello, and purchased goods from plaintiff under that name, etc. This tender of issue was stricken by the court on motion.

The plaintiff then tendered the issue as provided by section 6040 of the Code, to the effect that the property levied upon as the property of Jim Millitello, and which is claimed by V. Millitello, is the property of Jim Millitello, and is liable to the satisfaction of the said writ.

The claimant interposed, in addition to a plea taking issue on the tender, two special pleas, numbered 2 and 3, in which he sought to set up certain matters by way of estoppel, to the effect that the plaintiff was estopped from setting up and now claiming that Jim Millitello and V. Millitello are one and the same person. The substance of these pleas need not now be stated, as it will sufficiently appear in comment upon the testimony subsequently offered upon the question of estoppel, which was excluded by the court. Demurrer to these pleas was sustained.

[1] We recognize the rule in this state that an estoppel relied upon as matter of defense must be specially pleaded. *Jones & Co. v. Peebles*, 130 Ala. 269, 30 South. 564; 16 Cyc. p. 806.

The following quotation, found in *Jones v. Peebles*, supra, is in point:

"If a party has opportunity to plead an estoppel, and voluntarily omits to do so, and tenders or takes issue on the fact, he thus waives the estoppel, and commits the matter to the jury, who are to find the truth. * * * But if he have not opportunity to show the estoppel by pleading, he may exhibit the matter thereof in evidence on the trial under any issue which involves the fact, and both the court and jury are bound thereby."

Likewise apt is the following, from 16 Cyc. p. 806, cited above:

"At common law an estoppel in pais need not be pleaded, but under the statutes of the various jurisdictions it is now almost universally necessary that it should be. If, however, the state of the case is such that the estoppel cannot be pleaded, it may be given in evidence, and in such case it will be equally conclusive as if it had been pleaded."

[2] In the case of *Lehman, Durr & Co. v. Warren*, 53 Ala. 535, it was held that the only proper issue on the trial of the right of property is an affirmation by the plaintiff in the process that the property levied on is subject to the process, and a denial of the fact by the claimant. Says the court:

"It was never intended the proceeding should be embarrassed by formal pleading, either in the form of complaint, or plea, or replication, or rejoinder. The introduction of such pleading tends only to confusion, and to mar the simplicity of the proceeding, as it is authorized by the statute."

In the case of *Warren v. Liddell*, 110 Ala. 232, 20 South. 89, it was said that:

"The form of issue on the contest * * * is largely within the discretion of the court, is not subject to demurrer, nor governed by the rules of pleading."

We therefore conclude that while, as a general rule, estoppel as a defense must be specially pleaded, yet in the statutory trial of the right of property, where the form of the issue is largely within the discretion of the court, and its substance is prescribed by the statute, the only proper issue is an affirmation by the plaintiff in the process that the property levied on is subject to the process, and a denial of the fact by the claimant, and that in such case, such an issue is sufficient to authorize the plaintiff to introduce evidence of every fact showing the property liable to the process, and the claimant to give evidence of every fact showing that there resides in him a superior right of property.

We are therefore of the opinion that no necessity existed for the special pleas of estoppel, and that error to a reversal cannot be predicated upon the ruling of the court sustaining the demurrer to said pleas.

[3] This brings us to a consideration of the pivotal question in the case—that of the evidence offered by the claimant to show the estoppel, which evidence was, on motion of plaintiff excluded by the court.

For an understanding of the question it is necessary that this proffered testimony be given, which is found principally in that of counsel for claimant, who testified as follows:

"On the 6th day of December, 1912, I went to the Second division of the Birmingham court of common pleas, accompanied by my client, V. Millitello, the claimant here. V. Millitello had been served with a copy of the summons and complaint in the case of *B. F. Roden Grocery Company v. Jim Millitello*, No. 14559 on the docket of said court, and I was unable to tell whether V. Millitello was the party sued in that cause or not. Before leaving my office I drew up some pleas to be filed in the said case, and also an affidavit denying the correctness of the account sued on, and had Millitello to make the affidavit on each of the said two papers. Upon arriving at the said court, I found Mr. Guy M. Thompson there as the attorney representing the plaintiff. I told him that the party with me was V. Millitello, and that he had been served with a copy of the summons and complaint in the case of *B. F. Roden Grocery Company v. Jim Millitello*, but I believed he had the wrong man; however, if Thompson would state to me that this was the man he was suing, I would file pleas in the case and defend it. Thompson replied to me: 'You had better go ahead and file your pleas.' Thereupon, I filed in the case the pleas and affidavit denying the correctness of the account sued on, which I had prepared and which are in the file, and are in words and figures as follows: [The pleas are here omitted.] After the filing of the pleas, and before the case was called, Thompson tried to engage V. Millitello in conversation, and showed him some signatures on some writings he had, and asked Millitello if he did not sign those names thereto, which Millitello denied. V. Millitello remained in court with me. When the case was called for trial, the said Guy M. Thompson arose and said to the court: 'V. Millitello has filed some pleas in this case. The plaintiff is not suing him, and I move the court that the said pleas be stricken from the file.' I then said to the court, Judge H. B. Abernethy presiding, that a summons and complaint had been served upon this man V. Millitello, and

that the number of his store was indorsed on the back of the summons and complaint as the residence of the defendant; that the plaintiff had told the said V. Millitello, when he asked about it, that he had better make his defense in court; and I also told the court about the conversation I had had with the plaintiff's said attorney before the case was called. And I insisted upon being allowed to make defense for V. Millitello in the case, and said to the court that it might be later contended that Jim Millitello and V. Millitello are one and the same person. Thereupon Judge Abernethy said to me: 'Mr. Thompson says he is not suing your man, and the papers in the case show that he is not suing your man.' The court of common pleas then having intimated that, if the officer's return showed service on the defendant, he ought to enter up judgment for the plaintiff, and I again protested on behalf of V. Millitello, and said to the court that, if a judgment should be rendered in that case against Jim Millitello, an execution issued thereunder might be levied on the goods of V. Millitello; and Judge Abernethy replied: 'If the officer levies on the goods of V. Millitello, he will be liable for damages.' The said court thereupon announced that he would strike the pleadings that I had filed for V. Millitello from the file, and the court refused to allow the said V. Millitello to make defense to said action. I then stated to Judge Abernethy that, if that was his ruling, he should make an entry on his docket to the effect that: 'Pleas filed by V. Millitello are stricken from the file, upon plaintiff's attorney stating to the court that the plaintiff is not suing him.' Judge Abernethy announced from the bench that that entry would be made. Guy M. Thompson, attorney for plaintiff, was standing before the court all this time and heard the ruling, and the said V. Millitello was also sitting in the courtroom in the presence of the court and of said Thompson. Thereupon I and my client, V. Millitello, left the courtroom. The judgment that was entered in the case was rendered after we left."

The plaintiff offered testimony to the effect that claimant had, in dealing with it, represented that he was Jim Millitello, and that Jim Millitello and V. Millitello were one and the same person.

Claimant offered testimony to the effect that he was never known as or called Jim Millitello, so far as he knew, and had never so represented himself to plaintiff, and offered many witnesses to show that they knew and dealt with him by the name of V. Millitello, and that name only. All the proof tends to show that the account sued upon was for merchandise sold in 1907, and the claimant claimed that the goods so purchased by him in 1907 from plaintiff had been by him paid for.

This record therefore discloses that the plaintiff in the claim suit trial was relying for recovery upon the fact that Jim Millitello and V. Millitello were one and the same person, as the proof is without conflict that the property levied upon was the property of V. Millitello.

The testimony offered by the claimant shows that he went with counsel prepared to defend against the suit of B. F. Roden Grocery Company v. Jim Millitello, should he be the party against whom the suit was brought. He had, in fact, by counsel, filed pleas in the cause, but they were stricken on

motion of the plaintiff, for the reason that it was stated he was not the party sued.

Upon the statement and ruling of the court, either induced or acquiesced in by counsel for plaintiff, claimant made no defense to the cause, and left the court room with his counsel, after which the judgment was rendered against Jim Millitello. He was at no fault. Every necessary precaution had been taken by his counsel. If he was the party sued, but by wrong name, a willingness to waive any misnomer was shown, for plea 1, filed by him, which was stricken on motion, states, "Now comes V. Millitello, sued herein as Jim Millitello," etc., and he was told in court that he was not being sued. His counsel was assured by the court—all of which was in the presence and hearing of counsel for plaintiff—that an officer levying upon goods of V. Millitello upon such judgment would be liable in damages.

An old authority has given a definition of estoppel, as follows:

"An estoppel is where a man is concluded and forbidden by law to speak against his own act or deed; yea, even though it is to say the truth." 3 Words & Phrases, p. 2494.

In *Caldwell v. Smith*, 77 Ala. 165, it was said:

"It was anciently said that estoppels were odious, because they stopped or closed one's mouth from alleging the truth. * * * But, in modern times, the doctrine has certainly lost its odium, and may now be regarded as one of the 'most important, useful, and just agencies of the law.' * * * It has its origin in moral duty and public policy; and its chief purpose is the promoting of common honesty, and the prevention of fraud. Where a fact has been asserted, or an admission made, through which an advantage has been derived from another, or upon the faith of which another has been induced to act to his prejudice, so that a denial of such assertion or admission would be a breach of good faith, the law precludes the party from repudiating such representation, or afterwards denying the truth of such admission. * * * So a party who either obtains or defeats a judgment, by pleading or representing anything in one aspect, is generally held to be estopped from giving the same thing another aspect, in a suit founded upon the same subject-matter."

In *Wheeler v. Armstrong*, 164 Ala. 442, 51 South. 268, it was said:

"It is true that under our practice a party is allowed to file inconsistent pleas and to make inconsistent defenses in the same suit; but he will never be allowed to invoke an action of the court, and receive a benefit by reason of such action, and then take advantage because of such action which he invoked and by which he profited."

In the case of *Jones v. McPhillips*, 82 Ala. 102, 2 South. 468, the court, speaking through Chief Justice Stone, said:

"The conduct of causes in court, and the results thereby attained, have sometimes been held as working an estoppel in pais, precluding the party, who thereby obtained a decision in his favor, from afterwards disputing or controverting the truth of the ground, on which he had achieved his former success. Such cases combine all the elements of estoppel set forth above. To allow a party who succeeds in defeating one action, on a seeming state of facts, though false, to shift his ground, and defeat a second action,

by disproving the truth of his first defense, would be to sanction the grossest abuse and fraud."

"A claim made or position taken in a former action or judicial proceeding will estop the party to make an inconsistent claim or take a conflicting position in a subsequent action or judicial proceeding to the prejudice of the adverse party, where the parties are the same and the same questions are involved. Thus a party who has successfully interposed a defense or objection in one action or proceeding cannot shift his ground and take a position in another action or proceeding which is so inconsistent with his former defense or objection as necessarily to disprove its truth." 16 Cyc. 799, 800.

Indeed, the doctrine of estoppel has been applied to one who, as husband of the defendant, merely testified for the wife in support of her defense. The suit was for forcible entry and detainer against the wife. She defended on the ground that what was done was wholly the act of the husband, for which she was in no way responsible, and her defense was sustained by his testimony. In a subsequent suit for unlawful detainer of the same premises, brought against the husband, he was not permitted to defend, on the ground that he was acting as agent of the wife. *Luling v. Sheppard*, 112 Ala. 588, 21 South. 352. See, also, 16 Cyc. 801, 796.

Numerous definitions of estoppel in pais may be found in the above-cited volume of Words and Phrases, and it is unnecessary to cite further authorities or to give other quotations.

We are persuaded that the testimony offered, above set out, and which was excluded, was sufficient to create an estoppel against the plaintiff from setting up in the claim suit that Jim Millitello and V. Millitello were one and the same person. Indeed, counsel for appellee do not seem to insist that such would not ordinarily give rise to an estoppel, but the insistence seems to be that the claimant in such a case is not permitted to impeach the judgment recovered in the principal suit, and that such is the effect of the effort made by claimant.

[4] We recognize it as the general rule of law that in the trial of such statutory claim suit the claimant cannot question either the regularity of the judgment or that of the execution. *Hooper v. Pair*, 3 Port. 401, 29 Am. Dec. 258; *Harrell v. Floyd*, 3 Ala. 16; *Dent v. Smith*, 15 Ala. 290; *Schamagel v. Whitehurst*, 103 Ala. 260, 15 South. 611; *Nordlinger v. Gordon*, 72 Ala. 239.

When the process is void upon its face, of course a different question arises, with which we are not here concerned. *Nordlinger v. Gordon*, *supra*; *Wiggs Bros. v. Ringemann*, 155 Ala. 189, 45 South. 153.

[5] It is clear from the authorities that, for the purpose of impeaching the judgment obtained by the plaintiff, the claimant in this suit cannot show that the judgment was obtained by fraud. But such is not the effort, nor the purpose of the claimant. He does not here seek to have the judgment declared void and set aside, nor to have the

same in any manner disturbed. He merely says that in obtaining that judgment, the plaintiff misled him, to his injury, by insisting in court that he was not the party sued, that V. Millitello was not Jim Millitello, the latter being the name of the party actually sued, and thereby deprived him of the privilege of making and presenting his defense.

The judgment against Jim Millitello stands unquestioned and unassailed. What the claimant does say and insist, however, is that the plaintiff, having represented in that proceeding that Jim Millitello and V. Millitello were not one and the same person, cannot now be heard to say to the contrary, and insist that they are one and the same. The mere fact that the proof offered might be sufficient to avoid the judgment in a court of equity (a question we have not before us) would be a mere incident, and would in no manner affect the question of estoppel here sought to be interposed.

We are therefore of the opinion that the authorities relied upon by counsel for appellee, do not at all militate against the conclusion here reached, and that the court below erred in excluding the testimony of said witness.

For like reasons we think that claimant should have been allowed to show by the witness J. M. Bonner what was said by the court in reference to the matters testified to by the witness James A. Mitchell in the presence and hearing of the counsel for the plaintiff. We see no merit in the insistence for the affirmative charge for the claimant.

We have here treated the questions of prime importance in the case. The rulings of the trial court were not in accord with the conclusion we have here reached.

The judgment of the court below is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, MAYFIELD, SOMERVILLE, and DE GRAFFENRIED, JJ., concur. SAYRE, J., dissents.

SAYRE, J. (dissenting). The record and opinion in this case have produced in my mind the strong impression that appellant, Millitello, by reason of the fact that he bought under one name and sold under another, has been allowed a privilege not enjoyed by the ordinary trader, whose name, like his personal identity, is fixed. It must be assumed that Jim Millitello and V. Millitello are one and the same person, for so appellant claimed in the trial of the original cause, nor was he denied the right to show that they were different persons on the trial of the right of property. The legal effect of his claim, and of the evidence he offered in support of it, was that, if he had not been misled by the attorney for the plaintiff in the original suit, he would have

defeated a recovery, not by showing that Jim Millitello and V. Millitello were different persons, but that, being the same person, he did not owe the debt in suit; in other words, intervening as claimant, he is allowed to defend as defendant. Since *Hooper v. Pair*, 3 Port. 401, 29 Am. Dec. 258, decided nearly 80 years ago, and followed in twoscore cases, it has been the law of this state that the claimant, in a proceeding to try the right of property, cannot impeach the validity of the judgment on which execution has issued, by evidence that it was erroneously rendered or fraudulently obtained. The promise of this principle is conceded in the prevailing opinion, but its realization is avoided in this case on the ground that appellant was misled by plaintiff's insistence that the suit was against Jim, not V., as if anybody knew his name better than he, or as if an adult person in the possession of his faculties could be misled as to his own name; and so appellant, virtually confessing that he is and was the defendant in the original suit, is allowed to defeat the execution of the judgment there rendered by showing that he had a good defense. Knowing and there conceding that he was the person sued, appellant should have insisted on his defense, and, if he were denied the right to defend, he had ample remedy by a direct proceeding to reverse the judgment, if it was erroneously rendered, or to vacate it, if procured by fraud. Not only so, but the evidence on which this reversal is founded tends to prove, not that plaintiff in the original cause misled defendant, but, to the contrary, that defendant misled plaintiff, as I think will appear upon analysis of what the parties did and said on that occasion. For these reasons I cannot agree with the opinion and ruling of the court.

(190 Ala. 634)

**BIRMINGHAM WATERWORKS CO. v.
WINDHAM. (No. 988.)**

(Supreme Court of Alabama. Dec. 17, 1914.)

1. CONTRACTS ⇐152—CONSTRUCTION—QUESTION FOR COURT.

A plain and unambiguous contract is not open to construction.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 732, 733, 738; Dec. Dig. ⇐152.]

2. CONTRACTS ⇐147—CONSTRUCTION—INTENTION OF PARTIES.

The court in construing a contract must consider it as a whole and seek to ascertain the intention of the parties, and may assume at least prima facie that the parties made a reasonable and rational contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 730, 743; Dec. Dig. ⇐147.]

3. WATERS AND WATER COURSES ⇐203—PUBLIC SERVICE CORPORATIONS—ORDINANCES—CONSTRUCTION.

An ordinance, which grants to a public service corporation the right to furnish water to the inhabitants of a city, and which fixes schedules of flat and meter rates, and which

permits the company to set a meter on any service line and charge according to the meter schedule, fixing minimum charges for a daily consumption of 1,000 gallons, and which declares that any water consumer may require a meter on his service pipe and pay for water services by meter measurement, provided each consumer shall pay a minimum monthly charge for water privileges, gives to the company the right to install meters on any service pipe and collect meter rates and rent.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇐203.]

4. CONTRACTS ⇐170—CONSTRUCTION—AMBIGUOUS CONTRACTS—INTENTION OF PARTIES.

Where a contract is ambiguous, the ascertainment of the true intent of the parties may be aided by the interpretation they have given the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. ⇐170.]

Appeal from City Court of Birmingham; J. M. Miller, Judge.

Suit by T. C. Windham against the Birmingham Waterworks Company to restrain the cutting off of the water from complainant's house and for a mandatory injunction requiring the company to accept a certain sum in full for water services for a certain period. From a decree granting the relief prayed for, defendant appeals. Reversed and rendered.

Percy, Benners & Burr, of Birmingham, for appellant. Whitaker & Nesbit, of Birmingham, for appellee.

McCLELLAN, J. The rights and obligations of the parties to this cause and the correctness of the decretal order granting an injunction pendente lite restraining appellant from cutting off or discontinuing water service at the residence of the appellee depend upon the proper construction of the ordinance-contract entered into by the city council of Graymont and the appellant on the 25th day of October, 1908. In the decision of the Court of Appeals delivered in the cause styled *Birmingham Waterworks Co. v. Kelly*, 2 Ala. App. 629, 56 South. 838, will be found set out the schedule of flat rates and the schedule of meter rates, with other related provisions of this ordinance-contract. It is not thought necessary to republish, in extenso, those schedules. Reference to that report must suffice in that respect.

Section 13, so far as it need be here reproduced, is:

"That, as a further inducement unto grantee to construct said waterworks system and operate the same, said city agrees that grantee shall have the right for and during the full term and continuance of this ordinance to charge all persons and corporations using water from its mains at the following rates, which shall be collected quarterly in advance, except in cases where meters are used, in which cases charges may be collected quarterly or monthly, at the option of the grantee, and, in consideration of the foregoing, grantee does bind itself to furnish, during such term, water unto all consumers in said city having connections with its mains at such rates."

Section 14 of the ordinance-contract is in these words:

"That grantee shall have the right to set a meter on any service line, whether it be used for domestic or any other purpose and notwithstanding a specific or annual rate may be named therefor herein, and charge for use of water according to the meter schedule provided in this ordinance, and any water consumer shall have the right to require grantee to set a meter on his service pipe and to pay for water service by meter measurement, provided that each and every water consumer supplied by meter measurement, shall pay a minimum monthly charge for water privilege of at least one (\$1.00) dollar, or a minimum quarterly charge for water privileges of at least three (\$3.00) dollars, in cases where a one-half inch or five-eighths inch meter is used, except that in no event shall the minimum monthly or minimum quarterly charge for water privileges by meter exceed the flat rate charge for the same period."

The schedules of flat and meter rates appear in section 13 of the ordinance-contract; and in that section, following the schedules, it is provided:

"The rates provided for in this section are subject to the modifications and provisions of sections fourteenth, fifteenth, sixteenth and eighteenth."

The only specific reference in the meter schedule to as small a quantity of water as 1,000 gallons is in these words and figures in the first line of the schedule: "For a daily consumption of 1,000 gallons \$30 per 1,000 gals." Under the capital heading "Meter Rates," and, in parentheses, preceding the expression just quoted, these words appear: "Subject to the minimum charges and meter rates hereinafter provided for."

[1-3] The question propounded on this appeal is whether a residential consumer, whose service pipe is of the three-quarter inch class, and who uses less than 1,000 gallons of water a day, may be required to pay for water he consumes as measured by a meter; such consumer having for many years used the water furnished by the company (appellant) and having paid therefor during that time according to the measure thereof made by a meter installed by the mutual agreement of appellee and appellant, pursuant to what they conceived to be the rights established by section 14 (quoted above) of the ordinance-contract.

It will be noted that the quoted first line of the meter schedule appears to only contemplate a daily consumption of exactly 1,000 gallons; no more and no less. If this line of the schedule were considered alone, it would be readily conceded that the rate of 30 cents per 1,000 would and could only apply to a daily user of that exact quantity of water. When the meter schedule's succeeding ascending gradations of quantity consumed each day, viz., chiefly 500 gallons and 1,000 gallons, are considered, and the obvious fact that rarely, if ever, may there be a connectedly recurrent daily consumption of exactly 1,000 gallons of water is given its due attention, credulity is taxed to accept the words of the first line of the meter schedule as meaning what it seems to say and to

accord to it, in consequence, so nearly an impossible field of operation. Our opinion is that the contract in this respect is open to construction—a condition that could not obtain if the words of the contract were plain and unambiguous. Contracting parties usually engage upon rational considerations and to reasonable effects and ends; and, when the courts find it necessary to construe instruments of obligation, it is ever proper, and often essential, for them to assume, at least *prima facie*, that the unreasonable and irrational was not the contractual intent. The whole instrument must be considered, and out of this will and must come the intelligent judgment of what was the intention of the parties.

From the quoted parts of section 13, it appears with certainty that the company was assured the right to charge all persons and corporations using water from its mains at the rates thereafter set out in the instrument. It is clear that the common purpose was to fix rates of charge for all consumers in the territory described in the instrument. There is no mistaking this feature of the contractual intent. By section 14 the company was assured the right "to set a meter on any service line," regardless of the character of the user, and "notwithstanding a specific or annual rate may be named therefor herein," and to charge for the use of the water according to the meter schedule set out in the ordinance-contract. That section then declared the broad right in "any water consumer" to require the company to set a meter on his service pipe and exacted that he pay therefor "by meter measurement." The last three words we have quoted must of necessity refer to the meter schedule in the ordinance-contract. It cannot be supposed that a right so broadly declared and evidently regarded as of value and consequence to the whole class of consumers would be predicated of any other method or scheme of "meter measurement" than that stipulated in the ordinance-contract. So the provision for this right vested in any consumer, and the further stipulation that payment for the water used shall be by measurement must be read as appropriating to the completed expression intended the meter schedule laid out in the instrument.

This status of pertinent schedule provision and of unlimited declaration of right in both company and any consumer to install or to have installed meters and to exact payment according to measure presents this dual-formed question: Was it the contractual intent that the language of the schedule, whereby only a daily consumption of 1,000 or more gallons allows the purchase of water by measure, should qualify the broadly stated rights of seller and consumer as set forth in section 14 of the contract and limit those rights to enjoyment or employment by, or with reference to, those only who daily use 1,000 gallons or more; or, was it the

common intent that the pertinent provision of the schedule should accord with the unrestricted rights set out in section 14 to install meters or to require the installation of meters and the sale and purchase of water on a measuring basis?

Our opinion is that an affirmative response to the latter branch of the question just stated, and a negative response to the former branch of that question, will express the only conclusion that could be fairly, reasonably deduced. Surely, if the unrestrictedly provided rights to install, and to require installation of, meters on service pipes, was intended to be alone available in cases where the daily consumption was 1,000 gallons or more, so carefully drawn an ordinance-contract would not have committed the qualification of the unlimited provisions in this regard to the mere fact that no item of the schedule was laid out for consumers of a less quantity than 1,000 gallons of water a day. Silence is not the usual way by which, under such circumstances, it is to be reasonably expected contractors will qualify or intend to qualify major rights and obligations established in their instruments. Rather, it must be concluded, under the circumstances here disclosed, that they intended no qualifications, but that in reducing to writing their purposes some words were employed, or some words were omitted, that did not conform to the true expression of the contractual intent.

"Words may be supplied, or may be rejected, when necessary to carry into effect the reasonable intention of the parties"—a process that is allowable when there appears "contradiction, ambiguity, or uncertainty in the terms of the instrument." *Boykin v. Bank*, 72 Ala. 262, 270 (47 Am. Rep. 408).

So, it must be held, in accordance with the intent drawn from a consideration of the whole instrument, that the first line of the meter schedule was intended to provide a meter rate up to and including 1,000 gallons of daily consumption, subject to the minimum monthly or quarterly charge provided for in section 14.

[4] That the stated construction of the ordinance-contract is correct and accords with the intent of the parties is clearly confirmed by the fact shown by this record, that from the beginning consumers and the company actually acted upon the theory that the right to install meters on service pipes and the right of consumers to require the installation of meters on their service pipes, and thereby and thereupon operating to put into effect the obligation to pay by measurement for water used was not limited to those consumers whose daily consumption of water was 1,000 gallons or more. Where, as here, a contract is ambiguous, or contradictory in some of its terms, the ascertainment of the true intent of the parties may be greatly aided by the interpretation the acts of the parties have given the contract. *Crass v. Scruggs*,

115 Ala. 258, 268, 22 South. 81; *Comer v. Bankhead*, 70 Ala. 136, 141.

Under the provisions of section 15 of the ordinance-contract, the complainant (appellee) was obligated to pay meter rent of forty (40) cents per month.

The decision of this court in *Smith v. B'ham Water Co.*, 104 Ala. 315, 16 South. 123, is not an authority on the question here determined. The decision in *B'ham Water Co. v. Kelley*, 2 Ala. App. 629, 56 South. 838, is not in accord with the views of this court on the like question.

The company having, as we construe the Graymont ordinance-contract, the right to install meters on any service pipe and to charge by measure for water consumed and to collect meter rent under section 15 of the contract, the decretal order undertaking the restraint of the company from the severing of the complainant's water connection to his residence was laid in error and is reversed; and a decree will be here entered dissolving the temporary injunction for want of equity in the bill.

Reversed and rendered.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(190 Ala. 530)

ARNETT v. WILLOUGHBY et al. (No. 907.)
(Supreme Court of Alabama. Dec. 17, 1914.)

1. MORTGAGES \Leftrightarrow 434 — FORECLOSURE — PARTIES.

The second mortgagee, who has transferred his mortgage, and so has no interest to be affected by suit to foreclose the first mortgage, is not a proper party, and the bill, as to him, is without equity.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1272-1287; Dec. Dig. \Leftrightarrow 434.]

2. MORTGAGES \Leftrightarrow 235 — EQUITABLE ASSIGNMENT—TRANSFER OF SECURED NOTE.

A transfer, by mere delivery, of a note secured by mortgage, if for a valuable consideration, operates as an equitable assignment of the mortgage to the transferee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 620, 621; Dec. Dig. \Leftrightarrow 235.]

3. SUBROGATION \Leftrightarrow 23—PAYMENT FOR MORTGAGOR.

One, who, at instance of the mortgagor, and for his benefit, pays or advances money to pay the mortgage, is by equitable assignment entitled to be subrogated to the lien of the mortgage for reimbursement.

[Ed. Note.—For other cases, see *Subrogation*, Cent. Dig. §§ 60-66; Dec. Dig. \Leftrightarrow 23.]

4. MORTGAGES \Leftrightarrow 236—TRANSFER OF PART OF SECURED NOTES—PRIORITY OF LIEN.

One, who, at request of mortgagors, pays the first note secured by the mortgage, they giving him their note therefor and agreeing he shall hold the note paid as collateral, and to whom, in furtherance of such agreement, and for the accommodation of the mortgagors, the mortgagee assigns the note paid, while entitled to subrogation to the lien of the mortgage, for reimbursement, is not, as would be the case if the assignment by the mortgagee was for his own benefit, entitled to payment out of the mortgaged property prior to payment of the

other notes secured by the mortgage and still held by the mortgagee.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 456, 622, 623; Dec. Dig. ¶236.]

5. SUBROGATION ¶23—FIRST AND SECOND MORTGAGES.

The right of subrogation to the lien of the mortgage of one, who, at the request of the mortgagors, advances money for paying a note secured by first mortgage, exists against those claiming under a second mortgage, taken with notice of the first mortgage.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 60-66; Dec. Dig. ¶23.]

6. MORTGAGES ¶397—FORECLOSURE—SEVERAL NOTES.

A mortgage securing several notes maturing at different times may, if, by express or implied provision, default in one matures all, be foreclosed as to all on such a default, otherwise only as to those due when the decree is rendered; the decree, however, to stand as security for the others.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1162; Dec. Dig. ¶397.]

7. MORTGAGES ¶455—FORECLOSURE—CROSS-BILL.

While a mortgage securing several notes maturing at different times, though authorizing foreclosure as to all on default in one, will, at suit of the transferee of the notes first maturing, be foreclosed only as to the notes due when the decree is rendered, this being sufficient to conserve his interest without disturbing the mortgagee as to the notes not due, the mortgagee may by cross-bill have foreclosure as to all.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1329-1333; Dec. Dig. ¶455.]

8. EQUITY ¶148—MULTIFARIOUSNESS—MORTGAGE FORECLOSURE.

The bill to foreclose a first mortgage, so far as it seeks to have the second mortgage, and the sale under a power therein, declared void, seeks relief not germane to, but independent of, and in no way connected with, its foreclosure feature, and so is multifarious, it being immaterial to complainant whether the second mortgage, or such sale, be void, his claim on the land being superior to those under the second mortgage.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 341-367; Dec. Dig. ¶148.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by M. G. Arnett against Pauline P. Willoughby and others. From a decree sustaining a demurrer to the bill as amended, complainant appeals. Affirmed.

Richard B. Kelly, of Birmingham, for appellant. A. C. & H. R. Howze, of Birmingham, for appellees.

DE GRAFFENRIED, J. The facts upon which the complainant rested his right to relief in this case were stated by him in his bill of complaint as amended, as follows:

First. That Lizzie S. Arnett, the wife of H. B. Arnett, was indebted to John P. Willoughby in the sum of \$7,383.62, which was evidenced by 17 promissory notes, each bearing date July 1, 1910, each for the sum of \$400 and drawing interest at the rate of 7 per cent. per annum, and payable at the Birmingham Trust & Savings Bank, Birmingham, Ala., on or before January 1, 1911, July

1, 1911, January 1, 1912, and July 1, 1912, and the others payable on or before six months after July 1, 1912, up to January 1, 1919, and also one note for \$383.62. When this last note matures does not clearly appear from the bill.

Second. That on July 5, 1910, in order to secure the above indebtedness, the said Lizzie S. Arnett and her husband, H. B. Arnett, executed and delivered to the said Willoughby a mortgage on certain real estate of said Lizzie S. Arnett which is described in the bill.

Third. That in July, 1911, the second, in the series of notes secured by said mortgage, became due, and that the complainant, at the request of the mortgagors and under an agreement with them that complainant should succeed to the lien of said mortgage for his reimbursement, paid to the said John P. Willoughby, or to some one for him, the amount then due on said note, to wit, \$428, and that the said note, indorsed in blank by the said Willoughby, was assigned by delivery to complainant or to some one for him, and that the said mortgagors gave to complainant their note, due one year after date, for said sum, with the said mortgage notes attached thereto as collateral security.

Fourth. That on January 1, 1912, the third note in said series of notes secured by said mortgage became due, and that complainant, at the request of said mortgagors and under an agreement with them that he should succeed to the lien of said mortgage for his reimbursement, paid to Pauline P. Willoughby the amount then due on said note, to wit, \$442, and that the said note was assigned by delivery to complainant or to some one for him, and that the mortgagors gave to complainant their note, due six months after date, for said sum, with said mortgage note attached as security therefor; that John P. Willoughby, prior to this time, had died; and that Pauline P. Willoughby, his widow, had become the sole owner of the mortgage and of the mortgage indebtedness secured thereby.

Fifth. That on the 1st day of July, 1913, the sixth note in the series of notes secured by said mortgage became due, and that on November 17, 1913, there remained unpaid on said note \$200; that S. E. Thompson, at the request of the mortgagors, paid to the said Pauline P. Willoughby the said sum of \$200; that the said note was assigned to him, or to some one for him, by the said Pauline P. Willoughby by delivery; that said mortgagors executed and delivered to said S. E. Thompson their two notes for \$100 each, with said mortgage note as collateral security therefor, and that before the filing of this bill complainant paid to the said S. E. Thompson the amount due on said note, under an agreement with the mortgagors that complainant should succeed to the lien of the mortgage for his reimbursement, and that

said Thompson assigned by delivery to complainant, or to some other person for him, the said notes so given to him by said mortgagors with said mortgage note as collateral security; that none of the indebtedness evidenced by the notes above referred to as being the property of the complainant has ever been paid.

Sixth. That, subsequent to the execution and delivery of the above-described mortgage, the said Lizzie S. Arnett and her husband, H. B. Arnett, executed and delivered to one Kyser, to wit, on July 13, 1910, a mortgage to secure an alleged indebtedness of \$1,000; that Kyser transferred and delivered the said mortgage and the alleged indebtedness secured thereby to the Jefferson County Savings Bank; that said Jefferson County Savings Bank has sold the property under the power of sale contained in said second mortgage; that at the sale the said Jefferson County Savings Bank became the purchaser of the property, and has assumed possession of the same.

Seventh. Complainant alleges in his bill that the mortgage which Kyser transferred to the Jefferson County Savings Bank was fully paid before the property was sold under the mortgage; and the bill alleges that said mortgage was given by Lizzie S. Arnett to secure an indebtedness of her husband, and not to secure her own debt, and that the Jefferson County Savings Bank well knew these facts when it acquired said mortgage from Kyser.

Eighth. Complainant claims that he is entitled to have the amount due him on account of the Willoughby mortgage notes above referred to, including a reasonable attorney's fee for collecting the same, as well as the amount still due to Pauline P. Willoughby from said mortgagors, Lizzie S. Arnett and H. B. Arnett, ascertained; and said mortgage foreclosed. Complainant also claims that he is entitled to be first paid, out of the proceeds of said sale, the amount which it is ascertained is due him on account of the above transactions.

Complainant further prays that the Kyser mortgage and note, and the sale had thereunder, be declared null and void.

[1] 1. "The scope and purpose of a bill for the foreclosure of a mortgage on lands is to cut off the equity of redemption of the mortgagor, to obtain a decree for the sale of the estate created and passing by the mortgage, and the application of the proceeds of sale to the payment of the mortgage debt. Such being the scope and purpose of the bill, the general rule in a court of equity applies that all persons whose interests are to be affected or concluded by the decree must be made parties." *Wells v. Amer. Freehold Land Mortgage Co.*, 109 Ala. 430, 20 South. 136.

Under the allegations of this bill, all of the parties to the bill except Kyser are proper parties to the bill. Kyser, so the bill as amended alleges, has no interest to be affected by the bill, and in so far as he is concern-

ed the bill is without equity. *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708.

[2] 2. "A transfer by delivery merely of a promissory note secured by a mortgage, if based upon a valuable consideration, operates as an equitable assignment to the transferee of the mortgage by which the debt is secured." *Doe ex dem. Duval's Heirs v. McLoskey*, 1 Ala. 708; *First National Bank of Gadsden v. Sproull*, 105 Ala. 275, 16 South. 879; *Prout v. Hoge*, 57 Ala. 31; *Williams v. Cox*, 78 Ala. 327; *O'Neal v. Seixas*, 85 Ala. 80, 4 South. 745.

[3] 3. "Where one who, though having no previous interest and being under no obligation, pays off a mortgage or advances money for its payment at the instance of the mortgagor, and for his benefit, such person is in no true sense a stranger and volunteer, but is, under the doctrine of equitable assignment, entitled to be subrogated to the lien of said mortgage for reimbursement of the amount paid thereon." *Motes v. Robertson et al.*, 133 Ala. 630, 32 South. 225; *Allen, Adm'r. v. Caylor*, 120 Ala. 251, 24 South. 512, 74 Am. St. Rep. 31.

[4] The agreement between the complainant and the mortgagors was an agreement in furtherance and in recognition of the above-quoted doctrine, and we think that, taking the allegations of the bill as amended most strongly against the pleader, it is also plain that the assignment by delivery merely of the three notes described in the bill, by Willoughby, and after his death, by Mrs. Willoughby, was done for the purpose of aiding the agreements which had been made by the mortgagors with complainant and Thompson, and that the assignment by delivery merely of the notes, under the peculiar circumstances shown by the bill, was not intended or understood by any of the parties as clothing the transferee with the right to be first paid out of the mortgaged property. We think that the giving by the mortgagors of their notes to the transferees—although the original notes were not canceled but were held as collateral—plainly evidences this intention of the parties. In other words, we think that, under the allegations of the bill as amended, the three transactions upon which complainant rests the equity of the bill as amended were, in fact, loans made to the mortgagors with an understanding that the lien of the mortgage was to cover these loans, and that the assignment by delivery of the three notes by the mortgagee was done for the accommodation of the mortgagors and in furtherance of this agreement, but that it was not understood that thereby the mortgagee subordinated the notes not due to the notes so assigned by delivery. *McGuire v. Van Pelt et al.*, 55 Ala. 344. For this reason we are not of the opinion that the doctrine announced in *Knight v. Ray*, 75 Ala. 383, viz., that "the transfer of one of several notes secured by mortgage clothes the transferee with the right to be first paid out of the mortgaged property," is applicable to the facts set up in the bill.

[5] 4. We can see no reason why those who claim under the Kyser mortgage, under the facts alleged in the bill as amended, are in

a position to object to the foreclosure of the Willoughby mortgage at the suit of complainant. The Kyser mortgage is subordinate to the mortgage through which the complainant claims, and, if the bill as amended correctly states the facts, the complainant has not only done nothing to impair the security furnished by the Kyser mortgage, but the Kyser mortgage was made with the knowledge, either actual or constructive, of the Willoughby mortgage. Those standing in the shoes of the second mortgagee have the right to pay off the first mortgage notes now past due, and the others as they mature; but we do not see how, in a court of equity, they can object to the reimbursement of the complainant of the amount which, under the facts alleged in the bill, was paid by him to the holder of the first mortgage. *Kelly v. Longshore*, 78 Ala. 204; *Pratt v. Nixon*, 91 Ala. 192, 8 South. 751; *Ware v. Hamilton Brown Shoe Co.*, 92 Ala. 145, 9 South. 136.

[8, 7] 5. The general rule seems to be that:

"Where the debt secured by a mortgage is evidenced by several notes maturing at different times, and there is a provision that default of one matures all, or, if such construction can be given by implication, the mortgage may be foreclosed as to all; and, if there is no such provision in the mortgage, then as to the amount due only, and the decree stands as security for the balance, to be sold as the debt matures." 4 Mayf. Dig. p. 249, § 1167, and authorities there cited.

In this case the interest of the complainant can be conserved, and Mrs. Willoughby at the same time not disturbed as to the notes secured by the mortgage which are not due, by a foreclosure of the mortgage as to all the notes which are past due when the decree of foreclosure is rendered; the decree of foreclosure to stand as security for Mrs. Willoughby as to the notes which have not matured at the time of the rendition of the decree. Out of the proceeds of the sale Mrs. Willoughby should first receive the amount due her on her past-due notes, and then the complainant should be paid the amount due him. Of course, as Mrs. Willoughby, in her mortgage, is given the right to foreclose the mortgage as to all of the notes whether due or not, she can, by a cross-bill, if she sees proper to file one praying that relief, obtain a decree of foreclosure as to the entire indebtedness. Authorities supra.

[8] 6. In the case of *Evans et al. v. Faircloth-Byrd Mercantile Co.*, 165 Ala. 176, 51 South. 785, 21 Ann. Cas. 1164, this court held that, where a wife gives a mortgage on her property to secure her husband's debt, the mortgage is void, and that a junior mortgagee of the wife, whose mortgage contains covenants of warranty as to title and against prior incumbrances, is entitled to raise the

question of the invalidity of the first mortgage and to have it declared to be void, in order that on foreclosure of the second mortgage the entire land might be subjected to the second mortgage.

The allegations of the bill as amended do not bring the complainant within the reason of the rule declared in *Evans et al. v. Faircloth-Byrd Mercantile Co.*, supra. In so far as the complainant's rights as shown by the bill as amended are concerned, it does not matter to him whether the mortgage to Kyser was or was not null and void, and it does not matter to him whether the sale of the lands under the power contained in the second mortgage was or was not void. The complainant, in his bill as amended, shows that his claim upon the land is superior to the claims which are being made to it under the Kyser mortgage. It seems to us that the bill, in so far as it seeks to have the Kyser mortgage and the sale had under it declared to be null and void, is seeking relief which is not only not germane to, but which is altogether independent of, and in no way connected with, that feature of the bill as amended which prays for a foreclosure of the Willoughby mortgage. The bill as amended is therefore multifarious and was subject to that ground of demurrer. *Hardin v. Swoope*, 47 Ala. 273.

7. In the opinion filed with his decree sustaining the demurrer to the original bill, the chancellor states that the demurrer of the respondent Kyser "is sustained upon the grounds of multifariousness and want of equity, and the demurrers of the other respondents are sustained upon the ground of multifariousness." The decree sustaining the demurrers to the bill of complaint as amended is simply a decree sustaining the demurrers, but there is no opinion accompanying this latter decree. We presume that the chancellor sustained the demurrers to the bill as amended for the same reasons that he sustained the demurrers to the original bill; but, however this may be, we are of the opinion that the bill as amended is wanting in equity as to Kyser and that it is multifarious. The bill can, however, if amended to meet the views expressed in the above opinion, be rendered free from attack by demurrer.

The decree of the chancellor sustaining the demurrer to the bill as amended is affirmed. The appellant is given 30 days within which to amend his bill as amended, so as to meet the views above expressed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 36)

WOODWARD IRON CO. v. FRAZIER.
(No. 876.)(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)**1. CONTRACTS 337—BREACH OF CONTRACT—COMPLAINT—SUFFICIENCY.**

A complaint for breach of contract must assign the breach with such certainty and particularity as will apprise defendant of the particulars of his failure to perform, and a general averment of a breach, without giving the nature or character thereof, is insufficient.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1682-1690; Dec. Dig. 337.]

2. SALES 377—BREACH OF CONTRACT—ACTIONS—COMPLAINT.

A complaint in an action for breach of contract of sale, which alleges that the contract authorized the buyer to notify the seller when to ship, and that the contract could be canceled by either party on 60 days' notice, and which avers, after charging a breach generally, that the buyer notified the seller not to ship any more goods, is demurrable because it fails to show the manner of the buyer's breach.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1092; Dec. Dig. 377.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by W. W. Frazier against the Woodward Iron Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Count B is as follows:

Plaintiff claims of defendant \$1,000 as damages for that heretofore, to wit, about November 20, 1911, defendant entered into a contract with plaintiff which was in words and figures as follows:

"Woodward, Ala., Nov. 20, 1911.

"Mr. W. W. Frazier, R. F. D. No. 1, Bessemer, Ala.—Dear Sir: Referring to verbal order given you by R. E. Banister, please enter our order for from one to three car loads of logs per week, for use at our red ore mines, the supply of logs to be in accordance with the needs of our mines. Each log to be of the following specifications: Diameter not less than 14 inches at the small end. Length between 9 feet and 16 feet, as specified by the Woodward Iron Company. Logs to be of oak, pine, hickory, elm or chestnut. Only a limited number of gum logs will be accepted. Price to be 95 cents per log, delivered f. o. b. Woodward Iron Company rails. This price to be the same irrespective of length, size or kind of log. Terms cash 30 days. It is distinctly understood that the Woodward Iron Company is at liberty to purchase logs elsewhere, in case you are for any reason unable to furnish them with a good and suitable supply at any time. It is further understood that only sound timbers are to be supplied, and that the Woodward Iron Company has the right to reject any timber not up to specification. It is further understood that the life of this order shall be one year, but that it may be canceled by either party upon 60 days' notice being given to the other party.

"Yours truly,

"Woodward Iron Company,

"Per Herbert Smith."

Plaintiff avers that he accepted said contract and equipped himself to deliver said logs by purchasing suitable teams, mules, wagons, etc., to enable him to supply the defendant with a supply of such timbers as specified in the

contract; and he avers that he was ready and willing to carry out his part of the contract, and that he carried out his part of the contract until on or about July 1, 1912, at which time defendant breached its said contract and undertaking, and notified plaintiff not to ship any more timbers; and plaintiff avers that, by reason of and as a proximate consequence of the breach by defendant of its said contract, he was put out of employment, and caused to lose a great deal of time from his work, that he was caused to be put to great inconvenience and expense in feeding and caring for his mules while they were idle on account of the breach of said contract, and that he was forced to sell said mules at a loss, and that he lost the profits he would have made in said logs if he had been permitted to carry out his said contract, and was thereby damaged in the full sum as aforesaid, wherefore he sues.

Cabaniss & Bowie, of Birmingham, for appellant. Mathews & Mathews, of Bessemer, for appellee.

ANDERSON, C. J. [1] While no great particularity is required as to describing the breach of the contract, the essential facts constituting the breach should be set forth in unequivocal terms, and the breach should be assigned with such certainty and particularity as will apprise the defendant in what particular he has failed to perform. All that is required is that the breach complained of be substantially set forth and substantially proved. 2 Cyc. 728. While great particularity is not required, yet the general averment of a breach, without giving the nature or character of the breach, will not suffice, as the defendant must be informed as to how or wherein he breached the contract. Hart v. Bludworth, 49 Ala. 218. Indeed, Code forms 8 and 9 contemplate and provide that the breach complained of should be set out.

[2] Count B of the complaint was subject to the defendant's demurrer, which should have been sustained by the trial court, as it does not aver how or in what manner the defendant breached the contract. It does aver, after charging a breach generally, that the defendant notified plaintiff not to ship any more logs. This is not an averment that the breach consisted of the notification; but, if it could be so construed, it falls short of charging a breach thereby, as the contract authorized the defendant to so notify the plaintiff. It may be true that the notification not to ship could apply only to shipments after the expiration of 60 days, but the complainant does not put the defendant in default as to any logs or timbers within 60 days after said notification.

The case of Norton v. Woodwood, 64 South. 609, is not in conflict with this holding. There the demurrer seems to have taken the point that no breach at all was charged, and not that the nature or character of the breach was not charged; and the opinion in response to said demurrer stated that a breach was charged, and demonstrated that such was the case. There is nothing in the

opinion to indicate that the charge of a general breach would be sufficient as against an apt ground of demurrer.

The judgment of the city court is reversed, and the cause is remanded.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(190 Ala. 14)

MOSS v. STATE. (No. 969.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. HOMICIDE \S 253 — SUFFICIENCY OF EVIDENCE—MURDER IN THE FIRST DEGREE.

In a prosecution for murder in the first degree on the theory that defendant had lain in wait for deceased and shot him, defendant contending that he killed in self-defense, evidence held to sustain a conviction of murder in the first degree.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 523-532; Dec. Dig. \S 253.]

2. HOMICIDE \S 157 — EVIDENCE — PARTICULARS OF DIFFICULTIES.

In a prosecution for murder in the first degree, where it appeared that on the same night defendant and deceased had engaged in altercations, the particulars of the altercations were inadmissible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 288-292; Dec. Dig. \S 157.]

3. CRIMINAL LAW \S 363—RES GESTÆ—DIFFICULTIES.

In a prosecution for murder in the first degree, altercations between the deceased and defendant on the same night growing out of defendant's refusal to cash a check for deceased, the last of which was about 15 minutes before the homicide, were not admissible as part of the res gestæ of the homicide.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 804; Dec. Dig. \S 363.]

4. CRIMINAL LAW \S 789 — INSTRUCTIONS — REASONABLE DOUBT.

The trial court cannot be put in error for refusing to charge that if there was one single fact, proven to the satisfaction of the jury, inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt, and the jury should acquit.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. \S 789.]

5. CRIMINAL LAW \S 789 — INSTRUCTIONS — SUFFICIENCY OF EVIDENCE — REASONABLE DOUBT.

In a prosecution for murder in the first degree, a charge that, unless the evidence against defendant excluded to a moral certainty every hypothesis or supposition but that of his guilt, the jury should not convict, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. \S 789.]

6. CRIMINAL LAW \S 829 — INSTRUCTIONS — REQUESTS.

Charges requested by defendant were properly refused, where they were covered by the charges given.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

J. W. Moss was convicted of murder in the first degree, and he appeals. Affirmed.

The facts sufficiently appear in the opinion. The following were the charges refused:

(36) If there is one single fact proven to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit.

(37) The court charges the jury that, unless the evidence against defendant should be such as to exclude to the moral certainty every hypothesis or supposition but that of his guilt of the offense imputed to him, the jury must not convict the defendant.

Prosch & Prosch, of Birmingham, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

DE GRAFFENRIED, J. [1] The defendant was convicted of murder in the first degree and was sentenced to the penitentiary for life. This appeal is prosecuted by him for the purpose of reversing the judgment of conviction.

1. The theory of the state was that the defendant was guilty of murder, in that he lay in wait for the deceased and shot him, inflicting wounds upon him from which he died. Our statute makes this character of homicide murder in the first degree. There was evidence sustaining this theory of the state, and the verdict of the jury indicates that they were satisfied with the truth of that evidence beyond a reasonable doubt.

The theory of the defendant was that he killed the deceased in self-defense. He testified to facts which tended to establish this theory, and there was some evidence tending to corroborate his statements.

A critical examination of this record, however, convinces us that the defendant received in the court below a fair and impartial trial, and we are of the opinion that the judgment of the trial court should be affirmed for the reasons set out below.

2. It appears that the deceased came to his death at a late hour in the night. It also appears that prior to the homicide the defendant and the deceased, on this same night, had engaged in two altercations. These altercations probably grew out of the refusal of the defendant to cash a check for the deceased. The last altercation antedated the homicide about fifteen minutes. At the conclusion of the last altercation, the parties separated, and about 15 minutes afterwards the defendant shot the deceased while the deceased was walking along a street in Bessemer. The tendencies of the state's evidence were that the defendant concealed himself behind a column and shot the deceased while the deceased was peaceably walking down a street. One of the witnesses for the state described the homicide as follows:

"Mr. Moss, the defendant, shot Will Gray with a shotgun. Will Gray was walking on the street as defendant shot him; he was doing nothing to the defendant; he was walking on

the sidewalk. Going toward First avenue, kind of east, on the left-hand side going east. I was walking just a few steps behind Mr. Gray, going towards First avenue. Mr. Gray was walking next to the building on that side. We were on the left side of Nineteenth street, going toward First avenue. The defendant was standing up there, back there in the front door of the White Front store. That is known as the Barr store. It is a vestibule front. He was standing back in there. Mr. Gray said nothing to defendant before he shot Mr. Gray. William Gray had no weapon, and his hands were by his side."

The defendant claims that he killed the deceased while he was being attacked by the deceased and one Will Moose. On that subject he said:

"Will Gray kept following me up, and I told him not to come any further, if he did I would shoot him, until I got back against the building, and then I could not get any further, and he kept coming, and he made another step and raised his left hand to get my gun, and he had his knife in his other hand, and I threw my gun down on his leg and shot him. When I told him to get back, I had my gun on his body. When he reached for my gun with his left hand, I could see his knife open in his right hand. When I got to the corner of the alley, I saw him coming out of the alley, and he says: 'You God damn old ——! I will get you this time.' And I backed back about 20 feet, and Will Moose kept coming around at his side with his knife in his hand, and he came on around in front of me, and I saw I could not run because I have a crippled leg; I have a stiff ankle. I would run before I would shoot anybody, but I saw he was going to get me anyhow, and threw the gun down on his body, and then I threw it down and shot his leg. I did not think about his dying from it."

[2] By many questions propounded to several witnesses, the defendant undertook to bring before the jury the particulars of the two altercations or difficulties which the deceased had with the defendant on the night of the homicide and prior to the homicide. This, under well-established rules, the defendant had no right to do. *Bluett v. State*, 151 Ala. 41, 44 South. 84; *Robinson v. State*, 155 Ala. 67, 45 South. 916; *Patterson v. State*, 156 Ala. 62, 47 South. 52; *Harkness v. State*, 129 Ala. 71, 30 South. 73.

[3] The facts in this case do not bring these altercations to which we refer within the *res gestæ* of the homicide, and we do not think that they come within the influence of the doctrine announced in *Glass v. State*, 147 Ala. 50, 41 South. 727. The homicide probably grew out of the bad blood engendered by the altercations, but the altercations were not a part of the *res gestæ* of the homicide.

[4] 3. Charge No. 36, which was asked in writing by the defendant and was refused by the court, was, as applied to the facts set out in the bill of exceptions contained in the record in the case of *Hubbard v. State*, 10 Ala. App. 47, 64 South. 633, held by the Court of Appeals to state a correct proposition of law. This charge was also held to be a correct statement of the law by this court in *Roberson v. State*, 175 Ala. 15, 57 South.

829, and in *Simmons v. State*, 158 Ala. 8, 48 South. 606; *Walker v. State*, 153 Ala. 31, 45 South. 640. The above cases were expressly overruled by this court in *Ex parte Davis*, 63 South. 1010, and the trial court cannot be put in error for refusing to give said charge to the jury.

[5] 4. Charge 37, requested in writing by the defendant, was properly refused. If the charge had been predicated upon every reasonable hypothesis or reasonable supposition instead of upon "every hypothesis or supposition," a different question would be presented to us. *Crawford v. State*, 112 Ala. 1, 21 South. 214.

[6] 5. The other charges requested by the defendant, which were refused by the court, were duplicated in charges given or were patently bad.

We find no reversible error in the record, and the judgment of the court below is affirmed.

Affirmed.

ANDERSON, O. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 516)

ADAMS v. WALSH et al. (No. 557.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. EXECUTORS AND ADMINISTRATORS § 509, 510—SETTING ASIDE ACCOUNT—PLEADING—PRESUMPTION.

In view of Code 1907, § 2686, providing that if an administrator does not file his account by the day named in the citation the court shall proceed to state the account, section 2687, providing that after stating such account the court must issue citation to the administrator to file his accounts and vouchers for final settlement, and section 2688, permitting any person to contest any item of the account, a complaint by an administratrix to set aside a decree on an account stated by the court, which does not allege that plaintiff did not receive the statutory notice and was not present at the hearing, was demurrable; it being presumed on appeal, in absence of such allegations, that such notice was duly given and that plaintiff was present at the hearing.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2219, 2233-2256; Dec. Dig. § 509, 510.]

2. EXECUTORS AND ADMINISTRATORS § 509—VACATING INVOLUNTARY ACCOUNT—PLEADING.

Under Code 1907, § 3914, authorizing the correction of any mistake of fact or law in the settlement of a decedent's estate to the injury of any party, without fault or neglect on his part, within two years after final settlement, a bill to vacate the decree of the probate court, stating the final account of complainant as administratrix and rendering a decree against her, not alleging fraud, accident, surprise, or mistake in obtaining the decree, or negating complainant's fault or neglect, was insufficient.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2199-2219, 2233, 2234; Dec. Dig. § 509.]

Appeal from Chancery Court, Russell County; W. R. Chapman, Chancellor.

Bill by Ophelia J. Adams, as administratrix

of the estate of Warren D. Halliday, deceased, against Louisa J. Walsh and others. Decree sustaining demurrer to bill, and complainant appeals. Affirmed.

F. E. Blackburn, of Birmingham, for appellant. A. E. Barnett, of Opelika, and Evans, Ferrell & Glenn, of Seale, for appellees.

GARDNER, J. The bill in this case was filed by appellant, and seeks to vacate the decree of the probate court of Russell county, rendered December 19, 1911, against appellant, as administratrix, on final settlement of her administration of the estate of Warren D. Halliday, deceased, which said decree was in the sum of \$2,000 and in favor of the appellees, as the heirs and distributees of said Halliday, deceased. From the decree of the chancellor sustaining demurrer to the bill, this appeal is prosecuted.

It is alleged in the bill that the judge of probate proceeded on November 16, 1911, to state and file an account of the complainant, as administratrix of the said estate, and to make an order on said date setting same down for hearing on December 19, 1911, and proceeded to a hearing upon the account so stated by him, and, upon said hearing on December 19, 1911, entered the decree against her as administratrix in the sum of \$2,000, and that at this time there was on file a statement of her account filed by her on August 17, 1911, pursuant to an order of said court.

It is insisted by counsel for appellant that under these averments the judge of probate was without authority in stating an account against complainant and in rendering the decree of December 19, 1911, and that the same is void and should be vacated, and an accounting had in the chancery court.

It is urged by counsel that the bill "in fact is bottomed upon the proposition that the probate court had no such power or authority."

Speaking to this insistence, the learned chancellor, in his able opinion which accompanies the decree, has this to say:

"The complainant in this case first insists that the decree in the probate court is void because it was entered without setting the complainant's account down for hearing. It is alleged that, something more than a year after the grant of letters of administration, two of the respondents filed a petition in the probate court, as they had a right to do, to force complainant to make a settlement. Some time after the filing of this petition, complainant filed her accounts and vouchers; but it does not appear that the account was filed within the time required by the order of the probate court. The allegations of the bill are silent as to this. It is further alleged that thereafter the judge of the probate court stated an account of complainant's administration of said estate; that said account as stated by the court was filed November 16, 1911, and was set down for hearing on December 19, 1911; and that on said date judgment was entered against the complainant. It is not averred that complainant had no notice of the hearing on December 19, 1911. In the absence of such an allegation, it will be assumed that complainant had notice of the hearing, and was present in court, or,

if not present, had the right to be present and protect herself against such orders and decrees as might be made by the court. There are no facts alleged in the bill from which it could be concluded that the errors and mistakes complained of could not have been corrected, and indeed would have been corrected by the probate court if complainant had appeared and looked after her interest as she was in duty bound to do. * * * Complainant fails to attach as exhibits to the bill any of the proceedings of the probate court. The account which she claims to have filed in the probate court on August 17, 1911, is not attached as an exhibit. The statement made up by the court is not attached as an exhibit, nor the decree rendered by the court. It is impossible to know what these statements and decrees contained."

[1] It then appears that this was not a voluntary settlement governed by section 2687 et seq. (Code, 1907), but one that came within article 18 of said chapter of the Code, which provides for compelling a settlement by an administrator.

As shown above, the bill fails to allege that the complainant filed her accounts and vouchers by the day named in the citation which was issued out of the probate court, but merely that it was filed August 17, 1911. If not filed by the day named, the court should proceed to state the account under the provisions of section 2686 of the Code. Under the succeeding section, however, it is provided that after stating such account the court must issue citation to such administrator, to appear on a day named therein and file his accounts and vouchers for final settlement; and under section 2688 any person may attend on part of the administrator and show that he is entitled to additional credits, and any interested person may contest any item of the account. Indeed, this article of the Code contains provisions intended for the full protection, not only of the distributees of the estate, but of the administrator as well. It is not alleged that the complainant did not have all the notices provided therein, nor, in fact, was her presence at the hearing negatived by the bill.

Clearly, the court had jurisdiction therefore of the subject-matter and of the person.

"When on appeal the validity or regularity of the proceedings of the court of probate in the settlement of administrations is assailed, its records must discover every fact essential to the validity of its sentences. Intentments will not then be made to support them. When, however, the jurisdiction of the court has attached, and appears of record, and the sentence is assailed or impeached collaterally, the rule applicable to superior courts prevails, that all reasonable intentments and presumptions will be made to support them. * * * The jurisdiction of the court of probate was called into exercise when the administrator filed his accounts and vouchers for a final settlement and a day was appointed for the settlement. Whatever of irregularity there may seem to be in the appointment of a guardian ad litem for the infant complainant is mere matter of error, not of jurisdiction, and does not detract from the conclusiveness of the decree pronounced by the court." *Gamble v. Jordan*, 54 Ala. 432.

So, in the instant case, we conclude that, jurisdiction of the court having attached for the purpose of compelling a final settlement

and notices having been given, the decree of the court would not be void simply because the account complainant filed was not set down for hearing, and that at most, as stated in the opinion of the chancellor, it would be an irregularity and not sufficient to set aside the decree; and, indeed, if an irregularity, it is not made to appear to be such as resulted in any injury to complainant.

[2] In the sixth paragraph of the bill it is alleged that the probate decree was "burdened with gross errors of facts," and then follow certain credits complainant insists should have been allowed her, that were not so allowed, and a failure to allow her the commissions prescribed on all moneys etc.

No fraud, accident, surprise, or mistake, in obtaining the decree, or as to any item of credit complained of, is alleged in the bill. For aught that appears from the bill, the complainant was present at the hearing, and these matters now complained of were fully presented to the court and determined, and known and understood by all the parties at that time. As said by this court, speaking of the statute (section 3914, Code of 1907) here sought to be invoked, in *Martinez v. Meyers*, 167 Ala. 456, 52 South. 592:

"It was not the purpose of this statute, however, to merely authorize the chancery court to revise the decree of the probate court by correcting errors committed when all parties were cognizant of the facts upon which they may have been predicated"—citing *Waldron v. Waldron*, 76 Ala. 285.

And, besides, under the language of the statute, it is incumbent on the complainant by her bill to acquit herself of all fault or neglect, and this she has not done.

Under the decisions of this court, the bill is insufficient as one seeking relief under the provisions of section 3914 of the Code of 1907. *Hall v. Pegram*, 85 Ala. 522, 5 South. 209, 6 South. 612; *Bowden v. Purdue*, 59 Ala. 409; *Otis v. Dargan*, 53 Ala. 178; *Martinez v. Meyers*, supra.

Viewed in either aspect as here presented and argued by counsel, we are of the opinion that the bill is insufficient; and the decree of the chancellor sustaining the demurrer is, accordingly, affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(190 Ala. 549)

HAMILTON et al. v. ROBINSON. (No. 903.)
(Supreme Court of Alabama. Dec. 17, 1914.)

SUBROGATION §14 — PAYMENT OF INCUMBRANCE BY PERSON SECONDARILY LIABLE.

Where complainant conveyed land to H., who assumed debts secured by two mortgages thereon and in turn conveyed to P., who assumed only the first mortgage but had notice of the second mortgage, complainant, who was compelled to pay the debt secured by the second mortgage, was entitled to be subrogated to all

of the rights of the second mortgagee against the land.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 35-39; Dec. Dig. §14.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by Ellie H. Robinson against W. C. Hamilton and others. Decree for plaintiff, and defendants appeal. Affirmed.

Hamill & Savage, of Birmingham, for appellants. M. L. Ward and W. H. Smith, both of Birmingham, for appellee.

DE GRAFFENRIED, J. The bill of complaint in this case shows the following: That on the 27th day of November, 1911, the complainant, Ellie H. Robinson, sold to W. C. Hamilton certain real estate in consideration of \$10 cash and the assumption by Hamilton of an indebtedness of \$14,500 to Rosa B. Steiner secured by mortgage on the property and also an indebtedness of \$3,150, to Fidelity Mortgage & Bond Company secured by mortgage on said property, the latter mortgage being second to said Steiner mortgage; that on the 2d day of April, 1913, the said Hamilton conveyed the said property to John U. Poyntz, who, when he purchased, assumed the payment of the above-described indebtedness to Rosa B. Steiner and had notice of the above mortgage indebtedness due said Fidelity Mortgage & Bond Company; that W. C. Hamilton made default in the payment of said bond company mortgage indebtedness; that thereupon complainant was sued by said bond company, and a judgment was rendered in favor of said bond company against complainant for the same; and that complainant has been forced to pay the same. The bill prays that complainant be subrogated to the rights of the Fidelity Mortgage & Bond Company under the mortgage which was executed by complainant to said company; that the amount due by W. C. Hamilton upon said mortgage indebtedness to said bond company, and which he failed to pay, be ascertained; that the lands be sold for the satisfaction of said indebtedness; and that said lands be sold subject to the indebtedness due the said Rosa B. Steiner. The bill alleges that at least a part of the indebtedness to Rosa B. Steiner has been paid, prays that the balance remaining unpaid be ascertained, and that complainant be given the right to redeem said property from said mortgage. The bill fails to show whether all of the indebtedness to Rosa B. Steiner was due at the time the bill was filed.

2. If the allegations of the bill are true, then the complainant is entitled to be subrogated to all of the rights of the bond company upon the land described in the bill. The bond company, when it obtained its judgment against complainant, had a right to foreclose its mortgage and, if the Steiner mortgage was then due, to redeem the land from that mort-

gage. Hamilton failed, as he contracted with the complainant to do, to pay off the bond company mortgage, and for that reason complainant has been forced to pay the debt secured by that mortgage. Hamilton is the complainant's vendee, and Poyntz bought from Hamilton with knowledge of the existence of the bond company mortgage. No innocent person is therefore before the court, and as the complainant has been forced to pay a debt which, in equity and good conscience, should have been satisfied by Hamilton, the vendor of Poyntz, a court of equity will invest the complainant with all the rights of the bond company against the land for the payment of the debt so paid by complainant to said bond company. 27 Am. & Eng. Ency. Law, p. 203, subd. 4.

As between Hamilton and complainant, when Hamilton bought the land and agreed to pay off the bond company mortgage, Hamilton became the person primarily liable for the debt. This being true, complainant is, in equity, certainly entitled to be placed, under the allegations of the bill, in the bond company's shoes. *Knighon v. Curry*, 62 Ala. 408; *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Fawcetts v. Kimmey*, 33 Ala. 261; 4 Mayf. Dig. p. 870, subd. 19.

The decree of the court below was in accordance with the above views, and the decree of the court below is therefore affirmed. Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 169)

EMPIRE COAL CO. v. MARTIN. (No. 749.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. RAILROADS \Leftrightarrow 394—WANTON NEGLIGENCE—DEFENSE OF CONTRIBUTORY NEGLIGENCE.

Where a count for wanton negligence in killing a licensee on defendant's track was good as against a demurrer, special pleas of contributory negligence were no answer thereto.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331-1338; Dec. Dig. \Leftrightarrow 394.]

2. RAILROADS \Leftrightarrow 400—ACTION—QUESTION FOR JURY.

On evidence in an action for killing a licensee on defendant's premises, held, that it was for the jury to determine whether intestate was on the track when run over, or did not fall off the train, and whether defendant's servants were guilty of wanton negligence proximately resulting in his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1365-1381; Dec. Dig. \Leftrightarrow 400.]

3. RAILROADS \Leftrightarrow 350—ACTION—FAILURE OF PROOF.

Where plaintiff did not prove the averment of one count of his complaint that deceased was killed while crossing defendant's track, yet as the complaint put the defendant upon notice that it killed deceased while crossing its track, and not as a trespasser, defendant was entitled to the general charge as to such count.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1152-1192; Dec. Dig. \Leftrightarrow 350.]

4. RAILROADS \Leftrightarrow 394—ACTION FOR WANTON NEGLIGENCE—TRESPASS.

It was not a necessary averment under the wanton count that deceased was killed while a trespasser on defendant's tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331-1338; Dec. Dig. \Leftrightarrow 394.]

5. TRIAL \Leftrightarrow 142, 143—TAKING CASE FROM JURY.

Where there is a conflict in the evidence, or there is a reasonable inference of a fact which would make the question one for the jury, the general charge will not be given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 337, 342, 343; Dec. Dig. \Leftrightarrow 142, 143.]

6. RAILROADS \Leftrightarrow 396—ACTION—SUFFICIENCY OF EVIDENCE—TRESPASS.

In an action for killing plaintiff's intestate while he was on defendant's tracks, evidence held not to show that deceased was crossing the track, or was not a trespasser when killed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1356, 1358-1363; Dec. Dig. \Leftrightarrow 398.]

7. RAILROADS \Leftrightarrow 394—INJURIES TO PERSON ON TRACK—PLEADING—NEGLECT.

In a suit against a railroad for injury resulting upon simple negligence, plaintiff must aver and prove a relationship that would render the defendant liable for simple negligence; that is, that he was not a trespasser.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1331-1338; Dec. Dig. \Leftrightarrow 394.]

8. RAILROADS \Leftrightarrow 396—INJURIES ON TRACK—BURDEN OF PROOF—STATUTE.

Code 1907, § 5476, providing that, when any person is injured by a train, the burden is on the railroad to show that there was no negligence on its part, does not require the railroad, in an action against it for injuries due to simple negligence, to acquit itself of negligence for injuring trespassers, and it need only acquit itself of negligence for which it would be answerable to the injured party.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. \Leftrightarrow 396.]

9. RAILROADS \Leftrightarrow 276—INJURY TO PERSON ON TRACK—NOTICE OF PERIL.

The fact that one of defendant's trainmen knew that deceased with other boys was in or upon one of its cars was not notice that they or either of them would be in peril or liable to be run over when the car was run on a siding.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 878-886; Dec. Dig. \Leftrightarrow 276.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by Nathaniel C. Martin, as administrator of the estate of Fred Martin, for damages for the death of his intestate. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The action was for killing a licensee, and alleged that, at the place at which the accident occurred, people were accustomed to cross the track of said railroad at the point with such frequency and in such numbers as it was likely that persons would be on the track in passing to and fro around the end of the train or car while it was standing at that point, and that the servants or agents of defendant knew of this fact, and that it was likely that some person would be on the track. Notwithstanding this knowledge,

said servants or agents in charge of said train, in reckless disregard of the safety of such person, and without signal or warning, suddenly and violently backed the car on said intestate and killed him. It is further alleged that the defendant was a corporation operating a railroad, and that plaintiff was on the track crossing the same as a licensee. Pleas 2, 3, and 4 set up contributory negligence on the part of plaintiff: First, in going upon the track without stopping, looking, and listening; second, loitering or being upon or immediately adjacent to the track at a point where he had no right to be; and, third, that he was a trespasser on the private property of defendant in the nighttime, and at a place where he had no right to be, and was there without the knowledge on the part of defendant's servants, and that he negligently loitered on the track, and that he negligently failed to observe or look out for approaching trains.

Bankhead & Bankhead, of Jasper, for appellant. James J. Ray and L. D. Gray, both of Jasper, for appellee.

ANDERSON, C. J. [1] Count 9 is a wanton count and was not subject to the defendant's demurrer thereto, and, this being the case, the defendant's special pleas 2, 3, and 4, of contributory negligence, were no answer to same, and the trial court did not err in sustaining plaintiff's demurrers to said pleas. There was proof from which the jury could infer that the point at which the body of the intestate was found upon the defendant's track No. 1 was constantly and frequently used by the public at all times of the day, and especially late in the afternoon, about the time of the arrival of the train, and about the time of the accident in question, and that this user was of such frequency and duration that the servants of the defendant in charge and control of its train were conscious of such user and were conscious of the fact that to back, push, or drive a car upon the side track or main line anywhere between the tipple and washer, without signal or warning, would likely or probably result in injury to persons who would probably be on the track or tracks of the defendant. There was also proof that the coach or caboose was driven further down said track No. 1, suddenly and without signal or warning. There was also proof from which the jury could infer that the intestate was run over or against by the coach or caboose in question when being driven down said track No. 1. Of course, the intestate must have been upon the track and killed while on same in order to fasten a liability upon the defendant even under the wanton count, as it would not be liable if the deceased came by his death by falling or being thrown from the train or a car of the defendant, as the only wanton negligence inferable to the defendant's servants was in driving the coach down the

track without signal or warning with a consciousness that some one would probably be upon said track and would probably be injured, as there is nothing to indicate that the action of said servants could or would probably result in injury to a person on one of defendant's cars at the time or who was not upon the track. The evidence is by no means clear or certain as to where the deceased was when killed, whether he was on the train and fell off, or whether he was on the track; yet there was an inference for the jury that he was on the track when struck by the car, and, if such was the case, the jury could also infer that said servants of the defendant were guilty of wanton negligence. It may be true that the weight of the evidence showing that the track or tracks were frequently and constantly used by the public is confined to a point at or near the tipple, and all along between the tipple and the washer, and that side track No. 1, not extending to the washer, and the point on same where intestate was killed, being some distance from the tipple, the user of the defendant's track did not extend to and include that point at side track No. 1 where the injury occurred; yet there was some evidence that all of said tracks, including side track No. 1, were constantly and frequently used.

[2] It was therefore for the jury to determine whether or not the intestate was on the track when run over, or did not fall off of the train, and whether or not the defendant's servants were guilty of wanton negligence which proximately resulted in his death.

[3, 4] The general charge, however, should have been given for the defendant as to count 9, for the reason that the plaintiff did not prove the averment of his complaint that the intestate was killed while crossing the defendant's track. True, this was not a necessary averment under the wanton count, as it made no difference whether he was or was not a trespasser as to this count; but, as the complaint put the defendant upon notice that it killed the intestate while crossing the track and not as a trespasser, it was necessary to prove this averment. *A. G. S. R. Co. v. McWhorter*, 156 Ala. 269, 47 South. 84.

[5, 6] We are, of course, aware of the rule that if there is a conflict in the evidence, or if there is a reasonable inference of a fact which would make the question one for the determination of the jury, the general charge should not be given; but the evidence in this case has received a most careful and thoughtful consideration, and we fail to find any fact or facts which would create a reasonable inference that the intestate was crossing the track or was not a trespasser when killed. The fact that he was crossing said track is the merest conjecture or speculation which does not amount to a reasonable inference. It may be true that Joe Rayners said it was his understanding that Fred was following

him, that he thought it was Fred or Trav, one, but his testimony shows that he did not know whether he was following him or not and that he never saw him after he (witness) got off the coach. The evidence of Trav Hinson not only fails to afford an inference that the intestate was crossing the track when killed, but negatives all idea that the said intestate was following Joe Rayners when the latter said he thought Fred or Trav, one, was following him.

[7] It has long been settled by the decisions of this court that, when the plaintiff sues a railroad for injuries and relies upon simple negligence, it is incumbent upon him to aver and prove a relationship that would render the defendant liable for simple negligence; that is, that he was not a trespasser. *L. & N. R. R. Co. v. Holland*, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25; *Gadsden R. R. Co. v. Julian*, 133 Ala. 373, 32 South. 135.

[8] Nor does section 5476 of the Code of 1907 change this rule or place the burden of proof upon the railroad of acquitting itself of negligence for injuring trespassers upon its track. It need acquit itself only of negligence for which it would be answerable to the injured party, but need not acquit itself of negligence of which the injured party cannot complain or for which he was not in a position to recover. *L. & N. R. R. Co. v. Holland*, supra; *Ex parte Southern R. R.*, 181 Ala. 486, 61 South. 881; *L. & N. R. R. Co. v. Jones*, 67 South. 691. Nor does the case of *Ledbetter v. St. Louis R. R. Co.*, 63 South. 987, conflict in the slightest with this rule, as that case holds that it was only the duty of the defendant to acquit itself of negligence for which it was answerable to the injured party, and it seems that the intestate was killed at a crossing and not as a trespasser. Indeed, counsel for the plaintiff seem to have recognized this rule in framing the simple negligence counts in the case at bar, by averring that the intestate was killed while crossing the track, and was not therefore a trespasser, and this averment and proof of same was essential in the simple negligence counts, and, as the plaintiff utterly failed to prove said averment or to create a reasonable inference from which the jury could find that the intestate was killed while crossing the defendant's track, the trial court erred in refusing the general charge, requested by the defendant, as to the simple negligence counts.

[9] There were no facts which authorized the submission of the case to the jury upon the theory that the defendant's servants, or any of them, were guilty of subsequent negligence. True, there is proof that one of the trainmen knew that the boys were in or upon one of the defendant's cars that night, but this was not notice to the trainmen that they or either of them would be in peril or liable to be run upon when they drove the car down siding No. 1. So far as they knew,

the boys were in a position, when seen, where they would not be struck by the moving train.

The judgment of the circuit court is reversed, and the cause is remanded.

Reversed and remanded.

MCCLELLAN, MAYFIELD, and GARDNER, JJ., concur.

(190 Ala. 266)

CENTRAL OF GEORGIA RY. CO. v.
BRODA. (No. 882.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ⇨1040—HARMLESS
ERROR—RULING ON DEMURRERS.

The sustaining of a demurrer to a plea worked no injury to defendant, where the matter in it was also presented by other pleas as to which demurrers were overruled.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4106; Dec. Dig. ⇨1040.]

2. CARRIERS ⇨151—CARRIAGE OF GOODS—INTERSTATE COMMERCE—LIMITATION OF LIABILITY FOR NEGLIGENCE.

A carrier in interstate commerce may limit its liability for goods injured by its negligence by contract fixing the agreed value of goods between it and the shipper in the form prescribed by rule 6 of the Interstate Commerce Commission, but not by mere stipulation in the bill of lading.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 672, 673, 674-676, 680, 681, 687-690; Dec. Dig. ⇨151.]

3. CARRIERS ⇨158—CARRIAGE OF GOODS—CONTRACT LIMITING LIABILITY—CONSTRUED.

Where the action was against a railroad for injuries to goods in transit under contract in the form prescribed by rule 6 of the Interstate Commerce Commission limiting their value as to shipper and carrier to \$100 in case of injury, the contention of the defendant is unsound that if part only of the goods are injured the plaintiff's recovery is limited to a proportional part of \$100; such contracts limiting liability being construed strictly against a carrier, and failure of proof as to the relation of the amount of the value of the injured goods, to that of the total shipment, is immaterial.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. ⇨158.]

4. CARRIERS ⇨110—CARRIAGE OF GOODS—REPRESENTATION AS TO CONTENTS OF PACK-
AGE—EFFECT.

Where plaintiff's agent misrepresented the contents of a package to the carrier's agent in order to obtain a reduced rate of freight thereon, the verdict must be for the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. ⇨110.]

5. TRIAL ⇨148—CONFLICTING EVIDENCE—
QUESTION FOR JURY.

Where the evidence is in conflict, the question is for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. ⇨143.]

Appeal from City Court of Birmingham;
C. W. Ferguson, Judge.

Action by Mrs. J. Broda against the Central of Georgia Railway Company. Judgment for

plaintiff, and defendant appeals. Transferred from Court of Appeals. Affirmed.

London & Fitts and W. S. Brown, all of Birmingham, for appellant. Samuel B. Stern, of Birmingham, for appellee.

MAYFIELD, J. This action is by a shipper, against a common carrier, to recover damages for injury to a shipment of freight. The shipment was interstate—from Columbus, Ga., to Birmingham, Ala. It consisted of household goods. The shipper was moving from the one point to the other. The goods were crated or packed in a number of packages, and were mentioned in the bill of lading as: 1 dresser, 1 chiffonier, 3 boxes household goods, 5 barrels crockery, etc. The complaint claimed damages for injury to one barrel of crockery or cut-glass ware. The form of the action was in case, as for negligence in transporting or delivering—a breach of duty growing out of the contract of shipment of the common carrier. The defendant pleaded the general issue, and several special pleas setting up fraud on the part of the shipper as to the contents of the packages shipped, whereby she obtained rates less than the regular rates charged for the transportation of such goods, contrary to the acts of Congress. The bill of lading gave the weight of the entire shipment as 2,000 pounds, and stated the rate as 49 cents per hundred weight. The entire shipment was valued at \$100. The five barrels of crockery were not valued or weighed separate from the other articles shipped.

The provisions of the contract of shipment specially relied upon were as follows:

"The value of the shipment covered by this contract is fixed by shipper at one hundred dollars (\$100.00) which is accepted by the carrier as the real and true value thereof and the rate of freight is charged in accordance therewith, and the carrier assumes liability only to the extent of such valuation and no further."

The defendant also relied upon certain rules of the Interstate Commerce Commission as to interstate shipments, establishing tariffs and rate therefor. Among these rules are rules Nos. 4, 6, and 264. Rule 4 is as follows:

"Note. 4. Where the goods tendered are of such character that the shipper desires the reduced rating based upon agreed value, a statement to that effect must be written out or stamped in full upon the bill of lading at time of shipment and shipper required to accept in writing the value expressed. (See General Rule 6.) Where shippers do not desire to avail themselves of reduced ratings, based upon expressed value, notation to that effect should be inserted on the bill of lading by the agent at the time of shipment."

Rule 6 is as follows:

"Where the classification provides for reduced rate, based on a certain fixed valuation, the following special release, containing the agreed valuation, must be written and signed by the shipper or owner upon the face of the bill of lading or shipping receipt: 'The value of the shipment covered by this contract is fixed by the shipper at \$——; which is accepted by the carrier as the real and true value thereof, and the rate of freight is charged in accordance therewith, and the carrier assumes liability only

to the extent of such valuation and no further.'"

Rule 264 is as follows:

"Packages containing articles of more than one class the rate is for the highest class on packages containing more than one class."

[1] The trial court sustained a demurrer to plea 3, but overruled the demurrers to other special pleas setting up the same, or substantially the same, facts that are contained in plea 3. If there was error in sustaining the demurrer to plea 3, it was without possible injury.

The trial resulted in a verdict and judgment for the plaintiff for \$75, from which judgment this appeal is prosecuted.

There was no evidence to support the plea as to fraud on the part of the plaintiff—the making of false representations touching the contents of the packages. In fact, all the evidence rebuts all inferences as to fraud in the respect alleged in the plea. Consequently, there can be no error in the refusal of charges on this phase of the case.

The trial court, by instructions, limited the amount of recovery to \$100, the estimated value specified in the contract of shipment; and the jury found for \$75 only, thereby eliminating all questions as to a recovery in excess of the \$100 agreed on.

[2] The trial court at the request of the plaintiff charged the jury as follows:

"I charge you that the defendant cannot limit its liability for the negligence of itself or its servants in and about the transportation and delivery of the plaintiff's goods and effects, by a stipulation in a bill of lading to that effect and if you are reasonably satisfied from the evidence that the defendant was negligent in the transportation and delivery of the goods in question in this suit, and that as a proximate result thereof the plaintiff suffered damage, then you are authorized to award the plaintiff such damages as from the evidence you are reasonably satisfied she has so suffered, regardless of the valuation in the bill of lading or the true value of all the goods and effects shipped by plaintiff over defendant company's railroad.

"I charge you that if you find in favor of the plaintiff you are authorized to award such damages as the plaintiff has, from the evidence in this case, reasonably satisfied you she has suffered, not exceeding the amount of \$100, regardless of the valuation on the bill of lading in evidence or the true value of the goods and effects shipped by plaintiff over the defendant company's railroad."

There was no error in the giving of either of these instructions. The first charge has been so repeatedly held to be the law as to special contracts of shipment, as applied to both state and federal laws, that it is unnecessary to cite authorities to support it.

The second charge was unquestionably correct, as applied to the issues and the evidence in this case.

[3] The defendant insisted on the trial in the lower court, and renews his insistence here, that the plaintiff's recovery should be limited by the proportion which the value of the injured or damaged property—to wit, one barrel of crockery—bears to the value of the whole shipment; its theory being that the

amount of recovery is not only limited by the contract to \$100, the estimated and agreed value of the whole shipment, but to the proportionate value of the damaged articles to that of the whole shipment.

We cannot agree to this construction of the contract. The rule of construction as to such special contracts of shipment, and as to provisions of general contracts of shipment limiting the liability of the carrier, is that they are to be construed strictly against the carrier, and liberally in favor of the shipper. *L. & N. R. R. Co. v. Touart*, 97 Ala. 514, 11 South. 756; *L. & N. R. R. Co. v. Meyer*, 78 Ala. 600; *Moore on Carriers* (2d Ed.) p. 517. The courts are not uniform in their construction of the provisions of contracts limiting liability. Mr. Moore (*Carriers*, p. 517) says:

"In some jurisdictions the carrier is liable for the actual damages to property injured in transportation, not exceeding the sum named in a stipulation in a contract of shipment limiting its liability and fixing such sum as their value, although the property in its damaged condition sold for more than such sum, while in others the shipper is only entitled to recover as damages for the injury an amount bearing the same proportion to the actual damages that the stipulated value bears to the actual value."

The author cites decisions of the courts of Tennessee and Georgia, holding against the proportionate limitation, and one, of the Supreme Court of Arkansas, holding in favor thereof.

We are inclined to hold with the courts of Tennessee and Georgia—which line of decisions the trial court evidently followed in this case.

Mr. Hutchinson states both rules, and declares a preference for the rule which limits the liability to the proportionate value, but we do not agree with him in this; certainly not when the contract reads as does the one in this case, and the evidence is as it is here. See *Hutchinson on Carriers*, § 429.

Following this line of decisions, it was immaterial that the proof failed to show what proportion the value of the damaged or injured goods bore to the value of the whole shipment. The proof did show, or tend to show, that the damages to a part of the shipment amounted to more than \$100; but the court limited the amount of recovery to \$100, and the jury found for less, viz., \$75. While the proof showed that some of the goods injured were cut glass, and that the rate on cut glass was greater than that on crockery, as it was billed and rated, the proof tends to show that this was fairly agreed on, and that no fraud was thereby practiced on the carrier, and that the parties were bound by the contract.

[4] Moreover, the court fairly and correctly charged the jury on this phase of the case as follows:

"If you are reasonably satisfied from the evidence that the plaintiff's agent in Columbus, Ga., knew that one of the barrels contained cut glass and falsely represented to the agent of the de-

fendant that it contained crockery, in order to obtain and thereby did obtain a lower rate of freight than she would have obtained if they had clearly declared the contents of the barrel, then your verdict must be for the defendant."

There was no error in refusing any one of the defendant's requested charges, even if they were properly insisted upon.

[5] No one of defendant's pleas was proven without conflict, and therefore defendant was not entitled to the affirmative charge as to any one of them.

We find no error, and the judgment is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(190 Ala. 238)

SALTER v. FOX. (No. 979.)

(Supreme Court of Alabama. Dec. 17, 1914.
On Application for Rehearing,
Jan. 14, 1915.)

1. **TRESPASS** ⇐67—**TRESPASS QUARE CLAUSUM FREGIT**—**TRIAL**—**INSTRUCTIONS.**

In an action for trespass quare clausum fregit, where the evidence tended to show that defendant owned the land, that there had been a tenancy at will between the parties, and that the plaintiff had had notice to quit, but had held possession claiming adversely to the defendant, a refusal to give affirmative instructions for the plaintiff was proper.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. § 150; Dec. Dig. ⇐67.]

On Application for Rehearing.

2. **LANDLORD AND TENANT** ⇐61—**ESTOPPEL BY TENANCY TO DENY TITLE.**

A tenant is estopped to deny his landlord's title while holding under a lease or after its expiration.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 151, 152, 187-196; Dec. Dig. ⇐61.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by J. M. Salter against G. W. Fox. Judgment for defendant, and plaintiff appeals. Affirmed.

Pinkney Scott, of Bessemer, for appellant. Goodwyn & Ross, of Bessemer, for appellee.

DE GRAFFENRIED, J. This was an action in trespass quare clausum fregit. In the case of *Southern Railway Co. v. Hayes*, 62 South. 874, this court said:

"It is a perfect defense to an action of trespass quare clausum fregit to show that defendant owns the land in question, and that he had, at the time in question, the right to enter; and the fact that he entered by force, over the protest of plaintiff, does not destroy his defense. If he uses more force than is necessary and injures the person or the property of the plaintiff, he is liable in an appropriate action; but that action is not quare clausum fregit."

[1] In this case there was evidence tending to show that the title of the land described in the complaint was in the defendant; that the possession of the land had

been given by the defendant to the plaintiff under such circumstances as to create a tenancy at will; that the defendant had given the plaintiff a proper notice to quit (see *McDevitt v. Lambert*, 80 Ala. 536, 2 South. 438), but that, instead of yielding possession to the landlord, the tenant held to the actual possession of the land and claimed the land adversely to him. As there was evidence tending to show the above facts, this case comes directly within the doctrine above quoted from *Southern Railway Co. v. Hayes*, supra, and the trial court was not in error in refusing to give, at the written request of the plaintiff, affirmative instructions to the jury in his favor.

2. There are certain assignments of error relating to the action of the trial court in the admission of certain testimony on behalf of the defendant. Under the authority of *Southern Railway Co. v. Hayes*, supra, these assignments of error are without merit.

There is no error in the record, and the judgment of the trial court is affirmed. Affirmed.

ANDERSON, C. J., and MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

On Application for Rehearing.

DE GRAFFENRIED, J. [2] There is evidence in this record which brings the appellant within the familiar doctrine that a tenant is estopped to deny the title of his landlord while holding under a lease or after its expiration. For this reason there was evidence in this case from which the jury had the right to infer that, as between the appellant (the tenant) and the appellee (the landlord), the title to the land, under the above familiar doctrine of estoppel, was in the appellee. The question presented by this record and the evidence in this record are not identical with the question presented by, and the evidence to be found in, the record in the case of *Salter v. G. W. Fox and Nancy Fox*, 67 South. 1006, which was an action of ejectment.

In our opinion, there is no merit in this application for a rehearing, and the said application is overruled.

(190 Ala. 245)

STARKS v. COMER. (No. 843.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. LIBEL AND SLANDER — 48 — JUSTIFICATION — CRITICISM — PUBLIC MEN.

Criticism of public men must be founded on facts, and must be legitimate and reasonable to escape being defamatory, so as to support civil liability.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 144-147; Dec. Dig. 48.]

2. LIBEL AND SLANDER — 48 — QUALIFIED PRIVILEGE — CRITICISM OF PUBLIC MEN.

The publication of false statements impugning plaintiff's fitness for public office will ren-

der defendant liable for actual damages, since good faith, reasonable diligence in investigating the truth, absence of malice, and motives looking to the public good, do not create a qualified privilege.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 144-147; Dec. Dig. 48.]

3. LIBEL AND SLANDER — 124 — JUSTIFICATION — TRUTH — REDUCTION OF DAMAGES.

Under the express terms of Code 1907, § 3746, the truth may be shown under the general issue, in actions for libel and slander, only in mitigation of damages, and an instruction for plaintiff that the truth might be considered only in regard to punitive damages, and that the burden of thus reducing the plaintiff's prima facie damage was on defendant, was proper.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. 124.]

4. EVIDENCE — 94 — PRESUMPTIONS — BURDEN OF PROOF.

A presumption which establishes an element of a case, as of the falsity of libelous matter, imposes upon the other party the burden of proof on the point, especially where it supports an allegation of pleading.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 116, 117; Dec. Dig. 94.]

5. LIBEL AND SLANDER — 101 — TRUTH AS ISSUE UNDER PLEADINGS — GENERAL ISSUE — BURDEN OF PROOF.

In an action for libel and slander, a plea of the general issue controverts in fact plaintiff's assertion of the falsity of the statement, and the rule as to the burden of proof being upon the defendant to show truth in mitigation is the same under the general issue as when it is specially pleaded in justification.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. 101.]

6. APPEAL AND ERROR — 215 — OBJECTION BELOW — NECESSITY — INSTRUCTIONS.

A slight technical inaccuracy in the language of an instruction otherwise correct is not reviewable error, if unobjected to by the party at the time given.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. 215.]

7. TRIAL — 252 — INSTRUCTIONS — CONFORMITY TO EVIDENCE.

In an action for libel, where libelous matter was undisputedly shown to be untrue in at least three material particulars, the refusal of charges requested by the defendant predicated upon the possibility that the jury might find the publication had been generally true as a whole was not error.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 505, 596-612; Dec. Dig. 252.]

8. LIBEL AND SLANDER — 33 — PRESUMPTION OF DAMAGE — NECESSITY OF PROOF.

In an action for libel, the charge being actionable per se, the law presumes such general damage as mental suffering and injury to and loss of reputation, which need neither be alleged nor proven specifically.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 112, 277; Dec. Dig. 33.]

9. LIBEL AND SLANDER — 124 — DAMAGES UNDER PLEADINGS.

In an action for libel, where specific allegations and proof as to damages are not made and offered, but the reliance upon the mere publication of the libelous statement, the jury cannot be instructed to limit the amount of recovery to

nominal damages, though they may in their discretion do so.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 365-370, 372, 373; Dec. Dig. ¶124.]

10. LIBEL AND SLANDER ¶123—COMPENSATORY DAMAGES — MEASURE — QUESTION FOR JURY.

Where there was nothing to show that the plaintiff had not suffered in his feelings, conceding that he had suffered no pecuniary loss as the result of a libelous publication, the question of compensatory damages was still a question for the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. ¶123.]

11. TRIAL ¶252—INSTRUCTIONS TO JURY—CONFORMITY TO FACTS.

In an action for libel, a requested charge was abstract and inapplicable to the specific facts of the case, and hence properly refused, where based upon the assumption, entirely unsupported by evidence, that defendant had endeavored to ascertain the truth or falsity of his publication.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. ¶252.]

12. TRIAL ¶260—INSTRUCTIONS—REFUSAL TO REQUEST — POINT COVERED BY FORMER CHARGE.

In an action for libel, where the given charge plainly and fairly covered the matter relied upon for acquittance, another charge on the subject was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. ¶260.]

13. TRIAL ¶194—INSTRUCTIONS—SUPPORT OF AVERMENT BY EVIDENCE — QUESTION FOR JURY.

In an action for libel, where an amended count of complaint set up that the defamation was published in a paper not published by defendants, the averment found sufficient support in evidence when it appeared that the defendants paid for the insertion of libelous matter in a paper published by others, and hence the defense was not entitled to an affirmative instruction in its favor on such count.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. ¶194.]

14. EVIDENCE ¶106—RELEVANCY—LIBEL BY AFFIDAVIT—CHARACTER OF AFFIANT.

In an action for libel, where defendants had published a certain defamatory affidavit, they could not properly introduce evidence as to affiant's general reputation for veracity and reliability, since the relevancy of the evidence depended on defendants' knowledge of affiant's character at the time the affidavit was published, while their evidence offered nothing to the point.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 177-187; Dec. Dig. ¶106.]

15. WITNESSES ¶407—CHARACTER EVIDENCE — CHARACTER AS TO VERACITY—FOUNDATION FOR INTRODUCTION.

Contradiction, not impeachment in a technical sense, of a witness, by proof that he had made statements out of court differing from his testimony, does not authorize the introduction of character evidence as to his reputation for veracity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1280, 1282; Dec. Dig. ¶407.]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Braxton B. Comer against B. M. Starks and others for libel and slander.

Judgment for plaintiff, and defendant B. M. Starks appeals. Affirmed.

The substance of the libelous matter and of the complaint charging the same may be found in 151 Ala. 613, 44 South. 673, 13 L. R. A. (N. S.) 525, and 172 Ala. 613, 55 South. 195. As a sample of the pleas referred to, plea 3 is as follows:

The defendants say that, at the time of the publication of the alleged libelous matter, plaintiff was a candidate for the office of president of the Railroad Commission of Alabama, which was a public office of the state of Alabama, before a primary election of the Democratic party of the state of Alabama shortly thereafter to be held, and which was held; that said publication was made by said defendants to the electors of Alabama, and for the purpose of advising the electors of Alabama as to the fitness and qualification of plaintiff to fill said office for which he was a candidate at the time of such publication as aforesaid; that said defendants, before publishing the alleged libelous matter, exercised reasonable diligence to ascertain the truth of the facts so published, and at and before the time of said publication believed the facts stated in said publication to be true, and acted in good faith in publishing the alleged libelous matter, and solely for the purpose hereinbefore stated, and in good faith, and without expressed malice on their part.

Tillman, Bradley & Morrow, of Birmingham, for appellant. Samuel D. Weakley and Frank S. White & Sons, all of Birmingham, for appellee.

SOMERVILLE, J. The question of primary importance in this case is whether or not the communication made to the public by the defendant Starks, and others confederated with him, through the medium of the two Birmingham daily papers, was, though false, a privileged communication, if made with a bona fide belief in its verity, without actual malice to the plaintiff, and only for the purpose of informing the voters of the state as to his character and fitness for the office of president of the Alabama Railroad Commission; the plaintiff being then a candidate for the party nomination for that office in the forthcoming democratic primaries.

In other branches of this case heretofore appealed to this court (Comer v. Age-Herald Pub. Co., 151 Ala. 613, 44 South. 673, 13 L. R. A. [N. S.] 525; Comer v. L. & N. R. R. Co., 151 Ala. 622, 44 South. 676; Comer v. Advertiser Co. et al., 172 Ala. 613, 55 South. 195), this question does not seem to have been presented; nor does it appear that the general question involved has ever been a subject of decision or discussion by this court.

As shown by the briefs of counsel, the decisions in other jurisdictions are numerous, and diverge in two main conflicting lines, with some intermediate shadings of opinion.

We have examined these decisions, and have considered the question, with much care and with a due solicitude for the adoption by this court of the rule which most nearly reflects the spirit of reason, justice, and

sound policy; and we conclude that the libelous publication here shown was not one of qualified privilege, and that liability for actual damage by reason of its falsity cannot be defeated by such a plea.

Some of the leading authorities which support this view, with a citation and discussion of the other cases, are the following: *Com. v. Clap*, 4 Mass. 163, 3 Am. Dec. 212; *Burt v. Newspaper Co.*, 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97; *Banner Pub. Co. v. State*, 16 Lea (Tenn.) 176, 57 Am. Rep. 216; *McAllister v. Detroit Free Press Co.*, 76 Mich. 338, 43 N. W. 431, 15 Am. St. Rep. 318, and note, 353-357; *Smith v. Burrus*, 106 Mo. 94, 16 S. W. 881, 13 L. R. A. 59, 27 Am. St. Rep. 329; *Upton v. Hume*, 24 Or. 431, 33 Pac. 810, 21 L. R. A. 493, 41 Am. St. Rep. 863; *Jones v. Townsend*, 21 Fla. 431, 58 Am. Rep. 676; *Hamilton v. Eno*, 81 N. Y. 116; *Star Pub. Co. v. Donahoe* (Del.) 58 Atl. 513, 65 L. R. A. 980; *Coffin v. Brown*, 94 Md. 190, 50 Atl. 567, 55 L. R. A. 732, 89 Am. St. Rep. 422; *Dauphiny v. Buhne*, 153 Cal. 757, 96 Pac. 880, 126 Am. St. Rep. 136, citing *Jarman v. Rea*, 137 Cal. 339, 70 Pac. 216; *Post Pub. Co. v. Hallam*, 59 Fed. 530, 8 C. C. A. 201 (opinion by Judge Taft). In line, also, may be noted the leading English case of *Davis v. Shephstone*, 55 L. T. Rep. (N. S.) 1, 11 App. Cas. 187, 190.

Judge Freeman, after a very full consideration of the conflicting authorities, reached the conclusion that:

"The better opinion, and the one sustained by the preponderance of the authorities, both English and American, is that false or defamatory publications concerning the acts or character of a candidate are not privileged, and are actionable." Note, 15 Am. St. Rep. 355.

In his article on Libel and Slander in 25 Cyc. 404, Prof. Kinkead summarizes the law as follows:

"When a man becomes a candidate for office, his character for honesty and integrity and his qualifications and fitness for the position are put before the public and are thereby made proper subjects for comment. But as a general rule false allegations of fact charging criminal or disgraceful conduct, or otherwise aspersive of character, are not privileged."

To the same effect is the text of 18 A. & E. Ency. Law, 1042.

It is, of course, to be conceded that the decisions on the other side are respectable both as to their number and authority. Perhaps the leading ones are *Briggs v. Garrett*, 111 Pa. 404, 2 Atl. 513, 56 Am. Rep. 274; *Morse v. Times Co.*, 124 Iowa, 707, 100 N. W. 867; *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281, 20 L. R. A. (N. S.) 361, 130 Am. St. Rep. 390; *Express Print. Co. v. Copeland*, 64 Tex. 354. And alone among commentators, Judge Cooley seems to favor the minority view. Cooley on Const. Lim. (7th Ed.) 644. See, also, 22 Harvard Law Rev. 446.

The authorities above cited have presented the reasons leading to their conclusions so fully that nothing of value can now be added. We venture the suggestion, however, that

the public interest and welfare, upon a consideration of which alone the minority view seems to be grounded, are quite as likely to be injured and defeated by the public calumination of worthy candidates for public office—usually impossible of seasonable refutation other than by mere denial, and often not even by that—as they are likely to be conserved by the public exposure of the unfitness of those who are unworthy. Indeed, it may perhaps be asserted, as a matter of common experience, that the great majority of the detractory charges which are made or published against candidates during political campaigns are without substantial foundation in fact; and, also, that they are made for personal or partisan purposes, rather than for the enlightenment of the electorate and the purification of their verdict at the polls.

[1] Hence, not only as a matter of private justice, but on considerations of sound public policy as well, the disseminators of such calumnies ought not to be immune against civil responsibility merely because they believe them to be true, and themselves use them in good faith for the edification of the public. It is, of course, not to be understood that this view in any way denies the privilege of fair criticism of and comment upon the character, conduct, or fitness of candidates for public office. But such criticism and comment must be founded on facts, and not on falsehoods, and must be legitimate and reasonable, as pointed out in the case of *Parsons v. Age-Herald Co.*, 181 Ala. 439, 61 South. 345, 350.

[2] It results from the principles above approved that the defendant's special pleas of qualified privilege were subject to the demurrers assigned, and the demurrers were properly sustained.

[3] Under the plea of the general issue, our statute allows the defendant to give in evidence the truth of the words spoken or written, or the circumstances under which they were spoken or written only "in mitigation of damages," and not in bar of the action. Code, § 3746; *Ferdon v. Dickens*, 161 Ala. 181, 49 South. 888. But, in such case, a requested charge, which submits to the jury the question of truth or falsity, ought also to limit that issue to the mitigation of damages, since otherwise it might very well mislead the jury as to the effect of their finding. Under such a plea, the defendant in this case introduced evidence tending to prove the truth of the alleged libel. At plaintiff's request, the trial judge instructed the jury that:

"They could 'consider the question of the truth of the publication only as bearing upon the question of punitive damages, and in that aspect of the case the burden of proof to show the truth of the charge would rest upon the defendants and not upon the plaintiff.'"

It is insisted for the defendant that the truth of the charge has a logical bearing

upon the amount of the actual damage, in that the mental suffering arising from the publication of a charge which is true in fact may not be so great as it would be if the charge were false in fact. Logically, and in spite of the popular adage, "It's the truth that hurts," appellant's proposition is sound enough. Yet, under the peculiar rules which govern the pleading and proof in actions for defamation, we can find no warrant for the consideration of the truth of the publication for the purpose claimed. In the absence of a plea of justification, it is, by the express limitation of the enabling statute, to be considered only in mitigation of damages; and hence it cannot become a factor in the ascertainment of actual damage. This is to say in effect, as affirmed by plaintiff's eleventh given charge, that, so far as actual damages are concerned, the falsity of the publication is in this case, under the pleadings, to be conclusively presumed.

[4, 5] A legal presumption which establishes an element of a plaintiff's case, or of a defendant's defense, in his respective favor, in effect imposes upon the other party the burden of proof with respect thereto. This is especially true where a legal presumption supports an allegation of pleading. In the present case the law presumes that the publication was false, and that presumption continues until it is overcome by evidence showing its truth. Hence the charge to the jury that the burden of proof was upon the defendant to show the truth of the publication in mitigation of damages was practically correct, if not scientifically accurate. In *Hereford v. Combs*, 126 Ala. 369, 378, 28 South. 585, it is said that:

"Notwithstanding the truth of the words spoken may be given in evidence under the general issue by the defendant, the burden of proof is upon him to reasonably satisfy the jury of their truth."

This may be but a dictum, since in that case there was a plea of justification. But the plea of the general issue in fact denies the falsity of the publication as fully as does a special plea of justification, although its effect is limited, and there can be no logical reason for a different rule as to the burden of proof under the two pleas in this respect.

[6] We are not inadvertent to the distinction noted by law writers and judges between the burden of proof, which, strictly speaking, never shifts from the affirmative to the negative, and the "duty of going forward with the evidence," which frequently shifts as a result of prima facie proof or legal presumptions. 5 A. & E. Ency. Law, 40. We only mean to say, in this behalf, that the failure of the trial court to observe this nice distinction in phraseology in dealing with this subject was at least not reversible error. An explanatory charge should have been requested by the defendant if he appre-

hended a prejudicial misunderstanding of this charge by the jury.

[7] Several charges were requested by the defendant upon the predicate of a finding by the jury that the publication was true. The undisputed evidence is that it was untrue in at least three material particulars, viz.: (1) That the affiant Dickert asserted as a fact that he was a cousin of the plaintiff, B. B. Comer; (2) that Comer invited Dickert into Comer's private office; and (3) that Dickert swore to the truth of the alleged affidavit. The charges referred to were therefore abstract in so far as they were predicated upon the truth of the charge as a whole, and their refusal in the form requested cannot be held erroneous. The predicate should have been the truth of any material part or parts of the publication.

[8] The communication being libelous per se (*Comer v. L. & N. R. R. Co.*, 151 Ala. 622, 44 South. 676), the law presumes such general damage to the plaintiff as mental suffering and injury to his reputation, and it necessarily follows that these elements of damage need not be alleged in the complaint nor supported by proof. *Garrison v. Sun*, etc., Ass'n, Ann. Cas. 1914C, 291, 295, note; *Chesley v. Thompson*, 137 Mass. 136. A different rule has been adopted in this state in actions in Code form for assault and battery (*S. S. S. & I. Co. v. Dickinson*, 167 Ala. 211, 52 South. 594); but we cannot extend that rule to actions for libel or slander, although there was formerly some dissension of opinion on the subject, as shown by the opinions filed in *Advertiser Co. v. Jones*, 169 Ala. 196, 211, 670, 53 South. 759.

[9] The award of damages in this behalf is for actual damage, and not for punishment merely. *Comer v. Advertiser Co.*, 172 Ala. 613, 623, 55 South. 195. And while the jury might in their discretion limit the amount of their award, even down to nominal damages (*Advertiser Co. v. Jones*, 169 Ala. 196, 53 South. 759), they cannot be instructed to do so.

[10] Conceding that the evidence in this case shows without dispute that the plaintiff has suffered no pecuniary loss, and no injury to his reputation, there is nothing to show that the publication did not wound his sensibilities and inflict upon him substantial mental suffering. The matter of substantial compensatory damages therefore remained a question for the jury.

[11] Defendant's refused charge 29 is substantially covered by his given charge 11, except that 29 includes, among the facts to be considered in awarding punitive damages, if any should be given, the hypothesized fact that defendant used reasonable diligence to ascertain the truth or falsity of the publication. We discover nothing in the evidence that in any way suggests that the defendant Starks exercised any diligence or did anything at all looking to such an ascertainment, and hence the charge must be pronounced ab-

stract in that respect—for which reason it was properly refused.

[12] Defendant's refused charge 41 is faulty in form, as applied to the evidence, in that it practically leaves to the jury the interpretation of the complaint with respect to the scope of the word "published" as used therein. Defendant's given charge 10 stated clearly and fairly that defendant was not liable at all unless he published, or aided or abetted in the publication of, the article complained of, and covered in proper form the matter relied upon for an acquittance in the refused charge.

[13] The amended second count of the complaint charges defendant's publication of the libel in the Birmingham Ledger, "a newspaper not being then published by defendants or any of them, but by the Ledger Publishing Company." It is urged that, in view of this averment and the failure of any support for it in the evidence, the defendant was entitled to an affirmative instruction in his favor on this count.

We do not regard the averment as being in any way material to the plaintiff's case. However, the proof does show that the Ledger was published by the Ledger Publishing Company, of which J. J. Smith was president; that defendant and his alleged confederates were officials engaged in the employment of the Louisville & Nashville Railroad Company; and that they arranged by contract and for a pecuniary consideration for the publication of the article in the paper. We think that upon these facts it was at least open to the jury to infer that the defendants were not separately or severally the publishers of the Birmingham Ledger. This charge was therefore properly refused.

We find no reversible error with respect to any charges refused to the defendant, and the oral charge of the court and the charges given for the plaintiff are in harmony with the principles stated herein.

It remains only to consider the action of the trial court in refusing to allow the defendant to introduce evidence to show that Dickert's general character and reputation, and also his reputation for truth and honesty, was good before and at the time he signed the affidavit.

The character and standing of one's informant is always relevant to the inquiry whether or not the information received from him was credible, and whether or not it was in fact accepted in good faith as being true. And this is equally true whether the recipient personally knows his informer's character, or whether he knows it only by its reputation in the community.

[14] It is contended by the plaintiff that evidence of Dickert's good character or reputation was not competent in this connection until it was first assailed by the plaintiff; and reference is made, by way of analogy, to the familiar rule that the general character of a witness cannot be thus supported until

assailed by the opposite party. We think, however, that in a case like this, where the direct issue itself is the credibility of the informer and the recipient's bona fide acceptance of the information as true, the defendant ought to be allowed to take the initiative and prove the issue by showing the character or reputation of his informer. Certainly such evidence is relevant, and is not forbidden by considerations either of policy or convenience. We find only one case in which the question has been treated, and there it was held, not only that the defendant in libel may, but also that he must, show the source of his information, and that his informant was "possessed of such character and standing as would command a belief in the truth of his utterances." *Edwards v. San Jose Society*, 99 Cal. 431, 439, 34 Pac. 128, 130 (37 Am. St. Rep. 70, 76).

Without going so far as the California court, we hold that such evidence is competent and admissible.

It is obvious, however, that its value as indicative of the belief of the defendant depends absolutely upon his contemporaneous knowledge of his informant's good character or reputation; and unless such knowledge is made to appear, in connection with the offer of such evidence, the evidence is *prima facie* irrelevant and cannot be received. The evidence in this case offers no hint that the defendant knew of or relied upon the character or reputation of Dickert when he made publication of Dickert's alleged affidavit, and, for this reason, we think there was no error in its rejection.

It is suggested by the defendant that, independently of this ground of admissibility, this character evidence was admissible in corroboration of Dickert's testimony because he had been impeached by evidence of contradictory statements made on other occasions out of court.

[15] It is true that such corroboration is authorized whenever, upon proper predicate laid, by calling the witness' attention thereto, other witnesses have testified to particular statements as having been made by the witness, and which are presently denied or not admitted by him. But the record in this case does not show such an impeachment, but only a contradiction of Dickert's testimony by other witnesses. This does not authorize the introduction of evidence of his good character. *Baucum v. George*, 65 Ala. 259.

Finding no reversible error in the record, the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and DE GRAFFENRIED and GARDNER, JJ., concur.

On Rehearing.

SOMERVILLE, J. We have reviewed the several questions discussed in the foregoing opinion, and the full bench now concurs in the conclusions reached on the original hearing.

In the case of *Comer v. Advertiser Co.*, 172 Ala. 613, 625, 55 South. 195, 199, in distinguishing the case of *Shelton v. Simmons*, 12 Ala. 466, it was said, per Anderson, J.:

"There is a fixed distinction between considering facts, to ascertain the extent of damage sustained, and in considering them for the purpose of reducing and cutting damages sustained. In other words, circumstances attending and prompting the publication should be considered in determining whether or not actual damage was sustained and the extent of same, but not for the purpose of reducing, or mitigating the damage that was actually sustained."

It is insisted that this language is in conflict with our present holding that the truth of the publication can be shown under the general issue only for the purpose of mitigating punitive damages. We do not think that there is any conflict in these cases, for the obvious reason that the truth of the publication was not under consideration in *Comer v. Advertiser Co.*, or in *Shelton v. Simmons*, and the limitation of the use of the truth of the publication to the mitigation of punitive damages—there being no plea of justification—is founded upon a rule of pleading which is the outgrowth of public policy, and not upon the logical irrelevancy of the truth of the publication to the question of actual damage.

Speaking for himself alone, the writer is of the opinion that the case of *Shelton v. Simmons*, supra (wherein it was said that the "absence of malice * * * should be taken in consideration by the jury, in estimating the extent of the injury to the plaintiff's character"), is, as to that statement, utterly opposed to reason, and at variance with all authority, and should be overruled when the occasion arises. It is not necessary to do so now.

With respect to the burden of proof as to the truth of the publication, we can conceive of no reason, and we know of no authority, for holding that the presumption of its falsity arises only upon a plea of justification. We think it arises, and must be overcome by the defendant, in all cases, whatever be the nature of the defense.

It is insisted that our present ruling that actual damage, as presumed by law, may be recovered for under the Code form of complaint, without being specially claimed therein, is in conflict with the decision of this court in *Advertiser Co. v. Jones*, 169 Ala. 196, 211, 53 South. 759. Counsel is in error as to this. It clearly appears that only five justices sat in that case, and that three of these upon rehearing did not concur in the conclusion upon this question as stated in the original opinion. Counsel has doubtless overlooked the fact that neither Justice SIMPSON, nor Justice SAYRE, participated in that decision.

The application will be overruled. All the Justices concur.

(190 Ala. 239)

ALABAMA GREAT SOUTHERN R. CO. v. RUSSEY. (No. 911.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. TRIAL \S 251—INSTRUCTIONS—APPLICABILITY TO ISSUES.

Where defendant's pleas of contributory negligence were applicable only to the simple negligence count of the complaint, which was not submitted to the jury, there was no error in refusing his requests to charge on that subject.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. \S 587-596; Dec. Dig. \S 251.]

2. RAILROADS \S 348—CROSSING ACCIDENT—WANTONNESS—EVIDENCE.

In an action for injuries at a railroad crossing, evidence held to warrant a finding that defendant's servant in charge of the train was guilty of wantonness.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. \S 1138-1150; Dec. Dig. \S 348.]

Appeal from City Court of Birmingham; J. H. Miller, Judge.

Action by H. C. Russey against the Alabama Great Southern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

A. G. & E. D. Smith, of Birmingham, for appellant. Black & Sadler, of Birmingham, for appellee.

ANDERSON, C. J. [1] All of the appellant's assignments of error, except as to the refusal of the general affirmative charge, relate to instructions as to the plaintiff's contributory negligence. The pleas setting that up did not go to the wanton count, No. 2, but were properly treated as applicable only to count 1, the simple negligence count, and, as said count 1 was eliminated and was not submitted to the jury, there could be no reversible error upon the trial court's refusal to give the defendant's requested charges 19, 21, and 41.

[2] The evidence shows that the plaintiff was injured in the daytime at a public road crossing by the defendant's train running into his vehicle while he was crossing the track. The plaintiff's evidence showed that this was a very popular crossing, and that as many as 300 vehicles or persons crossed this point daily, that the defendant's freight train was going at a rapid rate of speed, 30 to 35 miles per hour, and also that the engineer gave no signal upon approaching the said crossing. There was also evidence showing that the engineer had been on the road about five years, and he was therefore reasonably familiar with the nature and use of the crossing in question. If this was true, the jury could have inferred wanton misconduct upon the part of the servant in charge of the engine, and the trial court properly refused the general charge suggested by the defendant. It may be true that the defendant offered positive proof as to giving signals, but this was denied by the plaintiff and his witnesses, and, while their evidence may have

been negative, the jury could well infer that they were in a position to have heard the signals if given, and it was therefore a question for the jury as to whether or not the defendant's servant in charge of the train was guilty of wantonness.

The judgment of the city court is affirmed. Affirmed.

SOMERVILLE, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 334)

SOUTHERN INDEMNITY ASS'N v. RIDGWAY. (No. 883.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. INSURANCE \S 634—ACCIDENT INSURANCE—ACTIONS—PLEADING.

In an action on an accident policy, it is sufficient if the complaint set out that part of the policy sued on, showing the consideration and the promise of which a breach was alleged, and it be generally averred that plaintiff complied with all the provisions of the contract; it not being necessary to set out all of the conditions precedent to recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1593, 1596, 1598, 1603-1606, 1608; Dec. Dig. \S 634.]

2. APPEAL AND ERROR \S 917—REVIEW—PRESUMPTIONS.

Where the record did not affirmatively show that the court had disposed of defendant's demurrer before entering a default judgment, it will be presumed on appeal that the demurrer was waived and no ruling was insisted upon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. \S 917.]

Appeal from Circuit Court, Walker County; James J. Curtis, Judge.

Action by Dock Ridgway against the Southern Indemnity Association on an insurance policy. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals. Affirmed.

The following is a copy of the complaint and demurrers:

1. Plaintiff claims of the defendant \$3,000 as damages, for the breach of an agreement entered into by it, on, to wit, the 1st day of May, 1910, in substance as follows: "In consideration of the application for membership, which is a part of this contract, the payment of the membership fee before the delivery of this policy, and monthly dues without notice on or before the first day of each month, in advance, beginning with the month of June, 1910.

"Mr. Ridgway, age 57, by occupation miner under grade B, class 4, and now residing at Drifton, state of Alabama, is hereby accepted as a member of this association, and is entitled to benefits during the time this contract is maintained in continuous force and effect, under the following terms, subject to conditions on back hereof.

"Accident. First. Thirty dollars per month or at that rate for any proportionate part of a month, should member receive personal bodily injuries while this policy is in force, of which there shall be visible signs effected solely through external, violent and accidental means, by reason of which and independent of any other cause he shall be immediately, wholly and continuous-

ly disabled so as to cause a total loss of time, and prevent him during such disability from attending to or performing any labor or business. The total period to be paid for during any one injury shall not exceed one year. Rate of indemnity shall in no case exceed three-fourths the average earnings or income of member."

And plaintiff alleges that he had complied with all the conditions and provisions of said agreement on his part, and that, on, to wit, the 4th day of April, 1911, he received personal bodily injuries while the said policy was in force, of which injuries there were visible signs, effected solely through external, violent, and accidental means, by reason of which, and independent of any other causes, he was immediately wholly and continuously disabled so as to cause a total loss of time, and prevent him during such disability from attending to or performing any labor or business. And said disability so continued for a period of one year from receiving said injuries.

And plaintiff alleges that, although he had complied with all the provisions of said contract on his part, as aforesaid, the defendant has failed to pay or cause to be paid to plaintiff the said amount so specified or agreed to be paid in case of such accident, or any part thereof, to the damage of the plaintiff as aforesaid, hence this suit.

2. Plaintiff claims of the defendant \$3,000 due on a policy whereby the defendant, on, to wit, the 1st day of May, 1910, insured for the term of ten years, or so long as the plaintiff complied with the terms of payment on said policy, the plaintiff from injury from violent and accidental means by which he was totally disabled, and that, on, to wit, the 4th day of April, 1911, plaintiff was so injured by such violent accidental means, and was wholly and continuously disabled for a term of one year, so as to cause a total loss of time, and prevent him from attending to or performing any labor or business. And of this the defendant had notice. Said policy is the property of the plaintiff.

Demurrers.

(1) Said count fails to set out the policy of insurance sued on.

(2) Said count fails to set out the policy of insurance sued on or a substantial copy thereof.

(3) Said count purports to set out a portion of the policy sued on, but fails to set out the entire policy.

(4) Said count fails to allege that the policy sued on contained no other stipulations or conditions than those set forth in said count.

(5) There are no facts set forth in said count showing how or in what manner the plaintiff sustained the injuries complained of.

(6) There are no allegations in said count which show the facts constituting the external and violent means which caused the plaintiff's injuries.

(7) Said count states the mere conclusion of the pleader.

This defendant demurs to the second count of the complaint, and for grounds of demurrer interposes the same grounds, separately and severally, as hereinabove interposed to the first count of the complaint.

Judgment Entry.

Came the parties by their attorneys. Defendant files its demurrers to counts 1 and 2 of the complaint. Said demurrers being considered by the court, it is the opinion of the court that the same are not well taken and are overruled.

October 31, 1913. The defendant having appeared and demurred to complaint, and this being the day set for trial, and cause being reached in its order, and defendant not appearing by agent or counsel, but makes default, it is therefore considered and adjudged by the court

that the plaintiff recover of the defendant the damages in this behalf expended; but, inasmuch as such damages are unknown to the court, let the plaintiff submit his proof, that the court may inquire of and assess the damages.

Came the plaintiff by attorney and submitted his proof upon the inquiry of damages in this case. And thereupon came a jury of good and lawful men, to wit, David M. Hester, and 11 others, who, having been impaneled and duly sworn, according to law, on their oaths do say they assess the plaintiff's damages at the sum of \$360, David M. Hester, Foreman. And the same being considered by the court, it is ordered and adjudged that the plaintiff have and recover of the defendant the sum of \$360, the damages assessed as aforesaid, together with the costs of this case, for which execution may issue.

Coleman & Coleman, of Birmingham, for appellant. Ray & Cooner, of Jasper, for appellee.

SAYRE, J. [1] The argument, in substance, against count 1 of the complaint, is that, having set out a part of the policy of insurance sued on, the entire policy should have been set out in verbiis, for, non constat, the part not appearing contained conditions precedent the performance of which by plaintiff should have been alleged. It was enough to set out the consideration and that part of the promise of which a breach was alleged, along with the general averment that plaintiff had complied with all the provisions of the contract on his part, as did the count in this case. *Brooklyn Life Ins. Co. v. Bledsoe*, 52 Ala. 538. There is nothing to the contrary in *Pennsylvania Casualty Co. v. Perdue*, 164 Ala. 508, 51 South. 352. There was in that case no question about the performance by plaintiff of a condition precedent, though in substance the rule of *Brooklyn Life Ins. Co. v. Bledsoe* was repeated—unnecessarily perhaps. The question there at issue was whether the complaint showed a loss, or the happening of the event on which, within the terms and meaning of the policy, the liability of the insured could attach in any event, as of course it should have done. As to that, the complaint alleged only that defendant was "liable." This was held insufficient, the language of the opinion intending only that plaintiff should have alleged facts showing a liability according to the terms of the promise declared upon. In the case now before us for decision, the demurrer was properly overruled.

[2] But appellant, taking precaution against an adverse ruling here on its demurrer, further contends in the alternative that the record falls to show a ruling in the court below on that point; that it was entitled to have its tendered issue of law decided; and that, so long as that issue remained undecided, the trial court could not without reversible error pass a judgment by default. That the court did in fact rule upon the demurrer is certain. Whether its ruling is shown by the record in such way as to admit of review in this court may be doubtful under

previous decisions of this court. Appellant cites a line of cases on that subject tending, however correctly, to the conclusion that recitals of the court's action on demurrer, such as appear in the transcript before us, are to be treated as mere memoranda by the clerk, not reviewable on appeal. Conceding for the argument only that the demurrer remained undisposed of, it must result that the recitals of the judgment entry purporting to show the ruling on demurrer be wholly eliminated in the consideration of the assignment of error now in hand. In further consequence, we must assume that the court below failed to act upon appellant's demurrer for the reason that it was not insisted upon, and so it must be held on appeal that the demurrer was waived, withdrawn, or abandoned. The cases so hold. *Walker v. Cuthbert*, 10 Ala. 213; *Hart v. Sharpton*, 124 Ala. 638, 27 South. 450; *Brandon v. Leeds State Bank*, 65 South. 341.

There is no error in the record.

Affirmed.

MCCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 449)

GAY et al. v. BIRMINGHAM, MONTGOMERY & GULF POWER CO. (No. 563.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 21, 1915.)

WILLS ~~616~~—POWER TO SELL LAND—PAYMENT OF DEBTS.

A will giving testator's wife all his property, real and personal, after having paid all his debts, to have during her life, then to be equally divided between the children, and authorizing the wife to sell any species of property without order of the court, but the proceeds of such sale to be the property of the children after her death, empowers the wife to sell real or personal property for the payment of debts of the estate; and hence a grantee of the wife takes the fee as against the children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. ~~616~~.]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Chancellor.

Bill by the Birmingham, Montgomery & Gulf Power Company against Ida Gay and others, to quiet title to certain lands. Decree for complainant, and respondents appeal. Affirmed.

The last will and testament of B. S. Smith is as follows (omitting the introductory part and that portion quoted in the opinion):

And at any time if the said Elizabeth Smith should think it prudent to give off my effects to the children, she is empowered to do so, but the property then given them by her must first be valued by three persons who are disinterested, and the child must be required to give a receipt to the amount of the value thereof, and on the division final, to be taken out as having received so much on her or his distributive share of the estate, and the minor children must not be charged anything or made to pay anything for schooling and a handsome

support during the said Elizabeth Smith's natural life; and if Elizabeth Smith should die before my children come to the years of maturity, Bartow and Lee Smith are empowered to have a division of my estate which must be done by a committee of five disinterested and prudent men without any order of court. Provided, further that if said Elizabeth Smith should marry, she shall be entitled to a child's part of my effects, but at her death said property must be restored back to my children, and if the said Elizabeth Smith should marry, then my estate must be immediately divided, which must be done by a committee consisting of five men as above mentioned; provided, further that the said Elizabeth Smith is hereby empowered to transact all of my unsettled business and carry out this last will of mine, and shall not be required to give bond nor obtain order from the court in the carrying out of these my orders and wishes, relative to my estate. [Signed] B. S. Smith.

W. A. Gunter and H. S. Houghton, both of Montgomery, for appellants. Denson & Sons, of Opelika, James W. Strother and Bridges & Oliver, all of Dadeville, and Thomas W. Martin, of Birmingham, for appellee.

ANDERSON, C. J. The will of B. S. Smith, deceased, which will be set out by the reporter, contained the following quoted provisions:

"I do hereby bequeath unto my beloved wife Elizabeth Smith all of my property, both real and personal of every nature which I now or may have at my death, after having paid all of my just debts, to have during her life then to be equally divided between my children and that she is hereby empowered to sell, or dispose of any part or species of my property either publicly or privately, without any order from court, that she may at any time think wise and prudent to do so, but the proceeds of said sale must be the property of my children at or after her death."

We think that it was the manifest purpose of the testator to provide for the payment of his debts out of his estate, and that his wife, the executrix, was not only given full power to do so, but was, in effect, required to do so, and that she was given the power to sell or dispose of any "part or species" of his property in order to settle same. It may be true that, after giving his wife the power to sell or dispose of his property, it was provided that the proceeds of the sale should remain the property of his children after the death of his wife; yet it is evident that the testator had in mind only the proceeds for property sold which came into the hands of his wife after the payment of his debts. To hold that the wife could not sell or dispose of any property for the payment of debts, and that she could only do so for proceeds which she should hold in trust for the remaindermen, would in effect preclude her from selling cotton or any other personal property for the purpose of paying the debts of the estate. If the power to sell or dispose of the property is confined to a sale only for proceeds which must be held in trust for the children, then we must hold that she could not sell or dispose of any of the property to pay the debts of the estate, notwithstanding the payment

of his debts was the primary object of the testator, as shown by his will. There is no room for holding that the wife could sell or dispose of the personal property under the terms of the will to pay debts but not the real estate, as the power to sell or dispose of relates to "any part or species" of the property. If she could sell any she could sell all, and, if she could not sell the land for the purpose of paying the debts of the testator, then for the same reason she could not sell the personal property for said purpose. It would be a most narrow and impractical construction of the will to hold that, although the testator provided for the payment of his debts before making any disposition of his property, the executrix could not sell or dispose of "any part or species" of his property for carrying out the primary requirement of the will, but must, under the power to sell, do so only for something that she must hold in trust for the benefit of the children after her death. We therefore hold that the wife had the power, under the will, to sell or dispose of the real estate or personal property in satisfaction of debts against the estate, and that it was the manifest intention of the testator to entail or create a trust only in the property or the proceeds thereof, other than what was used in discharging the debts against his estate.

As to whether the statute does or does not require the exhaustion of the personal property before the lands can be sold for the payment of debts matters not, as we are not dealing with the statute which has no application to sales authorized by the will; and, as above stated, we think that the will in question, when considered with a view of arriving at the real intent of the testator, gave the wife the authority to sell or dispose of any of the property for the payment of debts and provided a remainder or trust only as to such property, or the proceeds thereof, as was not sold or used for this purpose. We may therefore concede, but which is unnecessary to decide, that the wife did not take a fee, and that all property which was not disposed of, as provided by the will, or which may not be hereafter disposed of, or the proceeds of same not used for the payment of the debts or other purposes covered by the will, will, upon the death of the wife, go to the children as remaindermen, for the reason that we base this holding upon the power given under the will, regardless of the nature or character of the estate given the wife. As the wife was given the power, under the will, to sell or dispose of any of the property for the payment of the debts of the testator, we hold that the conveyance of the land in question to John W. Pace gave him the fee, and that the children of Smith, who are the complainants under the cross-bill, have no title to or interest in the land; and, as the complainant in the original bill holds under a chain of title connecting it with the

said John W. Pace, it is the owner of the land.

This holding is not in conflict with the recent case of *Nabors v. Woolsey*, 174 Ala. 289, 56 South. 533. There the donee of the life estate was given the power to sell the land solely for reinvestment, and the bill charged that she breached the trust by selling it in payment of her husband's debts. Mrs. Nabors got the property under the will of her father, and did not, of course, sell it for reinvestment when she conveyed it to Woolsey in payment of a debt of her husband. Here the will gave the wife the general power to sell and dispose of the property, "any part or species," whenever she deemed it wise and prudent to do so, and did not restrict her doing so only for reinvestment. True, the will provided that the proceeds must be the property of the children, but it, like any other property or the proceeds thereof, was subject to the payment of the testator's debts, as the wife nor the children got any interest in any of the property, except as was subject to the debts of the testator, and he did not intend to entail or fasten a trust upon the proceeds of the sale of all of his property, so as to defeat the payment of his debts after previously directing that his debts should first be paid before making any disposition of his property.

Counsel for the appellant lays great stress upon the case of *Russell v. Russell*, 36 N. Y. 581, 93 Am. Dec. 540, as forbidding the sale for the payment of the debts of the testator. This case does hold that the executrix and life tenant did not, under the power there given, have the right to convey the land to one of the legatees in payment of a debt due him by the testator, but the entire will is not set out in the report of the case, and it may be that it expressly required the payment of the debts out of the personal property. Here the testator made no provision for the payment of the debts with the personal property, merely required that the same be paid, and gave the wife the general power to sell or dispose of all parts or species of his property, and which, we think, gave her the power to sell the land in payment of the debts, if she deemed it wise and proper to do so. On the other hand, if there was no such direction as we suggest in the *Russell* will, and it did not direct the payment of the debts out of the personal property, but was identical with the one in hand, we would not be inclined to adopt the majority holding in said case, as it places too narrow a construction upon the power to sell, in view of the fact that the debts had to be paid before any one became entitled to the property.

In the case of *Stocker v. Foster*, 178 Mass. 591, 60 N. E. 407, the property left to the life tenant was authorized to be sold by him whenever he deemed it conducive to his comfort. He did not sell the property in order to

use the proceeds for his support and comfort, but gave it to the mother of his second wife in order that it would go to his children by a second marriage, and the court properly held that such a performance was an abuse of the power and could not defeat the remaindermen.

The case of *Woodward v. Jewell*, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478, is not in point, and has little or no bearing upon the question under consideration.

The decree of the chancery court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(190 Ala. 552)

KYLE v. HALEY et al. (No. 891.)

(Supreme Court of Alabama. Dec. 17, 1914.

Rehearing Denied Jan. 21, 1915.)

MORTGAGES \Leftrightarrow 38—ABSOLUTE DEED AS MORTGAGE—EVIDENCE.

In a suit to declare a deed absolute on its face to be a mortgage, complainant must satisfy the court by a clear preponderance of the evidence that a mortgage was intended and clearly understood by the grantee as well as by the grantor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 108-111; Dec. Dig. \Leftrightarrow 38.]

Appeal from Chancery Court, Marion County; W. H. Simpson, Chancellor.

Suit by J. E. Kyle against W. W. Haley and others. From a decree denying relief, complainant appeals. Affirmed.

Etheridge & Lamar, of Bessemer, for appellant. E. B. & K. V. Fite and C. E. Mitchell, all of Hamilton, for appellees.

DE GRAFFENRIED, J. The bill in this case was filed for the purpose of having a conveyance which is absolute on its face declared to be a mortgage and to redeem. In a case like this—where the instrument is absolute in form, and not in form conditional—to obtain relief the complainant must satisfy the court by at least a clear preponderance of the evidence that a mortgage was intended and clearly understood by the grantee as well as by the grantor. *Morton v. Allen*, 180 Ala. 279, 60 South. 866; *Irwin v. Coleman*, 173 Ala. 175, 55 South. 492; *Reeves v. Abercrombie*, 108 Ala. 535, 19 South. 41. "This severe rule does not apply in cases where the writings express a conditional sale, or where it is admitted that there was a contemporaneous agreement different from that expressed in the instrument." *Morton v. Allen*, supra; *Irwin v. Coleman*, supra; *Reeves v. Abercrombie*, supra.

It would be useless for us, in this case, to give the reasons for the above rules. They are well stated in the cases above cited. It would also serve no good purpose for us to engage in a discussion of the evidence in this

case. It has been carefully examined, and in our opinion the chancellor properly held that the complainant was not entitled to the relief prayed for in his bill of complaint.

The decree of the court below is therefore affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 536)

PHILLIPS v. JACKSON. (No. 839.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR §500 — QUESTIONS PRESENTED FOR REVIEW—RECORD.

Where the bill of exceptions showed the offer of an instrument in evidence, defendant's objection and request for leave to state the grounds later and a subsequent statement by defendant of the grounds of his objection, but nothing more, the propriety of the admission of the instrument cannot be reviewed; the bill showing no ruling or any exception to the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 500.]

2. APPEAL AND ERROR §671 — REVIEW — QUESTIONS REVIEWABLE.

Where evidence besides that contained in the bill of exceptions might have been heard below, the question whether the judgment was contrary to the evidence cannot be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.]

3. APPEAL AND ERROR §260 — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

The admission of illegal evidence cannot be reviewed, though assigned as a ground for motion for new trial, unless an exception was seasonably reserved at trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1503-1515; Dec. Dig. § 260.]

Appeal from Circuit Court, Jefferson County; C. D. Smith, Judge.

Ejectment by Henry Jackson, as guardian, against James L. Phillips. Judgment for plaintiff, and defendant appeals. Affirmed.

The case was tried by the court without a jury. There was judgment for plaintiff with a special finding of facts with respect to the instrument of title referred to in the opinion. The bill of exceptions contains the following recitals (after the instrument was identified):

The plaintiff then offered the said instrument in evidence. Whereupon Mr. A., for defendant, objected to the admission of the said instrument in evidence, asking and obtaining leave from the court to state the grounds of his said objection later in the trial, and the said grounds of objection as later in the trial stated by counsel for defendant are herein below set out in this bill of exceptions. The ruling of the court on said objection was reserved until the grounds were stated. * * * Plaintiff rests.

The defendant then gave the following grounds for objections to the introduction of

the written instrument signed by Emma Phillips and John L. Phillips, etc. (setting out objection):

Defendant's Evidence. * * * The bill of exceptions does not purport to set out all of the evidence.

Allen, Fisk & Townsend, of Birmingham, for appellant. J. W. Chamblee and Roscoe Chamblee, both of Birmingham, for appellee.

SOMERVILLE, J. The only question argued in brief of counsel, and, indeed, the only question in the case, is upon the admissibility of a certain written instrument as a muniment of title in favor of the plaintiff.

[1] Whatever may be the nature and effect of this writing, the bill of exceptions does not show any ruling nor any exception taken in the court below with respect to its introduction and use as evidence. Hence the first four assignments of error are without the necessary foundation in the record. *Stuart v. Mitchum*, 135 Ala. 546, 551, 33 South. 670; *L. & N. R. R. Co. v. Binion*, 107 Ala. 645, 18 South. 75.

[2, 3] Whether or not the judgment was rendered contrary to the law or the evidence, we could not determine without all the evidence before us; and, consistently with the recitals of the bill, there may have been other evidence before the court than what is shown by the bill. Nor, as to the other ground, can a motion for new trial, because of illegal evidence admitted, secure a review of its admission in the absence of an exception seasonably reserved during the trial. *Tobias v. Treist*, 103 Ala. 664, 15 South. 914.

Moreover, the assignment of error is not argued by counsel and must be treated as waived.

Upon these considerations, we are constrained to an affirmance of the judgment appealed from.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 308)

WODDY v. BERRY. (No. 564.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. PLEADING §80—PLEA—COUNTS.

Where a plea is addressed to a complaint as a whole which is in several counts, it may be good as to all the counts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 162, 181-183; Dec. Dig. § 80.]

2. VENUE §7—PERSONAL ACTIONS—TORTS—PLACE OF COMMISSION.

Code 1907, § 6110, provides that all actions on contracts except as may be otherwise provided must be brought in the county in which the defendant or one of them resides if the defendant has a permanent residence within the state, and all other personal actions, if the defendant or one of the defendants has a permanent residence within the state, may be

brought in the county of such residence or in the county in which the act or omission complained of may have been done or occurred. *Held*, that where a complaint was in three counts, one *ex delicto* for deceit or fraud as to the sale of certain land, and the second and third *ex contractu* for breaches of the same contract of sale, a plea in abatement that defendant was a resident of a county other than that in which the suit was brought was not good as to the cause of action for deceit, and was therefore demurrable.

[Ed. Note.—For other cases, see *Venue*, Cent. Dig. §§ 13-16; Dec. Dig. § 7.]

Appeal from Circuit Court, Coosa County; A. H. Alston, Judge.

Action by S. H. Woody against E. H. Berry. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Riddle, Ellis & Riddle, of Goodwater, for appellant. James W. Strother, of Dadeville, for appellee.

MAYFIELD, J. Appellant sued appellee in Coosa county. The original complaint contained three counts. The first was *ex delicto*, for deceit or fraud as to sale of land; and the second and third were each *ex contractu*, as for breaches of the same contract of sale. The defendant pleaded in abatement, to the complaint as a whole, that he was a resident of Tallapoosa county and not of Coosa county. The plaintiff demurred to the plea, and the court overruled the demurrer. The plaintiff then applied for leave to amend his complaint; which leave being granted, he added several counts *ex delicto*, relating to the same transaction as to sale of lands. On motion of defendant, the court struck from the complaint those counts added by amendment, on the ground that they amounted to a departure from the original complaint. The plaintiff then filed special replications to the plea in abatement, to which the defendant demurred, and the demurrer was sustained. Issue being joined on the plea in abatement, there resulted a verdict for the defendant on that issue, and judgment was rendered accordingly. From that judgment plaintiff prosecutes this appeal.

[1] The trial court evidently treated each count of the original complaint as being *ex contractu*. If this were true, the rulings of the court could be justified. We are of the opinion, however, that count 1 was not *ex contractu*, but was *ex delicto*, for deceit or fraud. If so, the plea was no answer to this count, and the demurrer to the plea should have been sustained so far as it attempted to answer the first count. The plea was addressed to the complaint as a whole, and not to each count. It therefore had to answer every count, to be good.

[2] Our venue statute, so far as is pertinent to this appeal, is as follows (Code, § 6110):

"All actions on contracts, except as may be otherwise provided, must be brought in the

county in which the defendant, or one of the defendants, resides, if such defendant has within the state a permanent residence; all other personal actions, if the defendant, or one of the defendants, has within the state a permanent residence, may be brought in the county of such residence, or in the county in which the act or omission complained of may have been done, or may have occurred. * * *

This court held, in the case of *Hoge v. Herzberg*, 141 Ala. 439, 37 South. 591, that an action of detinue could be brought either in the county of the defendant's residence or in the county where the wrong was done.

A case very much like the one at bar was *Karthauss' Case*, 140 Ala. 433, 37 South. 268, wherein this court, speaking through Dowdell, J., said:

"Generally speaking, where a complaint contains two or more counts, setting forth different causes of action, each count is regarded as a separate complaint. Such was the case here. The summons brought the defendant into court to answer the entire complaint and, of course, as much to answer the first count as the second. The court had jurisdiction of the subject-matter of the first count and by the summons acquired jurisdiction of the defendant. The plea in abatement should have been limited to the quashing of the summons as to the second count, of which count the court was without jurisdiction."

We do not mean to hold that each of the counts was so good as not to be subject to demurrer. That question is not before us. They did, however, state a cause of action. We do not mean to hold, either, that counts 2 and 3 can be joined with count 1, in a case like this, where the court has jurisdiction as to one count but not as to the other. The statutes as to amendments and venue must be construed together, so as to give effect to both if possible.

For the error pointed out, the judgment must be reversed.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(108 Miss. 784)

J. J. NEWMAN LUMBER CO. v. LUCAS. (Supreme Court of Mississippi. Feb. 22, 1915.)

APPEAL AND ERROR 564—RECORD—STRIKING TRANSCRIPT.

Under Laws 1910, c. 111, § 1, par. D, providing that if notice for transcript is given by appellant to the stenographer within 30 days after the term the transcript shall not be stricken from the record by the Supreme Court for any reason unless it is shown that the notes were incorrect in some material particular, a transcript which was filed by the stenographer after the expiration of the time allowed, though notice was duly given, and which appellee had no opportunity to examine for errors, as provided by paragraph A of the same act, cannot be stricken without a showing of material error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2501-2506, 2555-2559; Dec. Dig. § 564.]

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Action by Joseph Lucas, by his next friend, against the J. J. Newman Lumber Company. Judgment for plaintiff, and defendant appeals. Plaintiff's motion to strike the stenographer's transcript from the record overruled.

See, also, 67 South. 216.

Sullivan & Conner, of Hattiesburg, for the motion. S. E. Travis, of Hattiesburg, opposed.

SMITH, C. J. This cause was recently before this court upon a motion to docket and dismiss, which motion was overruled. 67 South. 216. It now comes on to be heard on a motion to strike the stenographer's transcript of the evidence from the record. The grounds of the motion are that this transcript was filed in the court below after the expiration of the time within which the stenographer was required so to do, and that appellee's counsel were given no opportunity to examine it and obtain the correction of any errors that may exist therein, as provided by paragraph A, c. 111, Laws of 1910. Paragraph D of this statute is as follows:

"Provided notice as above is given to the stenographer by the appellant or his counsel within thirty days after the conclusion of the term of court, no stenographer's transcript of his notes shall be stricken from the record by the Supreme Court, for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record by operation of law," etc.

The notice herein referred to was duly given the stenographer, and this motion is not accompanied by any showing that the "notes are incorrect in some material particular." The motion therefore must be, and is, overruled. Mississippi Central R. Co. v. Chambers, 60 South. 562.

Motion overruled.

(108 Miss. 789)

SOWELL et al. v. SOWELL et al.
(No. 16716.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

DEEDS ⇐208—DELIVERY—EVIDENCE.

In a suit for partition, where defendants claimed to be sole owners of the property under a deed to them, evidence held to show that the deed had been delivered by the grantor prior to his death.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 625-632; Dec. Dig. ⇐208.]

Appeal from Chancery Court, Panola County; D. M. Kimbrough, Chancellor.

Suit by Jno. T. Sowell and others against Matt T. Sowell and others for partition. Decree for partition, and defendants appeal. Reversed, and bill dismissed.

L. F. Rainwater, of Sardis, for appellants. Shands & Montgomery, of Sardis, for appellees.

COOK, J. J. W. Sowell, on the 5th day of March, 1907, wrote and signed with his own hand a deed conveying to appellants all of the real estate owned by him. He acknowledged this deed on the same day before a notary public. On March 20, 1907, he wrote and signed his last will and testament. His will disposes of his personal property, and makes no mention of his real estate. Mr. Sowell died on the 15th day of August, 1909. After the death of J. W. Sowell, appellees, certain of his heirs at law, filed a bill in the chancery court to partition the land described in the deed above mentioned between them and appellants, the grantees in the deed, and also heirs at law of the deceased, J. W. Sowell. Without following the procedure adopted in the trial of the issue, it is only necessary to say that appellants answered the bill and denied that appellees had any right, title, or interest in the land, and claiming to be the sole owners thereof by virtue of the deed. Much testimony was taken on both sides, and the chancellor decided in favor of appellees.

The sole point in the case is: Was the deed delivered to the grantees named therein by the grantor?

The writing, signing, and acknowledgment of the deed is not questioned, nor is it questionable under the proof in the record. The deed was in the possession of appellants, and was produced by them and offered in evidence. Appellees undertook to show that the deed was not delivered during the lifetime of the grantor; that he retained possession of same after he had executed it; and that it was found in his trunk, with his will, after his death. No witness was produced by appellees to testify that he had ever seen the deed before it was produced at the trial. The line of proof made by appellees went to show that some of the grantees had stated that the will and deed were found in the trunk of the deceased after his death, and they did not know that either was in existence until after they were found. All of the appellants to whom these admissions were attributed, except one, denied that they had made such statements. In the outset it will be remembered that the grantees could not testify about the delivery of the deed, they being disqualified as witnesses by section 1917, Code of 1906.

Mr. Sowell died on Sunday. A witness, a brother-in-law of the deceased, and an uncle of appellants, spent Friday night and Saturday at the home of the deceased. This witness and the deceased were intimate, and frequently discussed business and family affairs. They had visited each other constantly during the space of 40 years. During the day preceding his death, Mr. Sowell seemed to be in good health, though advanced in years. Mr. Sowell talked with this witness, telling him how he had disposed of his worldly goods. He told him about executing the

deed in question, and also told him that he had delivered it to his two daughters, and they had it and his will. Mrs. Sowell, the wife of one of the appellants, also testified that the deed was in the possession of the two daughters of deceased before the death of the grantor.

We have the deed itself. It is acknowledged before a proper officer. The grantor acknowledged that he delivered the deeds to the grantees therein named. The deed is in the possession of the grantees. The grantor stated on the day next preceding his death that he had delivered the deed. Also, we have the testimony of another witness, who testified that the deed was in the possession of two of the grantees and was kept in their trunk, not the trunk of the deceased. There was other evidence strongly corroborative of the positive evidence that the deed was delivered by the grantor to the grantees.

Opposed to this was the secondary evidence—hearsay evidence—admissible alone because it was the admissions of some of the grantees against their interests.

Mr. Sowell, the deceased, had been married twice. Appellants were children of the last marriage, and lived with him at his home, composing his family. The complainants were children and grandchildren of the first marriage.

In connection with the other evidence, we think it is clear from the will that the deceased thought he had made effectual disposal of his land, and that the grantees in the deed would remain on the home place and use the farm property in common, but would forfeit any interest therein should they leave the home. In fact, the will supports the theory that the deed was made effectual by delivery.

We can find no evidence inconsistent with the delivery of the deed. The deed may have been in the trunk of the grantor at the time of his death, and this alone would not, we think, negative the delivery of the deed. It would be evidential—a circumstance tending to show that the grantor was still in possession of the deed.

It will be noted that no witness claims to know that the deed was found in the deceased grantor's trunk. The evidence offered by appellees as to the whereabouts of the deed does not contradict Mrs. Sowell's testimony. This evidence merely shows that two of the grantees made admissions which were inconsistent with the positive testimony of witnesses for appellants.

May we not say that common knowledge leads to the conclusion that trunks in a household of this kind are not property of such exclusive character as to forbid the thought that a member of the household could deposit papers therein without the knowledge or consent of the person who claimed the trunk?

We believe there is no evidence which over-

throws the presumption of delivery, which follows the acknowledgment and the possession of the deed. The positive evidence is not materially shaken by the alleged admissions against interest.

There is some suggestion of a suspicion that the deed was not delivered, but we cannot consent to overthrowing the undoubted purpose of the grantor by secondary proof of this character.

It is so easy for interested witnesses to misconstrue the statements of others. It is difficult at all times to accurately report past conversations. The witness usually puts his own construction on the words of others, and, when afterwards he is called on to give the words employed by another, he merely states his recollection and understanding of what the other actually said.

In this case there is evidence warranting a suspicion that the deed was not delivered to the grantees, but this evidence does not rise to the dignity of proof. Suspicion cannot overthrow the clear and positive proof of a delivery.

Reversed, and bill dismissed.

(106 Miss. 793)

PEGRAM v. WEST HATCHIE AND OWL CREEK DRAINAGE DIST.

(No. 17927.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

COURTS \S 42 — CREATION—CONSTITUTIONAL PROVISIONS—"INFERIOR COURT."

Laws 1912, c. 197, provides that upon the filing of a petition for the organization of a drainage district, and its presentation to the chancellor, three drainage commissioners for each county in which the district lies shall be appointed. The commissioners are given jurisdiction over the organization of all drainage districts within their county, and the construction and maintenance of artificial or natural drains. Section 6 provides that the county board of drainage commissioners shall be a court of record, and may issue necessary process, compel attendance of witnesses, and do all things necessary to carry out the provisions of that act. Section 60 authorizes appeals to the chancery court. *Held* not a violation of Const. 1890, \S 144, vesting the judicial power of the state in the Supreme Court and such other courts as are provided for in the Constitution, or of section 172, providing that the Legislature shall from time to time establish such other inferior courts as may be necessary, since, though the board is given some judicial powers, most of its duties and functions are administrative, and the Legislature does not make it a court in the strict definition of the term, but merely declares it a court of record so as to make its records those of courts of record, and, moreover, if the board is a court of record because so denominated in the act, its establishment is expressly authorized by section 172, since, if it is a court, it is an "inferior court," as it has only limited jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. \S 163-170, 181-183; Dec. Dig. \S 42.

For other definitions, see Words and Phrases, First and Second Series, Inferior Courts.]

Appeal from Chancery Court, Tippah County; J. G. McGowen, Chancellor.

Suit by S. W. Pegram against the West Hatchie and Owl Creek Drainage District. Decree for defendant, and plaintiff appeals. Affirmed.

T. E. Pegram, of Ripley, for appellant. Spight & Street, of Ripley, for appellee.

REED, J. Appellant, a citizen and taxpayer of Tippah county, filed his bill seeking an injunction against the issuance of bonds of the West Hatchie and Owl Creek Drainage District and the assessment, levy, and collection of taxes on his land for the payment of the bonds. The drainage district was organized under chapter 197 of the Laws of Mississippi of 1912, being an act to create additional methods of organizing and maintaining drainage districts. There is no question raised in this case as to the regularity or sufficiency of the organization of the district. Appellant in his bill claimed that chapter 197 of the Laws of 1912 is in violation of section 144 of the Constitution of Mississippi, which section reads, "the judicial power of the state shall be vested in a Supreme Court and such other courts as are provided for in this Constitution," in that the county board of drainage commissioners, which is by the act declared to be a court of record, is not among the courts provided for in that section of the Constitution. He also claimed that the chapter is in violation of section 172 of the state Constitution, which reads "the Legislature shall, from time to time, establish such other inferior courts as may be necessary, and abolish the same whenever deemed expedient," in that the county board of drainage commissioners is not an inferior court contemplated by the section of the Constitution, and not therefore within the constitutional provision thereof. An answer was filed to the bill, which by denial presented the issue of the constitutionality of the law. The chancellor, upon hearing, denied the prayer of the bill and held that chapter 197 of the Acts of 1912 is a valid enactment and not in conflict with either section 144 or section 172 of the state Constitution.

Counsel for appellant, in his brief, states that the sole question for settlement in this case is:

"Whether or not the county board of commissioners, as provided in said chapter, is a constitutional court; or, stated differently, whether the Legislature has authority to establish a court of such functions, powers and jurisdiction as is given in said chapter to the court called therein the county board of drainage commissioners."

It is provided in chapter 197 of the Laws of 1912 that, upon the filing of a petition by landowners for the organization of a drainage district and the presentation of the same to the chancellor, three drainage commissioners for each county in which the drainage district lies in his chancery district shall

be appointed by him. The successors of these commissioners are to be appointed by the chancellor, who is authorized to fill vacancies which may occur on the commission. These commissioners are required to meet and organize by the election of one of their members as president. The clerk of the chancery court is made ex officio clerk of the board. To the commissioners is given jurisdiction over the organization of all drainage districts within their county which may be organized under the provision of chapter 197, Laws of 1912, and all jurisdiction over the construction and maintenance of all artificial or natural drains constructed or improved in their county under the provisions of the act.

We quote in full section 6 of the act, which declares that the county board shall be a court of record and provides for meetings, quorum, etc.:

"The county board of drainage commissioners shall be a court of record and shall have a seal which shall be enscribed 'County Board of Drainage Commissioners of _____ County, Mississippi.' Any two members shall constitute a quorum and they shall have regular meetings at such times as they may by order provide, and shall have called meetings whenever the president may think the business before the board may require. They shall have the power to issue all necessary process, compel attendance of witnesses, and do any and all things necessary to carry out the provisions of this chapter."

By section 60 of the act provision is made for appeal from the orders or decisions of the county board to the chancery court in that county in which lies the greatest number of acres of the drainage district. This appeal is to be heard by the chancellor in term time or in vacation.

We do not see anything in the provisions referred to of this act which is violative of the sections of the Constitution as claimed by appellant. It will be seen that the Legislature by this statute committed to the commissioners the general authority and power to organize drainage districts within their county in accordance with the act, and bestowed upon them the general supervision and control of artificial and natural drains. Their duties and powers are in the main administrative, though they have some judicial power. It was said by Chief Justice Cooper, in the case of *Telegraph Co. v. Railroad Commission*, 74 Miss. 80, 21 South. 15, that the Mississippi Railroad Commission "is a mere administrative agency, although, in some respects, it exercises quasi judicial power." This definition is applicable to the county board of drainage commissioners.

It was not the purpose of the Legislature to make the board of commissioners a court in the strict definition of the term; that is, a tribunal established for the public administration of justice and for the hearing and decision of cases. It is true that the board is given certain powers which are judicial, but the chief purpose for the establishment of the board and the larger part of their duties

and functions are of an administrative nature. We can well understand that the Legislature, in declaring that the county board was a court of record, had for its purpose to provide that the records of the board should be as those of courts of record, wherein the acts and proceedings are recorded for "a perpetual memory and testimony." Black's Law Dictionary. It is surely important in the administration of the business of the board and the general drainage affairs of a county that all proceedings and acts should be made of permanent record.

If we say that the board is a court of record because it has been so denominated in the act, then the establishment of the board is authorized by section 172 of the Mississippi Constitution; for, if a court, then it is an inferior court. It has limited and restricted jurisdiction. Its findings and determinations are not final and conclusive, and are subject to review or correction of a higher court under the very provision of the act for appeal from its orders or decisions to the chancery court.

Affirmed.

(108 Miss. 802)

PRINGLE v. STATE. (No. 17621.)

(Supreme Court of Mississippi. Jan. 11, 1915.

On Suggestion of Error, Feb. 22, 1915.)

1. WITNESSES ¶330—CROSS-EXAMINATION.

Where defendant on cross-examination of the state's witness asked him if he had not been drinking a good deal on the day he testified, and, receiving a negative answer, further asked him if he was not "pretty nearly drunk right now," which question was resented by the witness, but not answered, and on being repeated was answered in the negative, defendant was not prejudiced by the court's refusal to permit defendant to pursue the subject in the further examination of the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1106-1108; Dec. Dig. ¶330.]

2. CRIMINAL LAW ¶531—EVIDENCE—CONFESSIONS—PRELIMINARY PROOF.

Where a witness testifying to a confession by accused had told all that was said and all that occurred on the occasion, and his testimony as a whole showed that the statements of accused were free and voluntary, it was not objectionable because the precise formula was not observed in proving that the confessions were made without hope of reward or fear of punishment in advance of their admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. ¶531.]

3. CRIMINAL LAW ¶395—EVIDENCE—INCrimINATORY LETTER—EVIDENCE WRONGFULLY OBTAINED.

Where accused was charged with murdering deceased in order to rob her, and to prove such theory the state claimed that accused had little or no money before, but after the homicide gave certain money to M., a letter written by accused to M. attempting to suborn her to testify that she got no money from accused found on his person was admissible, though wrongfully taken from him after his arrest on a search of his person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 877; Dec. Dig. ¶395.]

4. CRIMINAL LAW ¶516—EVIDENCE—"CONFESSION."

A "confession" is a voluntary statement by accused acknowledging that he is guilty of the crime charged. It is a voluntary declaration of his agency or participation in the crime, as distinguished from the mere admission of facts from which guilt might be inferred; such admission not being a confession.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1139-1145; Dec. Dig. ¶516.]

For other definitions, see Words and Phrases, First and Second Series, Confession.]

5. JUDGES ¶6—QUALIFICATIONS—RIGHT TO OBJECT.

Accused could not successfully object to the qualifications of a judge by whom he was tried, where the judge was either a de facto or de jure judge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 11, 12; Dec. Dig. ¶6.]

On Suggestion of Error.

6. CRIMINAL LAW ¶824—INSTRUCTIONS—OMISSION.

Under the Mississippi rule forbidding a trial judge to instruct the jury except on a written request of the parties, a trial judge cannot be charged with errors of omission in instructions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1996-2004; Dec. Dig. ¶824.]

Appeal from Circuit Court, Lauderdale County; J. L. Buckley, Judge.

W. B. Pringle was convicted of murder and sentenced to imprisonment for life, and he appeals. Affirmed.

The evidence upon which appellant was convicted is entirely circumstantial. It was the theory of the state that robbery was the motive of the crime, as the evidence showed that the deceased was robbed of some money.

The sixth assignment of error, referred to in the opinion of the court, is based upon the overruling of the defendant's motion to exclude the testimony of witness Culpepper, with reference to certain statements made by the defendant at the time the note signed "W. B. P." was taken off defendant's person by Culpepper, who was an officer, and who testified that he had learned that the defendant had given two or three other parties money, and that he had told defendant that he knew of this, and that defendant admitted that he only had a small sum of money prior to the time of the killing, considerably less than the amount he had given away subsequent to the killing; that he had admitted that he had had some other money, and attempted to account for it in two or three different ways.

W. L. Scott and C. B. Cameron, both of Meridian, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, J. Appellant was indicted, tried, and convicted for the murder of Caroline Watts.

Appellant contends that he was convicted entirely upon circumstantial evidence, and

that many errors were committed by the trial court during the progress of his trial. The record establishes the contention that the case of the state rests upon circumstantial evidence alone.

The case made by the evidence is a strong one against the defendant, and, if no errors were committed, the verdict of the jury must stand.

[1] We will take up and consider the assignment of errors in the order presented by the briefs of appellant:

"The first assignment of error is based upon the refusal of the trial court to permit the appellant, through his attorneys, to show on cross-examination of the witness Sam Culpepper, a witness for the state, that said witness was drunk or under the influence of intoxicating drink, at the time he testified in this case in the court below."

It appears that this assignment is based on the action of the court in sustaining an objection to questions propounded to the witness while he was on the stand. He was asked if he had not been drinking a good deal during the day, and he answered that he had not. He was then asked if he was not "pretty nearly drunk right now." This question was resented by the witness, but not answered. The question was repeated, and answered in the negative. The district attorney then objected to the questions, and his objection was sustained by the court.

The judge and jury had the witness under observation, and the questions directed the attention of the jury to the witness. If the witness was drunk, it must have been apparent to the jury, and the jurors gave due consideration to that fact in weighing his testimony. The judge saw the witness and knew whether or not he was drunk, and he, no doubt, thought the questions were impertinent. There is nothing in the record to justify a belief that the witness was drunk, and therefore we cannot assume that he was. It seems to us that this was a poor way to prove that the witness was drunk. If the witness was able to testify upon his condition, his opinion was worth very little, because, if he was sober enough to realize that he was drunk, he was sober enough to testify intelligently. If he was in fact drunk, his opinion of his condition was worthless.

The second assignment of error is based upon the court admitting evidence relative to a certain razor found at the home of appellant's sister.

We think this evidence was of slight probative value, but we do not think it could have had any weight with the jury, and certainly its admission did not prejudice appellant.

[2] The third assignment of error refers to the testimony of one Sam Lackey, who arrested appellant.

This assignment is without merit. It is perfectly apparent that the witness related all that was said or done, and it is also clear that what the defendant said to the witness,

in response to his inquiries, was entirely free and voluntary.

It is safer for the trial judge to ascertain that confessions obtained from prisoners were made without hope of reward, or fear of punishment, as a condition precedent to the admission of the testimony; but where it is manifest that the witness has told all that was said and all that occurred, and his testimony shows that the statements of the accused were free and voluntary, there is no reason to reject the evidence, because the precise formula was not observed in advance of the admission of the evidence.

The fourth assignment of error is without merit, because it is based upon an erroneous assumption.

[3] The fifth assignment of error is the assignment upon which appellant especially relies.

The evidence shows that a constable searched the clothing of appellant while he was confined in jail awaiting his trial, and found in one of his pockets a letter written by appellant, which was afterwards introduced in evidence. It does not appear that appellant objected to the search of his clothing, but in our opinion it is immaterial whether he objected or not. The letter in question was in the following words:

"Say, listen Maggie, don't you never say I gave you any money when I was at your house, Clemmie and Boy give you what money you have got, state to the court I come to you at 6:30 and stay all night do this.

"[Signed] W. B. P."

The pertinency and damaging effect of this letter is clear. One of the circumstances which connected appellant with the crime was the possession of an unusual amount of money, and the fact, which was afterwards developed, that he had given "Maggie" money. It was evident that he appreciated the seriousness of his gift to Maggie, and yet he was, by this letter, attempting to suborn the witness.

The murdered woman was robbed by her assassin. It was the theory of the state that robbery was the motive for the murder, and the gift of the money to Maggie doubtless had a strong influence on the minds of the jury, and the attempt to induce her to deny the facts was prejudicial in the extreme. It cannot be doubted that the letter was one of the strongest links of the chain of circumstances which was forged by the state to the undoing of appellant.

The leading case, *State v. Turner*, reported in 82 Kan. 787, 109 Pac. 654, 32 L. R. A. (N. S.) 772, 136 Am. St. Rep. 129, and the notes thereto, go fully into a discussion of the principles involved in this assignment of error. Briefly stated, the rule is: Evidence against one accused of crime is not inadmissible because it has been wrongly obtained.

It may have been wrong for the constable to have searched the prisoner; his conduct may have been reprehensible; but this will

not affect the admissibility of the letter thus wrongfully obtained.

There is no question of a confession of guilt in this case. The defendant, from the beginning to the end, steadfastly and stoutly protested against any form of guilt, and insisted that he knew nothing about the homicide. It is hardly possible to say that defendant made any admissions of fact—the fact is, it was his policy to deny every criminalizing circumstance proven by the state.

[4] A "confession" is a voluntary statement of the accused acknowledging that he is guilty of the crime charged. It is a voluntary declaration of his agency or participation in the crime. When a person charged with crime only admits certain facts from which guilt may be inferred, this will not amount to a confession. This distinction between confessions and admission of facts is recognized by this court in *Richburger v. State*, 90 Miss. 840, 44 South. 772.

As stated above, the complaint here is that the defendant denied the existence of certain incriminating circumstances, and the state was permitted, over his objections, to prove the facts, and also prove that defendant denied their existence.

The vice of appellant's argument is the assumption that confession of guilt and admission of facts from which guilt may be inferred are one and the same thing.

It is also argued that the stripping and search of defendant's person was tantamount to forcing him to testify against himself. If the defendant had been served with a subpoena duces tecum requiring him to produce the letter in his possession, and in obedience to this writ he had produced it, the state could not use same as evidence against him.

"The compulsion must be directed to the accused person in the capacity of a witness. In other words, the compulsion must be strictly testimonial." *Turner v. State*, supra.

The statement of the rule is distinctly approved in *Wilkinson v. State*, 77 Miss. 705, 27 South. 639. In that case defendant produced a knife which was used in evidence against her. She was told that it would be better for her to produce the knife, and, if she did so, nothing would be done with her. The inducement for producing the evidence against her was the promise that she would not be punished for the crime. She did not confess the crime; she simply produced evidence from which the jury may have inferred guilt.

Numerous cases might be cited wherein the evidence was improperly or unlawfully obtained, but was nevertheless admitted as competent against the accused. In the earlier decisions a contrary doctrine was announced, but we think the rule as announced above is now almost universally approved by the courts.

The sixth assignment of error, complaining of the refusal of the court to exclude the testimony of the witness Culpepper, is without merit.

[5] The seventh assignment of error is based upon the alleged error of the court in overruling the following motion, viz.:

"Mr. Cameron: Comes the defendant and moves the court to discharge him, for the reason that the Honorable Jno. L. Buckley, presiding as judge of the Tenth circuit court district, occupies said position by virtue of an appointment at the hands of Gov. Earl Brewer of the state of Mississippi, said appointment being illegal and void, in that the appointment was in violation of the Constitution of the state of Mississippi, which made and makes the judges of the several districts elective, and that the said Jno. L. Buckley does not hold nor preside over the proceedings in this cause as de facto judge, for the reason that said appointment was made in violation of the Constitution of the state of Mississippi."

It is immaterial whether Judge Buckley was a de facto or a de jure judge; he was certainly the one or the other, and as such he was competent to try this case. His qualifications could not be raised by defendant.

We have carefully considered the points made by appellant mainly because there seems to be some confusion in the minds of the bar in regard to the main contention of appellant.

Affirmed.

On Suggestion of Error.

[6] The original opinion in this case contains this statement:

"We will take up and consider the assignment of errors in the order presented by the briefs of appellant."

The suggestion of error indicts the court for its failure to perform this self-imposed task. We enter a plea of nolo contendere, and will now endeavor to make amends.

It is admitted that 7 out of the 10 assignments of errors were considered in the former opinion, but it is claimed that the remaining 3 were entirely ignored.

The neglected assignments are numbered eighth, ninth, and tenth, and are in criticism of three instructions given to the jury at the request of the state, which instructions are here reproduced, viz.:

"The court further charges the jury that, if they believe from the evidence beyond every reasonable doubt that the defendant killed Caroline Watts, then the jury should find the defendant guilty, as charged in the indictment.

"The court instructs the jury for the state that absolute and demonstrative certainty is not required in a criminal case, and although, in the application of circumstantial evidence, the utmost care and caution must be used by the jury, yet circumstantial evidence may rise so high in the scale of belief as to generate conviction, and convince the mind to the highest degree of moral certainty and when, after due caution, this result is reached, and you believe the defendant guilty beyond a reasonable doubt from the evidence, you are authorized to act and to find him guilty.

"The court charges the jury that while it is true that circumstantial evidence, in order to warrant a conviction, must be of such a character as to exclude every other reasonable hypothesis, which is consistent with innocence, yet this means every other reasonable hypothesis arising out of the evidence. It does not mean that the jury is to conceive of theories evolved from their inner consciences to account for the

evidence against the defendant which are totally improbable and fanciful, but it means some theory consistent with the evidence against him and yet rendering him innocent."

The instructions given to the jury must be read as one instruction. When so read, if they give to the complaining defendant a fair statement of the law for the guidance of the jury in determining his guilt or innocence of the charge preferred against him, he cannot complain. There may be, and not infrequently there is, an inaccurate or incomplete statement of the rule, if we only consider the language employed in a single instruction. This will not be regarded as prejudicial when it appears that the other instructions, read in connection with the inaccurate or incomplete instruction, fairly state the law of the case.

To test the validity of appellant's complaint by the rule just announced, we here insert the instructions given at his request, viz.:

"The court instructs the jury for the defendant that the state in this case, since it relies upon circumstantial evidence for a conviction, must prove beyond a reasonable doubt that such circumstances as it relies upon really and truthfully existed as it contends, and as testified to by the witnesses, and, in addition to this, such circumstances, taken as a whole, must connect up in such a complete chain as to show beyond a reasonable doubt that defendant is guilty of the crime with which he is charged.

"The court charges you for the defendant that if you have a reasonable doubt, based upon the testimony of the existence and truthfulness of any material and necessary link in the chain of circumstances relied upon in this case for conviction, such that without such link you would not convict, then you should acquit defendant.

"The court further instructs the jury for the defendant that, in the application of circumstantial evidence to the determination of this case, the jury should proceed very carefully and exercise the utmost caution and vigilance to ascertain the truth and should acquit the defendant unless there is an unbroken chain of testimony which shows truthfully beyond every reasonable doubt that defendant is guilty of killing the old woman in question.

"Human life or liberty is too sacred to be taken on mere suspicion or probability of guilt, and nothing short of proof of guilt from all evidence introduced in the case, beyond every reasonable doubt, will warrant this jury in convicting this defendant of the crime charged in the indictment against him.

"You are further instructed that the defendant is a competent witness in his own behalf the same as any other witness, and, if you have no reason to doubt the veracity of his testimony other than the fact that he is the defendant in the case, then you should believe what he has testified to in the trial, and if what he has testified to on the trial is sufficient, if true, to show that he is not guilty, and you have a reasonable doubt as to whether it is true or false, then you should acquit him.

"The court charges you further for the defendant that he is presumed by the law to be innocent of the crime charged against him, and this presumption of innocence does not permit of a presumption of guilt; but on the contrary, it requires of you in the outset of the trial and all through same that you make an honest effort to harmonize the entire testimony in the case with this presumption of innocence, and, even though you cannot do this, still you will not convict defendant unless, from all the evidence,

you are convinced beyond a reasonable doubt that defendant is guilty as charged.

"The court further instructs you to acquit defendant if from all the evidence there is a probability that he is not guilty.

"The court instructs the jury for the defendant that, to warrant a conviction in this case, such a state of facts and circumstances must have been shown beyond a reasonable doubt that they are all consistent with the guilt of the defendant, and such as cannot, upon any reasonable theory and hypothesis be true, and the defendant be innocent; and in this case this rule should be applied by the jury to the evidence which is of a circumstantial nature, and if the jury find from the evidence that all the incriminating circumstances upon which the prosecution relies for a conviction will as well apply to some other person or persons as to the defendant, or if such facts and circumstances are reconcilable with any reasonable theory or hypothesis other than the guilt of the defendant, or if such facts and circumstances, together with the direct evidence offered in this case, do not satisfy the minds of the jury beyond a reasonable doubt of the guilt of the defendant, then you should by your verdict acquit him.

"The defendant does not have to prove that he is not guilty, or that he was not there at the time of the homicide or anything about the case, to warrant an acquittal; but the burden of proof is upon the state to convince this jury by competent proof beyond a reasonable doubt that this defendant is guilty as charged."

Theoretically, the jury is presumed to have read and harmonized the instructions of the court. It will be assumed that the jury read the instructions as one instruction, and correctly interpreted their meaning.

So, in this case, if we assume that appellant's criticism of the instructions, given at the request of the state, is sound, this does not by any means end the discussion and necessarily demand a reversal, if it appears that the court has given other instructions that supply the omissions and correct the inaccuracies of the instruction complained of.

In the analysis of instructions, we, of course, must bear in mind that the power of the circuit judge to instruct the jury is circumscribed by the statute. He is forbidden to give instructions at all, unless he is requested in writing to do so. He has no initiative in the premises—the jury can have no aid from the court, unless the parties to the suit elect to write out the instructions and submit them to the court for his approval. The theory of our law seems to be that the presiding judge is incapable of instructing the jury.

It is not for us to say whether or not the legislative department has acted wisely in thus writing the law.

In this case, as in all cases tried in courts of original jurisdiction in this state, the instructions are in theory the instructions of the court; but they are, in fact, the instructions that counsel on both sides of the case have permitted or allowed the court to approve.

This gives wide play to the strategy and tactics of opposing counsel, but does not always afford a proper guide for trial jurists.

When we consider the instructions given

in this case, in the light of the Mississippi plan, we find no error of which the appellant can complain. The trial judge within the limitations imposed upon him by the statute committed no error. He did all he was permitted to do to preserve the defendant's rights.

It is somewhat difficult to understand how it can be said that the judge erred by omission when he was not permitted to act—and when the statute absolutely prohibits him from acting until he is requested to do so by the parties to the lawsuit.

Suggestion of error overruled.

(108 Miss. 814)

LINDSEY WAGON CO. v. NIX. (No. 16517.)
(Supreme Court of Mississippi. Feb. 22, 1915.)

1. DAMAGES ⇐216—PERSONAL INJURIES—INSTRUCTIONS.

In an action for personal injuries, an instruction, if the jury found for plaintiff, to find a verdict for such an amount as in their judgment the evidence in the case warranted, and in fixing such amount to consider plaintiff's physical pain and mental anguish, was not erroneous as failing to give the jury any guide by which to measure the damages, as it required them to consider all of the proof, including everything therein in the way of claims of liability and of defense.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 548-555; Dec. Dig. ⇐216.]

2. TRIAL ⇐256—INSTRUCTIONS—NECESSITY OF REQUESTS.

In an action for personal injuries, an instruction, if the jury found for plaintiff, to find for such an amount as in their judgment the evidence warranted, was not erroneous because of its failure to state that the damages should be diminished in proportion to the amount of negligence attributable to plaintiff in accordance with Laws 1910, c. 135, as under Code 1906, § 793, providing that the judge shall not sum up or comment on the testimony or charge the jury as to the weight of evidence, but at the request of either party he shall instruct the jury upon the principles of law applicable to the case, the court could not on its own motion tell the jury that the damages should be diminished in proportion to the contributory negligence, and the instruction given did not exclude the defense of contributory negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. ⇐256.]

Appeal from Circuit Court, Jones County;
P. B. Johnson, Judge.

Action by Benton Nix, by his next friend, E. C. Nix, against the Lindsey Wagon Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Flowers, Brown & Davis, of Jackson, and Deavours & Sharbrough, of Laurel, for appellant. Neville & Stone, of Meridian, and Whitfield & Whitfield, of Jackson, for appellee.

REED, J. Benton Nix, a youth some 19 years of age, an employé of the Lindsey Wagon Company, while engaged in the operation of an edger saw in the company's factory,

had his left arm caught in the saw and badly cut and mangled, so that it became necessary for the arm to be amputated between the wrist and the elbow. The jury awarded him damages in the sum of \$8,000.

The evidence is sufficient to sustain the jury's verdict, and we therefore find no ground for reversal in the following assignments of error made by appellant: (1) Because the court overruled appellant's motion, made upon the conclusion of the testimony for the plaintiff, to exclude the testimony and direct a verdict in its favor; (2) because the court refused to grant a peremptory instruction for the defendant after all of the evidence had been introduced.

We see no force in the complaint by appellant that the court committed error in granting, modifying, and refusing certain instructions.

[1] We will make reference only to the argument of appellant's counsel that the court erred in granting the fifth instruction for the plaintiff. That instruction reads as follows:

"The court instructs the jury for the plaintiff, Nix, that if they find for the plaintiff they should find a verdict for such an amount as in their judgment the evidence in the case warrants; and in fixing the amount the jury should take into consideration the physical pain and mental anguish which plaintiff suffered as a result of his injury, if they believe from the evidence he suffered such pain and anguish."

The objection by appellant seems to be directed specially to that part of the instruction which tells the jury that "they should find a verdict in such amount as in their judgment the evidence in the case warrants." It is claimed by counsel that by this instruction no guide is given the jury, and that any amount the jury, according to their individual standards, might find warranted by the evidence, could be awarded; that they were directed to award full compensation to the plaintiff.

We see no error in this instruction. It simply tells the jury that they can award damages in such amount as the evidence warrants—this means the whole evidence, that for the plaintiff and that for the defendant; in deciding on the amount of their verdict they must consider all of the proof, and all that may be included therein in the way of claims of liability and of defense.

[2] But counsel for appellant maintain that the instruction is defective, because it fails to state that damages to be awarded appellee should be diminished in proportion to the amount of negligence attributable to him. They claim that, since the enactment of the concurrent negligence law (chapter 135 of the Laws of Mississippi of 1910), the court, when giving an instruction touching the amount of damages to be awarded for personal injuries, is required to tell the jury that such damages should be diminished by the contribu-

tory negligence of the person suffering the injury.

It appears to be counsel's argument that the trial judge must, *sua sponte*, give this information in an instruction. This might be the case in other jurisdictions, but it is not so in Mississippi. The circuit judge is denied the power of originating independent instructions. He cannot instruct the jury upon the principles of law applicable to the case in any respect, except upon the request of one of the parties. Section 793, Code 1906.

We do not find in the record in this case that any such request was made to the trial judge. No instruction in writing was offered by either party presenting the defense of contributory negligence. Such defense was not excluded in the instructions given. In fixing "the amount as in their judgment the evidence in the case warrants," they could make due allowance for contributory negligence.

The court is expressly forbidden by the statute to instruct the jury at its own instance; therefore the failure of the court to do that which it is forbidden to do by the statute cannot be assigned as error. *Dixon v. State*, 64 South. 468.

Under the law in this state regarding instructions, when it is desired that the jury be told of the statutory law that contributory negligence will operate to diminish damages, the party so desiring that information on the subject be given to the jury must present to the trial judge proper instructions in writing containing such information.

Affirmed.

(108 Miss. 818)

FREEMAN v. STATE. (No. 17534.)

(Supreme Court of Mississippi. Feb. 15, 1915.)

1. BANKS AND BANKING §85—INSOLVENCY—OFFENSES—RECEIVING DEPOSITS.

The time laid in an indictment for receiving a deposit in an insolvent bank on February 23d not being of the essence of the offense, proof of receipt of a deposit on February 11th was not a fatal variance.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212, 214-217; Dec. Dig. §85.]

2. INDICTMENT AND INFORMATION §160—AMENDMENT—DESCRIPTION OF DEPOSIT.

Where an indictment for receiving a deposit in an insolvent bank described the deposit as \$7.50 current and lawful money, while the proof showed the deposit consisted of \$1.50 in cash, a check for \$2, and a town warrant for \$4, the court, under Code 1906, § 1508, properly permitted the indictment to be amended to conform to the proof.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. § 515; Dec. Dig. §160.]

3. BANKS AND BANKING §85—CRIMINAL LAW §469—INSOLVENCY—OFFENSES—RECEIVING DEPOSITS—EVIDENCE.

In a prosecution for receiving a deposit in an insolvent bank in February, 1911, an assignment for benefit of creditors by the directors of the bank in December, 1911, and a petition and order making the assignee a receiver of the

chancery court, should not have been admitted to prove insolvency.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212, 214-217; Dec. Dig. §85; *Criminal Law*, Cent. Dig. § 1059; Dec. Dig. §469.]

4. CRIMINAL LAW §448—EXPERT TESTIMONY—INSOLVENCY.

That a bank was insolvent on a certain date was not a fact to be proven by expert or opinion evidence.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. §448.]

5. CRIMINAL LAW §486—OPINION EVIDENCE.

The opinion of a witness that a bank was insolvent on a certain date, if admissible, would not be permitted without showing that he was in possession of data on which to base his opinion.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1076; Dec. Dig. §486.]

6. BANKS AND BANKING §85—INSOLVENCY—OFFENSES—RECEIVING DEPOSITS.

In a prosecution for receiving a deposit in an insolvent bank, evidence that defendant in making a loan for the bank exceeded his authority was immaterial.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212, 214-217; Dec. Dig. §85.]

7. BANKS AND BANKING §85—RECEIVING DEPOSITS AFTER INSOLVENCY—EVIDENCE—VALUE.

In a prosecution for receiving a deposit in an insolvent bank, assessment rolls should not have been admitted to show the value of property, on the question of insolvency; the fact that owner of property listed therein had admitted it to be of a certain value being no evidence of such value as against defendant.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 212, 214-217; Dec. Dig. §85.]

Appeal from Circuit Court, Lawrence County; Allan Thompson, Special Judge.

T. M. Freeman was convicted of receiving a deposit in an insolvent bank, and appeals. Reversed and remanded.

See, also, 60 South. 782.

Whittington & McGehee, of Meadville, for appellant. Ross A. Collins, Atty. Gen., for the State.

SMITH, C. J. This is an appeal from a conviction of the crime of receiving a deposit in an insolvent bank without informing the depositor of the insolvency thereof.

Two of appellant's assignments of error are based upon a claim of fatal variances between the allegations of the indictment and the proof:

[1] First. Because the date of the receipt of the deposit laid in the indictment was the 23d day of February, 1911, while the actual date thereof, as shown by the proof, was the 11th day of February, 1911. There is no merit in this contention, the time laid in the indictment not being "of the essence of the offense."

[2] Second. Because the deposit alleged to have been received was described in the in-

dictment as "seven and 50/100 dollars current and lawful money of the United States of America," while the deposit proven to have been received consisted "of \$1.50 in cash and check of one Nelson for \$2.00, and a town warrant for the sum of \$4.00." It will be observed that a portion of this deposit did in fact consist of lawful money of the United States of America; but, conceding that there was a variance between the description of the deposit as contained in the indictment and the proof, the court, under the provisions of section 1508 of the Code, properly permitted the district attorney to amend the description of the deposit contained in the indictment to conform to the proof.

[3] Appellant was cashier of the Merchants' & Planters' Bank, of Silver Creek, on the 11th day of February, 1911, but resigned as such some time in March following, and was not thereafter connected therewith. The method by which it was attempted to prove the insolvency of the bank on the date of the receipt of the deposit in question was this: An assignment of the property of the bank for the benefit of creditors, executed by the members of its board of directors on December 20, 1911, together with the petition of the assignee therein named filed in the chancery court of Lawrence county, requesting his appointment as receiver under the statute, and an order so appointing him, was introduced in evidence. Mr. R. L. Crook, an expert accountant, was then introduced as a witness, and testified that he had audited the books of the bank since the assignment, and that in his opinion the bank was insolvent on the 11th day of February, 1911. This opinion was based, not upon any knowledge which the witness had of the value of the property and securities belonging to and held by the bank, or of the ability of the bank to then meet its obligations, but merely from the fact that the books disclosed that a number of accounts that were due the bank on that date, February 11, 1911, still remained unpaid, from which fact the witness supposed they were worthless, for the reason that if good he supposed they would have been collected, and the further fact that if these accounts were worthless on February 11, 1911, the bank, according to the books thereof, was then insolvent. Evidence was then introduced showing that the property described in the deeds of trust securing several accounts due the bank on the 11th day of February, 1911, and which, if worthless, were sufficient in amount to render the bank insolvent according to the books thereof, was much less in value than the amount of the accounts attempted to be secured thereby, and that some of these accounts represented money loaned by appellant in excess of the authority conferred upon him by the bank's board of directors.

One method by which the value of the property described in these deeds of trust was attempted to be shown was by the introduction of the county assessment roll. This evidence, in so far as the real property was concerned, was excluded, but was permitted to go to the jury in so far as the personal property was concerned. Why this distinction was made in the evidence does not appear. There was no evidence, other than this, tending to show the actual value of these accounts.

The assignment, petition, and order, making the assignee in the assignment a receiver of the chancery court, should not have been admitted. Appellant was not a party thereto and was not bound thereby. "Things done between strangers ought not to injure those who are not parties to them." This assignment proves nothing with reference to the insolvency of the bank, but was probably a very powerful factor in convincing the jury that such was the fact.

[4, 5] The opinion of R. L. Crook that the bank, on February 11, 1911, was insolvent, should have been excluded for two reasons: First, that fact is not one to be proven by expert or opinion testimony; and, second, even if it is, the witness was in possession of no data upon which to base an opinion.

[6] Whether in making the loans for the bank appellant exceeded his authority was wholly immaterial; the sole inquiry being the solvency, *vel non*, of the bank, upon which fact this evidence could throw no light whatever, and therefore it should not have been admitted. The course of the examination of the witness by which this proof was made seems to indicate that the court was trying appellant not for the crime laid in the indictment, but for having made loans in excess of the authority conferred upon him.

[7] The assessment roll should not have been admitted. Appellant was not bound thereby, and the fact that the owner of the property therein listed had admitted it to be of a certain value was no evidence of such value as against appellant.

With this evidence out of the record, there remains practically nothing upon which to base a conviction.

Reversed and remanded.

STATE ex rel. ATTORNEY GENERAL v. DUNNAM et al. (No. 16474.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

1. PUBLIC LANDS \Leftrightarrow 157—SCHOOL LANDS—SALE OF TIMBER—CONSTITUTIONALITY OF STATUTE.

Code 1906, § 4702, authorizing the sale of standing timber on school lands, does not violate the constitutional provision against the sale of such lands.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 454; Dec. Dig. \Leftrightarrow 157.]

2. PUBLIC LANDS — 157—SCHOOL LANDS — SALE OF TIMBER—INADEQUATE CONSIDERATION.

Mere inadequacy of price does not vitiate a sale of timber on school lands under Code 1906, § 4702.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 454; Dec. Dig. —157.]

Appeal from Chancery Court, Greene County; T. A. Wood, Chancellor.

Suit by the State of Mississippi, on the relation of the Attorney General, against G. T. and J. N. Dunnam. From a decree sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

This case was begun by a bill in chancery to cancel a deed to standing timber on sixteenth section lands; said deed having been made by the board of supervisors of Greene county to appellees, upon the ground that the board of supervisors was without authority to sell the timber; it being contended that section 4702 of the Code of 1906, under which they acted, is unconstitutional, and for the further reason that the consideration paid by appellees was grossly inadequate. Appellees demurred to the bill, and the demurrer was sustained, and an appeal granted to the Supreme Court.

Ross. A. Collins, Atty. Gen., and Flowers & Brown, of Jackson, for appellants. Green & Green, of Jackson, and Ford, White & Ford, of Gulfport, for appellees.

COOK, J. [1,2] Appellant reargues and requests that we overrule Dantzler Lumber Co. v. State, 97 Miss. 355, 53 South. 1. We have given due consideration to the argument, and decline to overrule the Dantzler Case.

Affirmed.

(108 Miss. 822)

BARNES & CO. v. BUCHANAN et al.
(No. 16479.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

HOMESTEAD — 95—LIABILITIES ENFORCEABLE — DECREE IN EQUITY.

Where plaintiff conveyed land to his brother, defendants, his creditors, securing a decree canceling the deed on the ground that the conveyance was fraudulent as to them and appointing a commissioner to sell the land to satisfy their debt, and where plaintiff married after the rendition of the decree but before sale under it, and moved on the land, occupying and claiming a homestead therein, his claim was valid, and the creditors' right was subject to his homestead exemption; specific decrees in equity having no greater force upon homestead rights than general liens arising on judgments at law, which are subject to homestead rights acquired at any time before levy and sale.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 141-146; Dec. Dig. —95.]

Appeal from Chancery Court, Marion County; R. E. Sheehy, Chancellor.

Action by J. C. Buchanan and another against Barnes & Company. Judgment for

plaintiff overruling a demurrer to the complaint, and defendants appeal. Affirmed.

Henry Mounger, of Columbia, for appellants. Lamar Henington, of Columbia, for appellee.

COOK, J. The bill of complaint in this case alleges that complainant, J. C. Buchanan, was the owner of a certain tract of land not exceeding 160 acres, nor exceeding \$2,000 in value; that on March 8, 1909, he conveyed this land by deed to his brother, J. S. Buchanan; that at the time this deed was executed complainant was a single man, a bachelor; that appellants, Barnes & Co., a creditor of complainant, on January 28, 1910, filed a bill in the chancery court alleging that this conveyance was fraudulently executed to hinder and delay said complainant in the collection of its debts against J. C. Buchanan, complainant in the present case, and praying that said deed made by J. C. Buchanan to his brother be canceled, and that the court decree that said Barnes & Co. have a lien on said land for the payment of said debt, that a commissioner be appointed to sell said land, and out of the proceeds of said sale pay to Barnes & Co. its indebtedness against said J. C. Buchanan. Appellants further allege that he answered said bill of complaint denying fraud, but the court nevertheless, by its decree, canceled said deed to his brother, and ordered a sale of the land to satisfy the claim of Barnes & Co., appointing I. C. Welborn, one of the defendants to the present bill, a master and special commissioner to make the sale.

The bill of complaint in the present case further alleges that, since the rendition of the decree in the former case, appellee has married and bought said land from his brother, and received a deed from him to the land in controversy; that he has moved on said land with his wife, and at the time of the filing of this bill he is occupying the land in good faith as a homestead. The present bill prays that the lien fixed on said land by the former decree be canceled as a cloud upon his title, and that the commissioner be enjoined from selling said land under the authority of the decree. Barnes & Co., appellants here, demurred to the bill, and for causes of demurrer assigns the following:

"First. That said bill of complaint shows on its face that the defendant, Barnes & Co., has a lien upon the land in the bill of complaint described, prior to and superior to any claim of the complainant that the same is a homestead, and that the defendant has a right to have L. C. Welborn proceed to enforce said lien in the manner in which he was proceeding as shown by the bill.

"Second. Said bill shows on its face that the complainant does not own the land described in the bill of complaint, or any interest therein entitling him to have the same protected as a homestead.

"Third. The bill shows upon its face facts relating to the conduct of defendant as to said

land, which estopped him to claim said land as a homestead or to claim any interest therein.

"Fourth. For causes to be assigned at the hearing."

The court overruled the demurrer, and an appeal was granted to settle the principles of the cause.

Taking the allegations of the bill of complaint as true, was the decree overruling the demurrer correct?

Stated differently, in the circumstances, has appellee here, complainant below, by his marriage after the decree canceling the deed to his brother, and fixing a lien on the land in controversy in favor of his (appellee's) creditors to satisfy their claim, acquired a homestead right in the land, which can be set up to defeat the lien acquired by the decree in the former case?

In *Trotter v. Dobbs*, 38 Miss. 198, it was held that if a judgment debtor becomes a householder and the head of a family, after the rendition of the judgment and before the sale, he will be entitled to hold exempt from sale, under a levy made to enforce the judgment, the homestead thus acquired. In that case the judgment debtor was residing on the land before the judgment was rendered, and continued to do so to the day of sale. He was, however, a single man, until the very day of the sale. He married on the day of the sale, and before the sale was actually made. This court in that case said:

"It appears therefore that, whenever a party fills this description of character, he is entitled to the benefit of the privilege conferred, provided he occupies the position before the land has been sold under execution. For it is as necessary that he should hold the property for the support of himself and his family, where he becomes a householder and head of a family after judgment rendered against him, as when he occupied that relation before the judgment; and the reason of the exemption applies as well in the one case as in the other."

In *Irwin v. Lewis*, 50 Miss. 363, this court said:

"Two things are necessary in order to consummate the right to the homestead: First, occupancy as a place of residence; second, by the head of a family and householder. If the debtor fulfills these conditions, then the premises, to the extent of quantity and value named in the statute, is exempt from 'seizure' and 'sale.' * * * Although therefore the property might have been liable to levy and sale at the * * * rendition of judgment, yet, if before either a levy or sale, the property is impressed with the rights of a homestead, the creditor can proceed no further."

In that case, a bill was filed in the chancery court to enjoin the sale under execution, and it was insisted that the court of chancery had no jurisdiction to enjoin the sale; the remedy being adequate at law. The court held that the chancery court did have jurisdiction.

The last-named case, so far as it has application to the present case, held that although the person claiming the exemption was not the head of a family at the time the debts were contracted and at the date the

judgments were rendered, and for some time thereafter, he could nevertheless claim the exemptions if he was married, the head of a family, and occupied the premises before the sale under legal process.

In *Letchford v. Cary*, 52 Miss. 791, this court stated the point involved thus:

"Mrs. Cary bases her right to the homestead on the ground that she actually resided upon the land before the sale, and since, but her possession did not begin until after the recovery of the judgments under which the sheriff sold and Letchford became the purchaser. Letchford claims, on the other hand, that the judgments under which he purchased were liens upon the land before Mrs. Cary took up her residence upon them, and that her occupation cannot divest the lien."

Citing *Trotter v. Dobbs*, 38 Miss. 198, the court confirmed Mrs. Cary's right to the exemption.

Thus far the decisions of our court were based upon claims of the homestead right as against judgment and execution liens. In the present case, a specific lien to pay a specific indebtedness was fixed upon the land, and a commissioner to sell the land was appointed by the court for the express purpose of liquidating the indebtedness of appellants.

In *Woods v. Bowles*, 92 Miss. 848, 46 South. 414, 131 Am. St. Rep. 559, considering the precise point here, the court approved *Dullon v. Harkness*, 80 Miss. 9, 31 South. 416, 92 Am. St. Rep. 563, wherein it was held that there was no difference between judgments at law and decrees in equity as to this right, and used this language:

"In the case now before the court the contention is that, because the claims forming the foundation of the decree were for rents and profits due the appellants and arising out of the common estate owned by them before partition, and because the court in making the decree for partition in kind adjudged certain amounts to be due appellants as rents and profits owing them by appellee, and made the sum so adjudged a charge upon the separate interest of appellee after partition, a different rule is to be applied. We cannot assent to this. The decree is subject to be defeated in its execution by the same things which would defeat any other decree or judgment."

Dullon v. Harkness, supra, seems to be peculiarly applicable to the instant case. In that case this court quotes with approval the following language taken from the opinion of the court in *Kuevan v. Specker*, 11 Bush (Ky.) 3, viz.:

"These appellees are asking now to subject the property to the payment of their debts, upon the ground that the conveyance to the son was fraudulent and void as to creditors; and, if made liable by the chancellor, it must be for the reason that it is still the property of Theodore Kuevan, the debtor. If his property, himself and wife being still in possession, the creditors will not be allowed to say that he can subject it to satisfy our demands because he is still the owner, and at the same time deny his right to a homestead for the reason that he is not the owner. If the property is made liable for Theodore Kuevan's debts for the reason that the conveyance is fraudulent and void, it must be sold subject to the exemptions made by law for the benefit of the debtor. * * * A fraudulent

conveyance does not enlarge the rights of creditors, but only leaves them to enforce such rights as if no conveyance had been made."

Meyer Bros. v. Fly, 63 South. 227, is not applicable to the facts of this case. That case went off on the citizenship and residence of the claimant to the homestead right.

We have reviewed the leading cases decided by this court which are pertinent to the issues presented in the present case. There was at one time some disposition to question the reasoning of the court in *Trotter v. Dobbs*, supra; but it is certain now that the rule announced in that case is the finally settled law of this state. It is also finally settled that specific liens fixed by the decrees of courts of equity have no greater force upon homestead rights than judgments pronounced by and executions issuing from law courts.

Woods v. Bowles, supra, and **Dulion v. Harkness**, supra, are on all fours with the present case.

If the claimant is otherwise within the statute, and is in the occupancy of the homestead before it is sold under execution or decree, his claim is complete. It is the policy of the law to encourage the acquirement of homes, and creditor's rights to collect their dues from their debtors is subordinate to the rights of the family. In all contracts made in this state is written the exemption statute, and no creditor has a right to complain.

Affirmed.

PRICE v. VON SEUTTER. (No. 16608.)
(Supreme Court of Mississippi. Feb. 22, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between George C. Price and C. J. Von Seutter. From the judgment, Price appeals. Affirmed.

Neville & Morse, of Gulfport, for appellant. Bowers & Griffith, of Gulfport, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. STRAAS.
(No. 16603.)
(Supreme Court of Mississippi. Feb. 22, 1915.)

Appeal from Circuit Court, Jefferson County; E. E. Brown, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and B. Straas. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Torrey & Logan, of Fayette, for appellee.

PER CURIAM. Affirmed.

NEW ORLEANS, M. & C. R. CO. v. BROGAN et al. (No. 16516.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

Appeal from Circuit Court, Jones County; P. B. Johnson, Judge.

Action between the New Orleans, Mobile & Chicago Railroad Company and Mrs. Sallie Brogan and others. From the judgment, the Railroad Company appeals. Affirmed.

Flowers, Brown & Davis, of Jackson, for appellant. C. S. Street and Goode Montgomery, both of Laurel, for appellees.

PER CURIAM. Affirmed.

CHAMBLISS v. NEW ORLEANS, M. & C. R. CO. (No. 16518.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

Appeal from Circuit Court, Jones County; P. B. Johnson, Judge.

Action between R. A. Chambliss and the New Orleans, Mobile & Chicago Railroad Company. From the judgment, Chambliss appeals. Affirmed.

Bullard & Gavin, of Laurel, and R. S. Hall and E. B. Taylor, both of Hattiesburg, for appellant. Flowers & Brown, of Jackson, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. JAMES.
(No. 16522.)

(Supreme Court of Mississippi. Feb. 22, 1915.)

Appeal from Circuit Court, Claiborne County; H. C. Mounger, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Martha James, by next friend, etc. From the judgment, the railroad company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. J. McC. Martin and R. B. Anderson, both of Port Gibson, for appellee.

PER CURIAM. Affirmed.

(190 Ala. 619)

HARRIS v. HARRIS et al. (No. 527.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)**1. FORCIBLE ENTRY AND DETAINER §4—
DEFINITION.**

"Forcible entry and detainer," though originally a public offense in England, is a tort in the United States to be redressed by a civil action, summary in its forms and machinery, by which the plaintiff seeks to gain possession of real property which has been tortiously taken or is tortiously withheld, being purely possessory in character and not maintainable unless plaintiff has had prior possession; title being not properly in issue.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 5-22; Dec. Dig. §4.]

For other definitions, see Words and Phrases, First and Second Series, Forcible Entry and Detainer.]

**2. FORCIBLE ENTRY AND DETAINER §11—
ENTRY BY FORCE OR THREATS—DEMAND.**

Code 1907, § 4262, in defining forcible entry and detainer and specifying what force may be considered sufficient, declares that it shall be sufficient if entry is made by threats of violence to the party in possession or by such words or actions as have a tendency to excite fear or apprehension of danger. *Held* that, where there were no contractual relations between the parties and defendant entered by force or threats, no demand for possession was necessary to entitle plaintiff to sue.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 52-56; Dec. Dig. §11.]

**3. FORCIBLE ENTRY AND DETAINER §34—
ENTRY—FORCE—QUESTION FOR JURY.**

In an action for forcible entry and detainer, whether defendant entered by threats of violence or by words or actions having a tendency to act, excite fear or apprehension of danger, *held* for the jury.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 157; Dec. Dig. §34.]

**4. FORCIBLE ENTRY AND DETAINER §29—
TITLE—LEASE.**

In an action for forcible entry and detainer against a mere trespasser, plaintiffs' lease, under which they were entitled to possession, was irrelevant under Code 1907, § 4271, providing that in such action the merits of the title cannot be inquired into.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 134-140, 147; Dec. Dig. §29.]

**5. LANDLORD AND TENANT §24—LEASE—
DESCRIPTION.**

Where a lessor, having occupied a certain 77 acres of land in M. county for several years and had no other land than that so occupied, leased "his place" to plaintiffs, the lease was not void for uncertainty of description.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 61-65; Dec. Dig. §24.]

**6. APPEAL AND ERROR §231—GENERAL OB-
JECTIONS—AMENDMENT OF PLEADINGS.**

A general objection to the allowance of an amendment to the complaint, to wit, "defendant objected," was insufficient to preserve any question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1299, 1352; Dec. Dig. §231.]

**7. FORCIBLE ENTRY AND DETAINER §12—
PLEADING—AMENDMENT.**

Where, in forcible entry and detainer, plaintiffs claimed under a lease from the owner, and defendant as to them was a mere trespasser or intruder, he could not complain of the court's refusal to permit him to show that one of the plaintiffs had made another or different contract with the landowner.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 57-63; Dec. Dig. §12.]

**8. FORCIBLE ENTRY AND DETAINER §43—
RIGHT TO ALLEGE ERROR—PREJUDICE.**

Where, in forcible entry and detainer, the lease under which plaintiffs claimed was irrelevant as against defendant, who was a trespasser, a charge, that for plaintiffs to recover the jury must be reasonably satisfied that the land was leased by plaintiffs under the alleged written agreement from the owner, placed on plaintiffs a burden which they were not legally required to bear, but of which defendant could not complain.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 169-182; Dec. Dig. §43.]

Appeal from Circuit Court, Macon County;
S. L. Brewer, Judge.

Forcible entry and detainer by Lewis Harris and others against Charles Harris. Judgment for plaintiffs, and defendant appeals. Affirmed.

O. S. Lewis, of Tuskegee, for appellant.
H. P. Merritt, of Tuskegee, for appellees.

GARDNER, J. This is an action of forcible entry and detainer, by appellees against appellant. The complaint contained one count, which was substantially in code form, for the above cause of action. The proof shows without conflict that the appellees were in the actual, peaceable possession of the 77 acres of land sued for, at the time the appellant went into possession, and had been in such possession for some few years prior thereto. The appellees were tenants of one Hezekiah Harris, the owner of the land. Appellant is the son of said Hezekiah, and he seems to have asserted his right of entry into possession upon a rental or lease from his father, the owner. Appellant and appellees had entered into no agreement whatever, as to the land, and were therefore strangers as to this land, so far as any contractual relations were concerned. The testimony of appellant shows that after he rented the land, occupied by appellees, from his father, he proceeded to haul lumber onto it, and built a house and cultivated the land, and has since continued in possession; and that appellees were in possession at the time he so acquired the land, and that appellees have had no possession thereof since. He insists that he made no threats, and did not know appellees had a lease on the land; that they offered no objection; and that he "thought everything was all right." To quote the witness: "I went on that land and took it, when they had used it for nine years, and they never said

nothing about it, never opened their mouths, old man Lewis or Frank."

The parties to the suit were closely related. The owner of the land, Hezekiah Harris, was the father of Charlie Harris, the appellant, the brother of appellee, Lewis Harris, and the uncle of Frank Harris. Hezekiah Harris, the owner, was not a party to this suit. There was no proof of demand made for possession before the suit was brought. The testimony for the appellees tends to show that appellant made use of certain threats in taking possession of the land, and that objection was made to his entry.

We take the following excerpts from the testimony of witness Lewis Harris:

"Charlie Harris, * * * he went on the land and began hauling lumber in December, some time, year before last. I had a conversation with him about it. I spoke to him about it. I told him that we had it leased for eight years, and we had a right to carry the lease out. I told him he had no right to disturb us because we had leased it for eight years, and it was right we should carry it out. He said he was going to cultivate it, or spill blood."

To the question, "Did he have any weapon at that time?" the witness answered:

"Well, in hauling the lumber I have seen him pass by my gate with a gun laying across his wagon. That was the time he made that declaration to me. He was hauling lumber on the land. * * * He had a weapon on his wagon when he was hauling lumber. He carried it along before Christmas, a double-barrel shotgun. After I told him I had it leased, and (you) did not want to be disturbed, he said he was going to have it if he had to spill blood; that was some time between November, year before last, and January, last year. Some time in January he got the land, took it from me, went into possession of it, kept it, has it now, had it when Frank and I brought this suit."

[1] "Forcible entry and detainer was a public offense in England, made so by statute. 4 Bla. Com., 148; 1 Russ. on Cr. 421. In this, as in many other states of the Union, it is a tort, to be redressed by a civil action, which the statute gives. It is an action summary in its forms and machinery, to regain possession of realty, which has been tortiously taken, or is tortiously withheld. It is purely possessory, and cannot be maintained unless the plaintiff has had prior possession. Title cannot be inquired into." *Welden v. Schlosser*, 74 Ala. 355.

Speaking by way of definition of the same subject, it was said in *Knowles v. Ogletree*, 96 Ala. 555, 12 South. 397:

"'Forcible entry and detainer,' as generally defined, is essentially an action given to protect the actual possession of real estate against unlawful and forcible invasion, to remove occasion for acts of violence in defending such possession, and to punish breaches of the peace committed in the entry upon or the detainer of real property. * * * Neither the question of title nor of the right of entry or of possession is involved in the issue, the gist of the action being the entry and detainer by force and violence, and the ousting from a peaceable possession contrary to law. * * * The legal effect of the statute is that, if the disseisor enters by force or threats, no demand is necessary before commencing the action; but if he takes possession 'by entering peaceably,' then, in order to support the action,

there must be a demand of possession and unlawful refusal thereof, or force or threats used in 'turning or keeping the party out of possession.'"

The above authority cites the case of *Horsefield v. Adams*, 10 Ala. 9, from which we take the following extracts having reference to the statute of forcible entry and detainer:

"It is evident the chief object of the statute is to maintain the party having the actual possession, against the entry of one whose right of possession, or of re-entry has not been conceded by him. * * * The possession at the time of intrusion is the only matter which is permitted to be the subject of investigation. All questions as to the ultimate title or as to the right of possession, as distinguished from the actual possession, are excluded from the jury."

See, also:

"Generally speaking, forcible entry and detainer is a remedy for the protection of the actual possession of realty, whether rightful or wrongful, against forcible invasion, its object being to prevent disturbances of the public peace, and to forbid any person righting himself by his own hand and by violence; and therefore ordinarily the only matters involved are the possession of plaintiff and the use of force by defendant." 19 Cyc. 1124.

[2] Our statute (Code 1907, § 4262) in defining forcible entry and detainer, and specifying what force may be considered sufficient, says, among other things:

"By threats of violence to the party in possession, or by such words or actions as have a tendency to excite fear or apprehension of danger."

As appears from the quotation from *Knowles v. Ogletree*, supra, where the entry is by force or threats, no demand for possession is necessary before commencing the action. In the instant case there was no contractual relation between these parties, no existing relation of landlord and tenant. The suit is brought under the provisions of section 4262 of the Code of 1907, the following section (4263), relating to unlawful detainer, having no relation of course to the case. From this record it appears, in the light of the foregoing authorities, that there were but two questions for the determination of the jury. The first was whether the plaintiffs in the suit had actual, peaceable possession at the time of the entry of the defendant; and, second, whether or not the defendant had entered by force, that is—in this case—as "by threats of violence to the party in possession, or by such words or actions as have a tendency to excite fear or apprehension of danger."

[3] The first, the actual, peaceable possession of the plaintiffs, was admitted by the defendant on the trial. That was at least without dispute. The testimony of one of the plaintiffs, from which we have above taken some quotations, was clearly sufficient for submission to the jury of the second question—that of force, by threats, etc., made by defendant upon effecting the entry. *Mallon v. Moog*, 121 Ala. 303, 25 South. 583;

Ladd v. Duhrcra, 45 Ala. 421; Farley v. Bay Shell Road Co., 125 Ala. 184, 27 South. 770.

[4] In a case of this character the merits of the title cannot be inquired into. Code 1907, § 4271. The plaintiffs offered in evidence a lease from the said Hezekiah Harris. The defendant objected to its introduction upon the ground that its execution had not been proven, but upon no other ground. There was due proof of its execution by attesting witness Borom, and its execution was admitted by the lessor when called as a witness for the defendant. This objection, besides, is not argued in brief of counsel. Under the facts as disclosed by this record, the lease was irrelevant and immaterial. But there was no objection to its introduction on this ground, and indeed its irrelevancy is not argued by counsel in brief. The only objection to its introduction was not well taken, and in this situation the trial court cannot be held in error for its ruling.

[5] After the plaintiffs rested their case, defendant, it seems, moved the court to exclude the lease upon the ground that it is void for uncertainty in description of the place leased, and upon this ground only. This insistence is urged here.

The instrument shows that the lessor leased "his place" to the lessees.

"Generality and indefiniteness of description will not avoid a conveyance. It is uncertainty that will not be removed when the conveyance is read in the light of the circumstances surrounding the parties at the time it was entered into, and their manifest design is considered." *Ellis v. Martin*, 60 Ala. 394.

There was evidence tending to show, not only that the lessees were then, and had been for some years, occupying this 77 acres of land as tenants of the lessor, but that this 77 acres of land in Macon county was all the land owned by the lessor. We do not think it can be said that the instrument was void on its face for uncertainty of description. *Chambers v. Ringstaff*, 69 Ala. 140; *Ellis v. Martin*, supra; *Boykin v. Bank*, 72 Ala. 271, 47 Am. Rep. 408. Reversible error cannot therefore be predicated upon the ruling of the court overruling the motion.

[6] During the progress of the trial, the court permitted an amendment of the complaint by adding a count claiming reasonable rental value of the land sued for, during the pendency of the appeal to the circuit court. The bill of exceptions recites that the "defendant objected."

In *Farley v. Bay Shell Road Co.*, 125 Ala. 184, 27 South. 770, it is said:

"To put the court in error in allowing an amendment, the amendment offered must not only be an improper one, but there must be made the specific objection which renders it improper at the time. A mere general objection will not be sufficient."

The objection here was general, and the above authority is directly in point. However, it might be added that a judgment for rent in such cases is not dependent upon the

complaint. Code 1907, § 4282; *Helton v. Ft. Gaines Oil Co.*, 39 South. 925.

A continuance was insisted upon, in the court below, on account of this amendment.

[7] It requires no argument to show that there was no error in the court's refusing to continue the case on this account. We think the authorities from which we have herein quoted demonstrate that, so far as disclosed by the record, any lease, either to the plaintiffs or to the defendant, was irrelevant and immaterial. The defendant, so far as any contractual relation was concerned, was a stranger to the plaintiffs, a mere trespasser, an intruder, and he cannot complain at the refusal of the court to permit him to show that one of the plaintiffs had made another or different contract with the owner. That was a matter with which he was not concerned.

[8] The defendant reserved an exception to that portion of the oral charge of the court, wherein the court charged that, for the plaintiffs to recover, the jury must be reasonably satisfied that the land in question was leased by the plaintiffs under the written agreement from Hezekiah Harris. We have shown that this lease was irrelevant, and therefore no burden rested upon the plaintiffs to show such lease. The portion of the charge referred to placed upon the plaintiffs a burden not required by the law. This was a matter of which the plaintiffs alone could complain. Clearly, the defendant could not.

What we have here said we think sufficiently shows that there was no reversible error committed by the trial court, as disclosed by any assignment of error treated by counsel for appellant in brief, and we deem it unnecessary to discuss each insistence separately, made by counsel.

The judgment of the circuit court is affirmed.

Affirmed.

MCCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

BARRETT v. BROWNLEE. (No. 845.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. EXECUTION ⇐78—FORM—OMISSION OF PARTIES.

An execution reciting that "you caused to be made the sum of \$100 judgment, * * * which — recovered of him on April 7, 1890," etc., failing to show in whose favor it was issued, was void.

[Ed. Note.—For other cases, see *Execution*, Cent. Dig. § 174; Dec. Dig. ⇐78.]

2. COURTS ⇐91—OPINIONS—STARE DECISIS.

A decision that an execution not showing in whose favor it was issued was void, having stood undisturbed for more than 25 years, will

not be overruled, under the rule of stare decisis, though criticized.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. § 91.]

Appeal from City Court of Birmingham; John C. Pugh, Judge.

Ejectment by William F. Barrett against Bannister Brownlee. Judgment for defendant, and plaintiff appeals. Affirmed.

Plaintiff introduced final certificate of entry from United States to Benjamin Brownlee, including the lands sued for, and patent from the government to Benjamin Brownlee to the same land. Plaintiff further introduced the transcript of a cause determined in the circuit court of Jefferson county, wherein William Kirkpatrick brought suit and recovered judgment against Benjamin Brownlee for penalty for cutting trees, together with execution, which was as follows (omitting formal part):

"You are hereby commanded that of the goods and chattels, lands and tenements of Benjamin Brownlee, you caused to be made the sum of \$100 judgment, and \$33 costs, which — recovered of him on April 7, 1890," etc.

The levy following on the land here sued for, notice of sale, and sheriff's deed conveying same to Louis L. Dean, deed from Louis L. Dean to William and Evelyn Kirkpatrick for the same land, and deed from William Kirkpatrick to William F. Barrett, plaintiff, together with the will of Kirkpatrick, leaving all his property to Barrett.

W. T. Hill and James A. Mitchell, both of Birmingham, for appellant. Allen & Bell, of Birmingham, for appellee.

DE GRAFFENRIED, J. [1, 2] In the case of Cooper & Co. v. Jacobs & Belsinger, 82 Ala. 411, 2 South. 832, this court, through Somerville, J., said:

"The execution issued by the justice of the peace, Hilton, was properly excluded from admission in evidence, being void on its face. It fails to show in whose favor it was issued, and amounted to nothing more than a roving commission to any constable of the county to make a certain sum of money out of the goods and chattels of Hayes & Roberts. The indorsement on the back of the execution was no part of it, and cannot be looked to in aid of this fatal defect."

The above decision has stood undisturbed as the law of this state for more than 25 years, and while it has been somewhat criticized by other courts (Collins v. Hines, 100 Tex. 304, 99 S. W. 400, and McGuire v. Galligan, 53 Mich. 453, 19 N. W. 142), and while, since its rendition, this court had indicated a disposition to treat mere clerical errors or omissions in execution with more liberality than is indicated in the above decision (De Loach v. Robbins, 102 Ala. 288, 14 South. 777, 48 Am. St. Rep. 46), nevertheless the point decided in the above case was involved in it, and in this case we must either follow that case or overrule it. The doctrine

of stare decisis protects society from the uncertainty of fluctuating judicial decisions and renders certain the "great landmarks of property." The above decision was adopted by what is regarded by the legal profession as a great court, and we are not disposed to disturb it. Snider v. Burks, 84 Ala. 57, 4 South. 225; Morton's Case, 79 Ala. 616; Herstein v. Walker, 85 Ala. 37, 4 South. 262; Farrior's Case, 92 Ala. 176, 9 South. 532, 12 L. R. A. 856.

As we have reached the above conclusion, it is unnecessary for us to consider any of the other questions presented by this record. The judgment of the trial court is affirmed. Affirmed.

ANDERSON, C. J., and MCLELLAN and MAYFIELD, JJ., concur.

No. 20024.

ROBINSON & CO. v. COSNER (LEWIS, Warrantor).

(Supreme Court of Louisiana. June 8, 1914. On Rehearing, Jan. 25, 1915. Dissenting Opinion Feb. 19, 1915.)

(Syllabus by the Court.)

1. TAXATION § 725 — SALE — REDEMPTION — WHAT CONSTITUTES—MORTGAGES.

An instrument purporting to be a sale of property from a tax purchaser to the owner, but made within the delay allowed for redemption, and for a price about equal to the amount paid by such purchaser, plus the interest and penalties allowed by law, is a redemption which leaves the mortgages resting upon the property unaffected.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1445-1447; Dec. Dig. § 725.]

2. BANKRUPTCY § 196—PETITION AND DISCHARGE—EFFECT ON JUDICIAL MORTGAGE.

A judicial mortgage, inscribed more than four months prior to the filing of a petition in bankruptcy against the mortgage debtor, is unaffected by such petition or by the subsequent discharge of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. § 196.]

3. JUDGMENT § 784—JUDICIAL MORTGAGE—PRIORITY OF LIENS.

A judicial mortgage is unaffected by a claim of privilege for the price of improvements placed upon real estate, where the claim is unrecorded, the judgment for the price fails to specify the particular property upon which such privilege bears, and is recorded in the conveyance, and not in the mortgage, book, and the entire property is appraised and sold in globo.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1353-1357; Dec. Dig. § 784.]

4. EXECUTION § 272 — EXEMPTIONS — CLAIM AT SALE—SUFFICIENCY.

A verbal statement on behalf of the owner, made at sheriff's sale of his property, that he will insist upon his homestead rights, is without effect when followed by inaction for several years and until, after the distribution by the sheriff of the proceeds, a controversy arises among creditors as to the legality of such dis-

tribution, and the owner intervenes merely to favor one creditor to the prejudice of another.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 771, 781-788; Dec. Dig. ¶ 272.]

5. HOMESTEAD ¶169—EXEMPTION—WAIVER—SUFFICIENCY.

A verbal waiver of homestead, made on behalf of the husband alone, at the time of the public sale of the property, is ineffectual.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 335; Dec. Dig. ¶169.]

6. EXECUTION ¶322—ADJUDICATEE—PROCEEDS OF SALE—APPLICATION.

Where the seizing creditor becomes the adjudicatee of property sold in satisfaction of a senior mortgage and vendor's lien, he is entitled to retain from the price an amount sufficient to pay his claim, together with the costs of the proceeding, and, if there be any surplus, he is required to apply the same to the payment of the special junior mortgages, if any there be; but, if the junior mortgages are general, he should pay the surplus to the sheriff, to be applied by him to their payment, or, as it has been held, he may deposit it in court, and call the mortgagees in to litigate their respective rights.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 949-955; Dec. Dig. ¶322.]

7. MORTGAGES ¶590—FORECLOSURE—SALE—CANCELLATION OF MORTGAGES.

The sheriff is authorized to cancel mortgages on property sold by him only when the price realized is insufficient to do more than satisfy the senior mortgage under which the sale is made and to pay the costs of the suit; and there is no law which authorizes him, or any one, to cancel, without notice to the mortgagee, a general mortgage, so long as there exists a fund which is applicable, or may be applied, though in controversy to its payment.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1691, 1692; Dec. Dig. ¶590.]

8. MORTGAGES ¶568—FORECLOSURE—SALE—PROCEEDS—RIGHTS OF JUDICIAL MORTGAGEES—REMEDIES.

Where, as the result of a sale, in satisfaction of a senior mortgage or privilege, there is a surplus of price, attributable to the payment of junior general mortgages, the holders of such mortgages may assert their rights either by way of third opposition at the time, or, subsequently, by way of the hypothecary action.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1639-1646; Dec. Dig. ¶563.]

O'Niell and Provosty, JJ., dissenting.

Appeal from Fifteenth Judicial District Court, Parish of Jefferson Davis; A. M. Barbe, Judge.

Hypothecary action by Robinson & Co. against George W. Cosner, with John H. Lewis as warrantor. From judgment for plaintiffs, defendant and his warrantor appeal. Affirmed on rehearing.

Cline, Cline & Bell, of Lake Charles, for appellant Cosner. McCoy, Moss & Knox, of Lake Charles, for appellant Lewis. J. Sheldon Toomer, of Lake Charles, for appellees.

PROVOSTY, J. This is an hypothecary action by Robinson & Co. against Geo. W. Cosner to enforce a judgment obtained by Robinson & Co. against one Neely, and duly recorded while the property now sought to be proceeded against stood of record in Neely's name.

Neely failing to pay the credit part of the price of the sale by which he had acquired this property, his vendor, John H. Lewis, obtained a judgment against him, and caused a *fi. fa.* to issue on it, and the property to be seized and sold, and purchased it at the sheriff's sale. He subsequently sold it to Cosner, who has called him in warranty to defend the suit.

Included in this judgment for the vendor's claim was a debt which, for want of registry, was not secured by any mortgage or privilege as to third persons, and the *fi. fa.* was issued for both debts, and the sale was made for both. Lewis' bid was the only one made at the sale, and was for the full amount called for by the writ; that is to say, for the full amount of the two debts, plus the costs. The sheriff's deed to Lewis recited that the price of the adjudication was paid by Lewis; but the sheriff's return on the writ shows the contrary, since it contains the statement that the money was received from Lewis and paid to his attorney. As a matter of fact, no part of the price of the adjudication was paid, except to an amount sufficient for the costs. The sheriff's deed to Lewis which was duly recorded, directed the clerk of court and ex officio recorder of mortgages to cancel all mortgages subsequent in date of registry to Lewis' said vendor's claim; and, under this instrument, the registry of Robinson & Co.'s said judgment was canceled. And it was after this cancellation that the defendant, Cosner, bought the property from Lewis. He did so in good faith, relying upon the records of the recorder's office, which showed said property to be free of mortgages.

The property was Neely's homestead, and he was present at the sale for the purpose of asserting his homestead right of \$2,000 against any excess of the price of the adjudication over and above the amount of Lewis' judgment. He could not claim the homestead as against Lewis' judgment, because one of the debts for which it had been rendered was for the purchase price of the property, and the other was for labor and materials that had gone towards improving the homestead. Const. art. 245. This other debt, not having ever been recorded, did not bear mortgage or privilege upon the property as against third persons, and, while priming the homestead, was itself primed by Robinson & Co.'s judicial mortgage. Robinson & Co., though present at the sale through an agent for the purpose of asserting any rights they might have, made no attempt to interfere. Doubtless, they considered that, inasmuch as their claim was inferior in rank to the vendor and homestead claims, which together exceeded the amount of the adjudication, they could get nothing by interfering. That this was the reason for their nonaction is not shown affirma-

tively, but results by a very strong implication. It was only some nine months later that they awoke to their present idea of their having rights in the premises, and brought this suit. The date of the sale was August 5, 1911. This suit was filed June 10, 1912.

The question is, of course, whether at said sheriff's sale the property passed to Lewis free of their said judicial mortgage, or burdened with it. If it passed free, the sheriff was authorized to direct the inscription of said mortgage to be canceled. If it passed burdened with said mortgage, the cancellation of the inscription of said mortgage was unauthorized, and cannot affect Robinson & Co.'s mortgage rights.

The rule is that the property sold at a sheriff's sale passes burdened with the mortgages resting upon it, which are superior in rank to the claim of the seizing creditor, but free of those which are inferior (C. P. arts. 679, 683-685, 708, 710), unless the inferior mortgages are special, and a balance remains after the seizing creditor's claim is satisfied; in which event the purchaser retains in his hands this balance to an amount equal to that of these inferior special mortgages (*Tessier v. Bourgeois*, 38 La. Ann. 256). But he cannot retain this balance when the inferior mortgages are not special, but are general—i. e., legal or judicial. *Pasley v. McConnell*, 38 La. Ann. 474. In *Fortier v. Slidell*, 7 Rob. 398, this court said that the Code had made no provision for the mode of raising subsequent general mortgages when at a sheriff's sale there remains a surplus, and propounded the question, "What is to be done in such a case?" and answered the question by saying that this surplus must be paid to the sheriff, to be attributed by him to satisfying these subsequent general mortgages. This view was expressly reaffirmed in *La Gourgue v. Summers*, 8 Rob. 175, and has never been departed from.

All this we do not understand the learned counsel for Robinson & Co. as contesting in any way; in fact, they have cited the said articles of the Code and decisions as authority on their side. Their contention is that, unless the sheriff does apply the surplus to the subsequent mortgages, they are not extinguished, but continue to remain upon the property, and that in the instant case he did not do so, but applied it in part to the satisfaction of the second item of Lewis' judgment, which was inferior in rank to Robinson & Co.'s mortgage.

We do not think that the manner in which the sheriff has distributed the price of a sale made by him can exercise any influence upon the question of whether the property passed to the purchaser burdened with, or free of, the mortgages subsequent in rank to the claim of the seizing creditor, unless, indeed, the subsequent mortgages are special, and the surplus of the price of adjudication has been paid to the holder of them; in which

case, of course, these special mortgages would be extinguished by payment, and could no longer affect the property. The purchaser at a sheriff's sale is not required to supervise the distribution of the proceeds of the sale. All he is required to do is to comply with his bid. The law then regulates the situation; and, according to this law, the property passes to him free of the general mortgages inferior in rank to the claim of the seizing creditor.

Indeed, if the sale in this case had been made to satisfy only that part of Lewis' judgment which was for the vendor's claim, and Lewis had paid the price of the adjudication, the case would appear to us to be wholly free from difficulty. But the sale was made to satisfy both the vendor's claim and the unsecured claim included in the judgment. The judgment was for both claims, and the *fi. fa.* was for both, and the sale was, in form and in fact, made to satisfy both, and Lewis paid no part of the price; he and the sheriff merely went through the paper ceremony of exchanging receipts.

Under these circumstances, doubt has arisen in our minds whether, to the extent that the sale was thus made to satisfy the unsecured claim, it must not be considered as having been for a debt inferior in rank to Robinson & Co.'s said mortgage, with the result that the property passed subject to said mortgage.

We have concluded, however, that while the sale was, in fact, made to satisfy both claims, it was, in legal contemplation, made to satisfy only the vendor's claim. Our reason for so concluding is that, in law, a sheriff's sale must have the effect of either removing subsequent general mortgages from the property sold, or letting them remain thereon; that its having the effect of both removing such mortgages and letting them remain is a legal impossibility; that therefore this sale must be considered as having been made, in legal intentment, to satisfy one or the other of said two claims, and not both; and that, in this condition of things, it must be considered as having, in legal intentment, been made to satisfy the paramount claim included in the writ. We have concluded that the legal situation in the case of such a dual writ is not different from the situation where, instead of the two claims being included in one writ, they are embraced in separate writs, and the two writs are placed in the hands of the sheriff at the same time, and the sale is made to satisfy both. In such a case the paramount writ alone is considered; an adjudication must be made regardless altogether of whether the amount bid is sufficient or not to leave a balance for the subordinate writ. C. P. art. 685. We do not think that the fact that the two claims were included in one judgment and in one writ, instead of being kept separate, has altered the legal

situation. They have continued to be entirely separate in legal intendment.

If, in the case of such a dual writ, the sale had to be considered as being made to satisfy the unsecured claim, there could be no adjudication whenever the amount of the subsequent mortgages and the secured claim together exceeded the value of the property. This is so because the bidders at the sale would understand that the property was to pass to them burdened with these subsequent mortgages, and would regulate the amount of their bids accordingly, and would make no bid if the secured claim and the subsequent mortgages together exceeded the value of the property. In the instant case, if the announcement had been made at the sale that the property was to pass burdened with this Robinson & Co. mortgage, there could not have been any sale, as the amount of this mortgage and of the vendor's claim together largely exceeded the value of the property, judging of this value from the bidding at said sale.

Again, in the case of such a dual writ, the property would unquestionably pass free of the homestead claim; for the sale would have been made to satisfy the vendor's claim. Now, if, while it thus passed free of the homestead right, it passed subject to subsequent general mortgages, the legal situation would be that these subsequent general mortgages would, as an effect of the sale, be endowed with a preference over the homestead in every case where the price of the adjudication did not exceed the amount of the vendor's claim by an amount sufficient to satisfy both it and the homestead. The property would then pass free of the homestead, but subject to subsequent general mortgages.

Robinson & Co.'s mortgage is for a much larger amount than is being claimed in this suit. In other words, Robinson & Co. are not seeking to enforce their mortgage for its full amount, but only to the extent of the surplus of the price of the adjudication over the vendor's claim. Now, if said sale had been made to satisfy this unsecured claim, the legal situation would have been that the property would have passed burdened with Robinson & Co.'s mortgage to its full amount. By claiming only the surplus, therefore, Robinson & Co. have practically recognized that the legal situation stands just as if the sale had been made to satisfy the vendor's claim alone. The only ground upon which they base their contention that their mortgage continued to adhere to the property is that the surplus was legally attributable to it, and was erroneously attributed to Lewis' unsecured claim.

As the price of the sale was divisible, although the sale itself was indivisible, one might, at first blush, think that the sale might be considered as having been made in

satisfaction of the vendor's claim up to its amount, and in satisfaction of the unsecured claim for the balance; but, on principle, as we have endeavored to show, this cannot be done; and a departure from principle is always fraught with pernicious consequences. Erroneous doctrine comes with smiling face and in pleasant garb when presenting itself for adoption, but thereafter makes no end of trouble.

As already stated, we are clear that the property at a sheriff's sale passes free of subsequent general mortgages, and that the purchaser has no concern with the disposition which the sheriff may make of the proceeds of the sale. But what if the price of the adjudication is not paid, but, as happened in this case, is retained by the purchaser? In such a case, we have little doubt that, to the extent that the price of adjudication thus retained would, if paid, have been attributable to the subsequent general mortgages, the property passes subject to these mortgages. The ceremony of an exchange of receipts between the purchaser and the sheriff could not in such a case alter the legal situation, which would stand just as if the purchaser had retained the surplus of the price for the express purpose of satisfying these subsequent general mortgages. Whenever the price had been thus expressly retained, no one, we imagine, would say that the property had passed free of these mortgages. Therefore, if Lewis were still the owner of this property, and the suit were against him, we should have little doubt of Robinson & Co.'s right to the hypothecary recourse they are now seeking to exercise. But Lewis is no longer owner; Cosner is; the suit is not against Lewis; it is against Cosner, who, as already stated, acquired the property in good faith, believing it to be free of mortgages—a brief founded upon the public records.

In saying founded on the public records, we do not lose sight of the fact that the sheriff's return, which the law required should be on file in the office of the clerk of court and ex officio recorder, showed that the price had not been paid, but had been retained by Lewis; but we do not consider that this sheriff's return forms any part of the public records in connection with the question of whether at the sheriff's sale the property passed free of, or burdened with, the general mortgages inferior in rank to the seizing creditor's claim. Articles 693 and 698, O. P., provide in that connection as follows:

Article 693:

"This act must make mention:

"1. Of the writ by virtue of which the object has been seized and sold.

"2. Of the title of the cause in which the writ has been issued.

"3. Of the names and surnames of the defendant, plaintiff and purchaser.

"4. Of the nature of the object sold, with a

description of it, as well as of the price and conditions on which it has been adjudged.

"5. Of the manner in which the purchaser has paid the price, or bound himself to discharge it.

"6. Of the amount of the privileges or mortgages with which the property adjudicated is incumbered, and which were made known at the time of the adjudication.

"7. And finally, of the special mortgage which he has given to secure the payment of this price, where the sale has been made on a credit."

Article 698:

"This act, thus recorded and delivered to the purchaser, shall be held as full proof of what it contains, in all the courts of this state, in the same manner as an act before a notary would be."

We think that when Cosner came to examine the records with a view to determining whether this property had passed at said sale free of, or burdened with, this judicial mortgage, he had a right to rely upon this sheriff's deed, and was not required to consult the sheriff's return. This deed informed him that said property had been sold to satisfy a debt superior in rank to said judicial mortgage, and that the price of the adjudication had been paid. With the verity of the sheriff's statement contained in the deed, that the price had been paid, Cosner had no concern. His sole concern had to be as to whether, assuming the price to have been paid, the sheriff was authorized by law to cause the inscription of subsequent mortgages to be canceled; and the sheriff had such authority if the sale was made to satisfy a claim superior in rank to this judicial mortgage.

Cosner and Lewis make the point that this surplus now sued for would not have been attributable to Robinson & Co.'s mortgage if paid, but to the satisfaction of Neely's homestead claim, which had a preference over it; and that therefore Robinson & Co. are without any right of action. Into this and other questions raised in the case and argued in the briefs we have deemed it unnecessary to go.

The judgment appealed from is therefore set aside, and the suit of plaintiffs is dismissed at their cost in both courts.

On Rehearing.

MONROE, C. J. On January 12, 1911, plaintiffs obtained a judgment against W. A. Neely, which was recorded in the mortgage book of the parish of Calcasieu on January 26, 1911, and took effect, as a judicial mortgage, upon a half section of land then owned and occupied by the judgment debtor, and there is still due upon that judgment a balance exceeding the amount here involved. On May 12, 1911, John H. Lewis obtained judgment, by confession, against the same defendant, which was recorded in the conveyance book of the parish on January 5, 1912, for amounts aggregating \$4,623.19, of which \$3,713.60 (\$2,213.60 plus \$1,500) was represented by notes, secured by mortgage and

vendor's lien priming any claim for homestead that the defendant might have asserted, and also priming the judicial mortgage acquired by the plaintiffs herein. The remaining \$909.59 was represented by notes which had been given by Neely to Layne & Bowler in payment for a pump and machinery which he had purchased for the irrigation of his land. His claim (merged in his judgment) with respect to those notes was recorded after the registry of the judgment obtained by plaintiffs, and was then recorded in the conveyance, and not in the mortgage book; and, while the judgment recognizes Lewis' mortgage and vendor's lien upon the land to which we have referred, it contains no specification of the particular property to which the privilege for the price of the pump and machinery is supposed to have attached. Upon the judgment so obtained Lewis issued execution, under which, on August 5, 1911, the land in question was adjudicated to him, as the sole bidder, for \$5,900, being the amount of the judgment, including principal, interest, and costs, and the writ was returned satisfied. He paid the costs, amounting to \$118.54, and retained in his hands the balance of \$5,781.46. Thereafter, on December 22, 1911, he sold the land to the defendant, Cosner, and, on January 5, 1912, the deputy clerk, at the request of the counsel representing Mr. Cosner, and (to quote language of the counsel) "upon exhibiting the record in the suit of Lewis v. Neely, * * *" canceled the judicial mortgage recorded in favor of the plaintiffs. On June 12th following plaintiffs brought this hypothecary action praying that Cosner be cited and condemned to relinquish the land so acquired by him, in order that it may be sold by the sheriff for the payment of the debt due to them, to the extent of \$957.04, with legal interest thereon from August 5, 1911, or, in default of so doing, that he be condemned to pay plaintiffs that amount, which represents the difference between the \$5,900, at which the property was adjudicated to Lewis, and the amount required to satisfy so much of Lewis' claim and judgment as primed plaintiffs' judicial mortgage. Cosner excepted, answered, and called Lewis in warranty; and Lewis excepted, and answered, in effect, as follows: That plaintiffs' petition discloses no cause or right of action; that the proceeds of the sheriff's sale, save so much as was expended in payment of costs, were properly retained by him, for the reason that the debts for the payment of which the sale was made primed that due to plaintiffs, the two first mentioned representing the purchase price of the property, and the third having been incurred by the defendant, Neely, for money, labor, and material purchased for the repair and improvement of his place, and being, therefore, payable from any amount to which Neely would be entitled by right of his homestead claim, and

hence entitled to precedence over the claim of the plaintiffs; and that, moreover, Mr. and Mrs. Neely have waived their homestead rights in favor of appearer and have authorized him to assert them in their behalf; that appearer conveyed to the defendant, not only the title acquired at the sheriff's sale, but also a valid tax title acquired by him from C. Brent Richard; and that plaintiffs' claim against Neely had been discharged by reason of Neely's discharge in bankruptcy. To the claim thus predicated upon the tax title plaintiff filed a plea of estoppel.

On May 8, 1911, after Lewis had answered, Neely filed an opposition, in the suit which Lewis had brought against him, in which he had confessed judgment, and in which the property in controversy had been sold, and he therein sets up a claim to \$1,500 of the proceeds of the sale, or "so much thereof as may remain in the sheriff's hands after payment of all claims against which appearer cannot assert his homestead right." This opposition appears to have been signed and sworn to by Neely, in person, in the state of Arizona, on March 25, 1913, and was filed in the district court on May 8th following. On the other hand, we find in the record an ex parte affidavit executed by Mrs. Neely, at Lake Charles, La., on March 19, 1913, and admitted in evidence over the objection of plaintiffs' counsel, in which she declares that the judgment under which the property in question was sold took precedence of her homestead rights (though she asserted, and now asserts, those rights as against other creditors and debts), and that she and her husband, at the time of the sheriff's sale, waived and abandoned any and all right to claim a homestead as against the debts included in said judgment—

"and do hereby waive and transfer to said John H. Lewis all of their homestead rights in the premises or the proceeds thereof, to the extent that same may be necessary to satisfy said judgment, authorizing said John H. Lewis to appear in any legal proceeding and assert said homestead rights, either in the name of appearer or in his own name."

She further declares that the item of \$900.59 included in the judgment obtained by Lewis represents "machinery, materials, and goods furnished by Layne & Bowler Company to improve the property here in question," and that the indebtedness therefor "was secured by a lien and privilege upon the pumping plant and one acre thereof," and that, taking \$8,850 as the value of the entire property, the pumping plant and one acre were worth \$3,000.

Mr. Goudeau, a member of the bar (called by either defendant or warrantor) testified that Mr. Neely requested him to appear at the sheriff's sale and announce that he (Neely) was urging his homestead claim, and that witness complied with his request.

"My understanding," continues the witness, "was that he had made an agreement with Mr. Lewis, and my recollection is that he told me

that he wanted to make this claim for the homestead, and, if Mr. Lewis complied with his price or agreement with him, it would not be necessary to urge the homestead claim, but that he wanted to do that in order to protect himself—to make sure that the agreement would be carried out—whatever the agreement was. And after the sale he seemed to have been satisfied, and said that it was not necessary to take any further steps. He was satisfied. Evidently, Mr. Lewis did what he promised."

Judge Barry, who at that time appears to have represented Lewis, and who was called as a witness on his behalf, testified that Neely had spoken to him about claiming homestead rights, and that, the suggestion having been made that he get another attorney, he employed Mr. Goudeau, who notified the sheriff:

"That, in case there should be more than a sufficient amount to pay the privileged debts, he [Neely] should demand his homestead rights."

"Q. Do you recall whether Mr. Goudeau said that he was claiming the homestead against privileged claims, * * * or claiming the homestead, except as against J. H. Lewis' claims? A. I don't know that he specified Prof. Lewis. He said, if anything above the vendor's lien privilege and such as ranked the homestead, why he expected them (?) to claim them. Now, the sheriff didn't know but what there would be lively bidding on that property, I think, from the way he talked."

It is admitted that plaintiffs have recovered two sums of \$269.35 and \$499.47, respectively, which are to be credited on their judgment, but it is shown that they were no parties to the cancellation of the judicial mortgage whereby the balance due was secured. The original of the sheriff's deed to Lewis is not copied in the transcript, but we find an abstract thereof, from which we take the following excerpt, which we assume to be part of the "record" which was exhibited by the counsel, to wit:

"The said John H. Lewis, purchasing the above-mentioned property under a judgment rendered on a vendor's lien, purchases same subject to the special mortgage of Charles F. Spaulding for \$1,500, and the special mortgage of Chas. Ranson A. Nockton for \$2,213.60, and all subsequent mortgages against this property are hereby authorized to be canceled by process of law."

It is shown that Lewis sold the property to Neely, on February 27, 1909; that on June 25, 1910, it was sold by the tax collector to C. B. Richard for taxes of 1909, assessed to Lewis; that on May 11, 1911, Lewis obtained the confession of judgment from Neely upon a petition in which he alleges Neely's ownership of the property and his own mortgage and privilege thereon; that he obtained recognition of the mortgage and privilege in the judgment, and thereunder caused the property to be sold, on August 5, 1911, as the property of Neely, and took title from, and appropriated the proceeds of, the sale; that on August 18th following he took a quitclaim deed from Richard; and that on December 22, 1911, he made the sale to Cosner.

It is shown also that plaintiffs were recognized upon Neely's schedule in bankruptcy as secured creditors for the debt here asserted, that Neely was discharged March 19, 1913.

[1-3] Our reconsideration of the case has led to no change of view in regard to the tax title, the bankruptcy proceedings, the status of Lewis' claim for the \$909.50, or the homestead claim.

If plaintiff had proceeded by third opposition to claim the surplus here involved, Lewis, who had just caused the property to be sold as belonging to Neely, had accepted title as coming from Neely, and was retaining the proceeds of the sale as in payment of a debt due by Neely to him, could hardly have been heard to say that the property thus sold belonged to Richard, and that the surplus of the proceeds over and above the amount required to pay his mortgage debt could not be attributed to the payment of another of Neely's mortgage creditors, and it may well be doubted whether he can be heard to say so for the purposes of the defense that he now sets up. Be that as it may, the tax deed to Richard bears date July 6, 1910, was recorded September 13, 1910, and reads, in part, as follows:

" * * * To hold the same to the said C. B. Richard, legal heirs and assigns forever, with the understanding and express stipulation that the owner of the property described herein shall have the right to redeem the same at any time for the space of one year, beginning on the day when the said deed is filed for record in the conveyance office in the parish in which the property is situated, and is [should be 'if'] not redeemed, such record in the conveyance or mortgage office shall operate as a cancellation of all conventional and judicial mortgages."

This instrument, relied on as evidencing a sale, bears date August 18, 1911, and contains the recital that it was executed in consideration of the payment to Richard of \$100, which about covered the amount that he had paid at the tax sale, with the interest and penalty added, and was about one-sixtieth of the amount for which the property had been adjudicated to Lewis on August 5th. Moreover, Richard did not own the property, but held merely an inceptive, or inchoate, title, and, as Lewis was then the owner, the transaction amounted merely to a redemption, which left the mortgages unaffected.

We have been unable to find in the transcript the exact date of the filing of the petition in bankruptcy, but, from the data at hand, we conclude that it was more than four months after the recording of plaintiff's judgment, and Neely's discharge did not, therefore, affect the mortgage thus acquired. 4 Cyc. 403.

[4, 5] The claim upon the Layne & Bowler notes, if properly recognized in the judgment and recorded, would have borne a privilege, which could be successfully asserted against a third person, upon the pump and machinery and one acre of the land upon which they were situated; but the judgment contains no

specification of the property to be affected, and was not recorded until after the registry of plaintiffs' judgment. C. C. art. 3249; People's I. R. M. Co. v. Benoit, 117 La. 999, 42 South. 480; Const. art. 186; Bank v. Maples, 119 La. 47, 43 South. 905; Allen-Wadley Lumber Co. v. Huddleston, 123 La. 522, 49 South. 160. Again, conceding that under article 246 of the Constitution the parties who furnished the pump and machinery were otherwise entitled to a privilege to the extent above stated, and that Lewis was subrogated to their rights, the privilege was lost by reason of his failure to have the property to which it was subject separately appraised and sold. C. C. 3228, 3268; Hoy v. Peterman, 28 La. Ann. 290; Scannell & Lafaye v. Beauvais, 38 La. Ann. 217; Payne & Joubert v. Buford et al., 106 La. 83, 30 South. 263. And, further, it seems to be asserted, upon the one hand, that the claim upon the notes in question is good as against the homestead claim, and, upon the other hand, that it became good against plaintiffs by reason of the fact that Neely, upon the occasion of the sale, waived his homestead right in favor of Lewis, or, rather, that he asserted that right as against all other claims save those held by Lewis. But the evidence does not sustain the view last stated. The witnesses called by defendant or warrantor testified, as we understand them, that Neely had his homestead right verbally asserted, as a matter of protection against Lewis, as well as any one else, and more particularly, to secure the carrying out of some agreement between him and Lewis, which was thought by one of the witnesses to have been carried out, but of which we have no definite information. Such an assertion, followed by inaction, can hardly be considered effective; and, though it may be made at any time before, it comes too late after, the distribution of the proceeds has been made. Johnson v. Agurs, 116 La. 634, 40 South. 923, 114 Am. St. Rep. 562; Abbott v. Heald, 128 La. 719, 55 South. 28. The homestead could not have been waived in the manner stated at any time or in favor of any person.

Lewis having long since, with the acquiescence of Mr. and Mrs. Neely, but with no such waiver as would have bound them, become the beneficiary of the distribution of proceeds, which took place shortly after the sale here in question, they would have no standing to reclaim anything from him, and it is now, as we think, too late for them to interfere merely to prevent the plaintiffs herein from recovering that which they may have the right to recover, though the Neelys may not.

[6-8] The remaining point presents the question, as we now see it, whether, under our law, a man can be deprived of his property, through no fault of his own, without his consent, and by means of a proceeding in court to which he was not made party. Plain-

tiffs were the owners of a claim secured by a valid general mortgage, which was primed by the homestead right and possible claim of their debtor, and by two out of three claims held by another creditor. The homestead right was not asserted in a manner entitling it to recognition, and the other creditor, proceeding upon all of his claims, caused the property to be sold, and it realized a price sufficient to pay the two claims which primed plaintiffs' and to furnish a surplus which was legally attributable to the payment, in part, of plaintiffs' claim, as the next in rank. But the seizing creditor retained the entire proceeds, appropriated the surplus to the payment of his own inferior claim, and, having been the adjudicatee of the property, sold it to a third person, who thereafter obtained the cancellation of plaintiffs' mortgage upon an ex parte application to the recorder.

The Code of Practice is clear to the effect that, where property burdened with special junior mortgages is sold in satisfaction of the senior mortgage, the purchaser not only may, but shall, retain in his hands, and apply to the payment of such junior mortgages, the surplus over and above so much of the price as may be required to pay the senior mortgage. If he pays such surplus to the sheriff, he does so at his own risk, for the sheriff has no authority to receive it, and his sureties are not liable for it if he does so. The language used in article 707 is:

"* * * And the purchaser shall apply the surplus of the price, if there be any, to paying the special mortgages existing on the property, subsequent to that of the suing creditor."

If the suing creditor, being the holder of the senior mortgage, happens to become the adjudicatee of the property, he, of course (i. e., where there are special junior mortgages) retains the amount required to pay his own debt and applies the surplus beyond that amount to the special junior mortgages, but there is no warrant for the idea that, with such surplus in his hands, he can cancel the special junior mortgages, with or without notice to the holders, until he has paid them, so far as the surplus will go.

If, however, there is no surplus of price beyond the amount required to satisfy the senior mortgage, in foreclosure of which the suit is brought, the suing creditor, being the adjudicatee, pays the costs and retains the balance of the price, thereby, in effect, taking the property in payment of his debt, and the sheriff is authorized to give him a release from the junior mortgages, whether special or general. C. P. art. 708. Where the property is burdened with mortgages and privileges which have a preference over the judgment of the seizing creditor, there can be no adjudication unless the amount bid is sufficient to discharge them. C. P. 684. If, in such case, the amount bid is sufficient to pay the mortgages and privileges having precedence of the judgment of the seizing creditor, the property may be sold, and the pur-

chaser may retain in his hands so much of the price as is required to pay the "special mortgages and privileges." C. P. arts. 679, 683, 706, 718.

There is therefore abundant provision for the protection of special mortgages and privileges and for the disposition of the funds attributable to their payment, but there is little mention, in that connection, of general mortgages. Article 710 of the Code of Practice, which seems to contemplate the sale of property subject to general mortgages, and the eviction of the purchaser, and which nevertheless provides that the purchaser must pay the price to the seizing creditor, unless an action for eviction is brought against him or he has just cause to fear will be brought, can have no application in a case in which property is sold in satisfaction of a senior mortgage or privilege, and was probably intended as a means of keeping, to some extent, in the market, real estate burdened with general and tacit mortgages in favor of married women and general mortgages in favor of minors, many of which were uncertain in amount and difficult or impossible to remove. We are not, however, concerned with that article at this time, since it has no special application to this case, and has been thus referred to, in connection with the subject under consideration, for the purpose of showing that it, in a manner, negatives the idea that one can be deprived of his security without his knowledge, or save upon payment of his debt; in saying which it will be understood that, when one accepts as his security a mortgage upon property so burdened for an amount far in excess of its value, he does so with the knowledge that the holders of the prior mortgages are to be paid first, and that they have the right to provoke the sale of the property and appropriate the entire proceeds, if needed for that purpose, to the payment of their mortgages. He has, however, the right to rely upon it that, if, when the sale is made, the property realizes a price more than sufficient to satisfy all the prior mortgages, the surplus will come to him, and that he will not be deprived of his security until he gets it, or until the law takes possession of it for his benefit. The question of the precise disposition that should be made at the moment of the sale of the surplus to which we have thus referred, when attributable to the payment of general mortgages, has received serious consideration from this court, on several occasions, as may be seen from the following résumé of some of the adjudged cases, to wit:

In *Powell v. Kellar*, 5 Rob. 272, it appeared that certain property had been sold under execution to satisfy a privileged claim, and that it realized \$2,250 more than was required to pay the same, which surplus, having been paid into the hands of the sheriff, was used by him in satisfying two judicial mortgages which stood next in rank to the

privilege of the seizing creditor, whereupon the defendant, owner of the property, ruled the sheriff to show cause why he should not pay the \$2,250 over again to him, and, the rule having been discharged, the plaintiff appealed.

This court, though holding to the view that the purchaser cannot withhold from a seizing creditor the payment of the price by reason of general mortgages, also held that it did not follow that the surplus, in a case such as that before it, was to be paid to the defendant in execution, and the judgment discharging the rule against the sheriff was affirmed, though it seemed to have been admitted, or partially admitted, that, "in strictness of law," he had no authority to make the payments complained of. In the course of the opinion, it was said:

"Article 708 of the Code of Practice provides that: 'The purchaser is bound for nothing beyond the price of his adjudication, and if, after paying the suing creditor, as directed in the preceding article, there remains nothing more due, to discharge mortgages subsequent to that of the suing creditor, the sheriff shall give him a release from these mortgages.' From this provision, it may well be inferred that, if there remains a surplus to discharge subsequent mortgages, the sheriff shall grant no release, at least to the extent of such surplus. The question, then, is: What is to be done with the excess? We understand that in this parish [Orleans] the sheriffs have uniformly understood this article as authorizing them to discharge the subsequent mortgages, to the extent of the funds in their hands, in order to give to the purchasers a clear and unincumbered title."

Article 679 is very explicit to the effect that the purchasers shall pay into "his" (the sheriff's) hands the surplus of the price in excess of the amount required to satisfy the privileges and special mortgages; nor do we understand the court to hold differently in the case cited; the question there presented having been, not as to the authority of the sheriff to receive the surplus, but whether he should have used it, as he did, in paying the general mortgages, or should have turned it over to the judgment debtor, and the court holding that, though "in strictness of law" he may not have been authorized so to do, yet that, having used the surplus in paying the general mortgages, to the benefit of the debtor, he (the debtor) was not entitled, in equity, to recover it.

In *Fortier v. Slidell and others*, 7 Rob. 398, it appeared that the plaintiff purchased, at sheriff's sale, for \$3,600, on credit, one-sixth interest in a plantation and slaves, the property of James Peuch, which was affected by a special mortgage to the Union Bank and two general mortgages, the one to Slidell, and the other to the Peuch minors; that, being thereafter threatened with eviction by the mortgagees last mentioned, he refused to use the proceeds left in his hands in paying the special mortgage; that the bank, as holder, obtained judgment thereon and seized the interest in question under execution, and that it was again adjudicated to plaintiff for

\$6,000; that, after paying the claim of the bank, there remained \$2,142.65 in the hands of the purchaser, who then brought the suit, alleging that the amount was insufficient to pay either of the general mortgages, and praying that he be allowed to deposit the same, and that they be called in to litigate their rights with respect to it. In the course of its opinion the court said:

"What was the plaintiff to do with the balance of \$2,142.65 remaining in his hands of the price of the adjudication, after paying the debt of the * * * bank? The purchaser is bound for nothing beyond the price of his adjudication, says article 708 of the Code of Practice. Had that price been inadequate to discharge the claim of the bank, or barely sufficient to pay it, there could have been no difficulty, for the article just quoted provides that, in such a case, the sheriff shall give the purchaser a release from the mortgages subsequent or inferior to that of the suing creditor; *but the Code nowhere provides for the mode of raising such incumbrances, where there remains a surplus after paying the suing creditor who had a special mortgage preferable or anterior to them.* [Italics by present writer.] Article 707 of the Code of Practice provides that, if after paying the suing creditor, there be a surplus, the purchaser shall apply it to the payment of the special mortgages existing on the property, subsequent to that of the suing creditor. In the present case there exists no special mortgage subsequent to that of the bank, but there are two general mortgages, both subsequent or inferior to it. To whom, then, was this surplus to be paid, in order to exonerate the purchaser, and to clear the property from its incumbrances? It can hardly be pretended that in such a case the money should be paid to the debtor, leaving the purchaser exposed to be evicted by the subsequent mortgage creditors of that very debtor, who would thus have been permitted to pocket the money arising from the sale of their pledge. It is not, on the other hand, the province of the purchaser, nor can he safely take upon himself to decide to which of two general mortgages the balance in his hand is to be applied. The purchaser, being bound for nothing beyond the price of his adjudication, has surely, on paying that price, the right of having the property cleared of all incumbrances subsequent to that of the suing creditor. The course pursued by the plaintiff to assert and enforce this right presents, in our opinion, a safe and proper rule of proceeding for a case like the present. It arises ex necessitate rei, and we cannot see any good reason why, in the absence of any law to the contrary, it should not be adopted and sanctioned by us."

And there was judgment accordingly.

In *La Gourgue v. Summers*, 8 Rob. 175, it appeared that, under a judgment obtained upon a debt secured by special mortgage, the property of Summers had been seized and sold, and that, after paying the suing creditor, there remained a surplus in the hands of the sheriff, which was seized by *La Gourgue*, under an ordinary judgment which he had obtained against Summers, and which had been recorded and operated as a general mortgage on the property which had been sold. It further appeared that *La Gourgue* ruled the sheriff to show cause why he should not pay over to him (*La Gourgue*) the money thus seized. Other holders of general mortgages appear to have intervened in the matter, and the court concluded to remand the

case for further inquiry in regard to the status of one of the claims so asserted. In dealing with the legal question presented, however, the court, after some reference to C. P. art. 710, said:

"From the words of this article it is obvious that its provisions apply more particularly to judicial mortgages anterior in date to that of the suing creditor; for, as to those posterior in date, there would be no need of providing against any danger of eviction or disturbance from their existence, as they could never be an impediment to the suing creditor's applying the proceeds of the sale of the property first to the satisfaction of his mortgage claim; and the subsequent mortgages could never complain of the sale, or disturb the purchaser. Be this as it may, it is clear from this article that the purchaser cannot retain any part of the price, except in certain cases, when the property sold is subject to special mortgages other than the seizing creditor's, and that the amount of the price must be paid to the sheriff, without any regard to the general mortgages. Thus the sheriff has a right to require payment of the whole price, unless there be special mortgages; and the question presents itself: What must he do with the balance, after satisfaction of the debt due to the seizing creditor? This question was answered by us in the case of *Powell v. Kellar*, * * * in which, under what we considered to be a correct application of article 708 of the Code of Practice, we came to the conclusion that the safest course to be pursued was to discharge the subsequent general mortgages to the extent of the funds in the hands of the sheriff, in order to give to the purchaser a clear and unincumbered title. Indeed, it cannot be pretended that the debtor is entitled to receive such surplus, and to keep it for his own use, to the prejudice of his other mortgage creditors, who, perhaps, would find no other property on which their executions could be levied, and who would have no recourse against the property sold to satisfy a debt secured by an anterior mortgage. So we held again, in the case of *Fortier v. Slidell*, * * * although the features of that case, and the proceedings resorted to, were somewhat different from those of the case first above referred to. The question was not free from difficulties, and we must confess that, in approving, and even adopting, the course pointed out in the cases mentioned, in the absence of any legal provision, we yielded to the suggestions of a strong sense of equity; for it is obvious that, as under article 708, if there remains nothing more due on the price after paying the suing creditor, the sheriff is authorized to give to the purchaser a release of all the *inferior or subsequent mortgages* [italics by the court], justice and equity require that, when there is a balance in his hands proceeding from the sale, such balance should be applied by the sheriff to the satisfaction pro tanto of the said subsequent mortgages according to their dates, unless ascertained to have been previously satisfied, *before giving the release which the purchaser has the right to demand; nay, such release cannot be given, unless it is ascertained that nothing is to be applied to the extinguishment of those subsequent or inferior mortgages* [italics by present writer]."

Citizens' Bank v. Payne & Gilmore, 21 La. Ann. 380, was an action against a sheriff for an alleged misapplication of the proceeds of a sale made by him; the facts disclosed being, substantially, as follows:

Certain lots were sold under executory process to enforce a vendor's lien and mortgage, and realized, say, \$1,600, more than was required to pay the debt. The *Citizens' Bank* held a general mortgage, second in rank, and

Joseph Getzinger held a similar mortgage, third in rank. The attorney for the bank, who also represented *Getzinger*, ruled the sheriff to show cause why he should not pay the balance in his hands to those mortgagees, but concluded that a better course would be to seize the money under *fi. fa.*, and, withdrawing his rule, he obtained a *fi. fa.* and prepared proceedings in garnishment, which he handed to the sheriff for acceptance of service. The sheriff received the papers and started to write his acceptance, when he was interrupted, and went out, and, as subsequently appeared, paid the balance in question to the defendant in the case—owner of the property which had been sold—and thereupon the bank proceeded against him (he having afterwards been served as garnishee) to recover the balance in question. In passing upon the case the court said that the sheriff had made himself liable, and, further, as follows, to wit:

"It was held by this court in the case of *Delassize v. Cenas*, 4 Mart. (N. S.) 509, that an ex parte order of court directing the payment of money does not bind a party entitled to the proceeds of sale of property sold under execution, nor protect the sheriff. A fortiori the sheriff cannot pay out funds subject to conflicting claims on his own authority. Numerous authorities are to the same effect in regard to the distribution of the proceeds of mortgaged property. [*Powell v. Kellar*] 5 Rob. 272; [*Fulton v. Fulton*] 7 Rob. 73, and [*Fortier v. Slidell*, 7 Rob.] 898; [*Wright, Williams & Co. v. Trustees of Bank*] 7 La. Ann. 123; [*Judice v. Kerr*] 8 La. Ann. 464; [*Byrne, Vance & Co. v. Prather*] 14 La. Ann. 654."

In *Morris v. Cain*, 34 La. Ann. 665, this court, considering the question of the right of a purchaser at a judicial sale to disincumber the property adjudicated to him by distributing the retained portion of the price among the mortgagees entitled to it, said:

"It is only after hearing all concerned in the amount retained by the purchaser, and in the inscriptions securing payment, that the court can pass upon the correctness and dignity of each claim. It is only after such judgment has become final and executory that the purchaser is authorized to pay, and can force the creditor to receive payment, and, in default, can deposit the amount accruing to him, contradictorily with him, in such manner as the court may, under the law, determine. * * * An inscription duly made can be erased only with the creditor's consent, or by a valid decree of court contradictorily obtained. [*Leverich v. Prieur*] 8 Rob. 97; [*Macarty v. Landreaux*, 8 Rob.] 130; [*Guesnard v. Soulie*] 8 La. Ann. 58; [*Chige v. Landreaux*] 2 La. Ann. 606; [*State v. Recorder of Mortgages*] 21 La. Ann. 401; [*State v. Heron*] 29 La. Ann. 848; [*Florance v. Mercier*] 2 La. Ann. 489; [*Waters v. Mercier*] 4 La. Ann. 17; [*State v. Le Blanc*] 5 La. Ann. 329; [*French v. Prieur*] 6 Rob. 299; [*Delavigne v. Gaiennie*] 11 Rob. 171."

In *Morris v. Cain et al.*, 35 La. Ann. 759, this court sustained a proceeding whereby the purchaser of property at judicial sale called the mortgagees into court to litigate their rights with respect to the price, the syllabus in the case reading:

"The adjudicatee of property at judicial sale, being entitled to pay but once to receive a clean unincumbered title, when harassed by conflict-

ing claims of mortgage and other rights, may call the various claimants to interplead and settle their claims contradictorily with each other, to the end that he may pay advisedly to secure his exoneration."

In *Alford v. Montéjo*, 28 La. Ann. 593, it appeared that Montéjo, as a mortgage creditor of Rose, Allen & Co., caused the mortgaged property to be sold by the sheriff in satisfaction of his claim, and that it was adjudicated to him and Genéres; that he (Montéjo) retained enough of the proceeds to pay his claim, and, from the balance, paid \$2,500 to Hine, who also held a mortgage; and that another (whose name does not appear), holding a judicial mortgage, ruled the purchasers to show cause why they should not pay his claim. It was said by this court:

"But we think the judge a quo correctly sustained the defendants' exception that plaintiff has shown no cause of action, and that, if he has any right in the premises, he must proceed by the hypothecary action against the property, and not by rule against the purchaser. It appears that plaintiff's mortgage is a judicial mortgage, and, if the defendants' mortgage was not superior in rank, the plaintiff's remedy was to claim the proceeds, by third opposition, or, subsequently, by the hypothecary action."

In *Godchaux v. Succession of Dicharry*, 34 La. Ann. 579, affirming the ruling in the case last above cited, it was held (quoting the syllabus):

"It is only where privileges or prior special mortgages are recorded against an estate that the purchaser can retain in his hands the portion of the price necessary to discharge said prior special mortgage or privilege.

"The purchaser in this case had no right, under a prior general mortgage, to retain a portion of the purchase price to satisfy it; his remedy was to claim the proceeds in the sheriff's hands, by third opposition, or subsequently to bring an hypothecary action."

The ruling so made was again affirmed in *Pasley v. McConnell et al.*, 38 La. Ann. 476.

It seems hardly necessary to say that the judgment by confession obtained by Lewis cannot operate to give him a privilege where the law gives none, and thereby to affect the rights of the plaintiffs with respect to the matters here in controversy. As to the defendant, it appears, as we have stated, that he bought the property in question on December 22, 1911, with the general mortgage in favor of the plaintiffs herein still resting on it, and that the mortgage was canceled on January 5, 1912, at the request of his counsel. This action is said to have been taken by some authority, and, as we understand, the authority is found in the sheriff's deed, from the abstract of which, as copied in the transcript, we make the following excerpt, to wit:

"* * * All subsequent mortgages against this property are hereby authorized to be canceled, by process of law."

Our attention has not been called by defendant's counsel to any other process adopted in this instance than his request and the cancellation by the recorder. Our conclusions are: That Mr. Lewis was entitled to retain, from the \$5,900, for which the prop-

erty in question was adjudicated to him, only the amount required to pay the costs of the suit and so much of the claim sued on as was secured by mortgage and vendor's lien, or, say, \$4,942.96, and that he should have paid the balance of the price, say, \$957.04, to the sheriff, or have deposited it in court and called upon the plaintiff herein, as the holder of a general mortgage upon the property, to litigate with him their respective claims to such balance.

That Mr. Lewis had no capacity to sit in judgment in his own case, decide that the surplus in his hands should be applied to the payment of his own unsecured claim, rather than to the secured claim of the plaintiffs, and execute his judgment, all without according a hearing to the plaintiffs.

That the sheriff is authorized to cancel mortgages on property sold by him only when the price realized is insufficient to do more than satisfy the senior mortgage under which the sale is made and pay the costs of the suit, and that there is no law which authorizes him, or any one, to cancel, without notice to the mortgagee, a general mortgage, so long as there exists a fund which is applicable, or may be applied, though in controversy, to its payment.

That neither the adjudicatee of the property, nor his vendee, nor the recorder, have any capacity to authorize the cancellation of, or to cancel, a mortgage, under such circumstances, and that such cancellation, made by the recorder, at the request of the counsel for the vendee of the adjudicatee, is not by any process known to the law.

That where, as the result of a sale in satisfaction of a senior mortgage or privilege, there is a surplus of price attributable to the payment of junior general mortgages resting on the property, the holders of such general mortgages may assert their rights either by way of third opposition at the time, or, subsequently, by the hypothecary action.

The decree heretofore entered in this case is, therefore, set aside, and the judgment appealed from is now affirmed.

O'NIELL, J., dissents, being of the opinion that the plaintiff had no right to the hypothecary action under the facts stated in the foregoing opinion.

PROVOSTY, J., dissents for the reasons stated in the judgment of this court heretofore handed down, and also for the additional reasons hereafter to be handed down.

PROVOSTY, J. (dissenting). I cannot agree with that part of the majority opinion which would make the superiority of Lewis' claim over Neely's homestead right depend upon whether the claim bore privilege and was recorded.

Privilege is the right by which one creditor is entitled to be paid by preference over

another creditor out of the property of the common debtor. It is a matter between creditors. Homestead is a right by which a debtor's property is exempt from seizure. It is a matter between the debtor and the creditor. Privilege and homestead have nothing in common.

This exemption, says the Constitution, shall not apply to debts for the purchase price of the homestead or for labor and materials furnished for improving the homestead. Lewis' judgment was in part for the purchase price of the homestead and in part for labor and materials furnished for improving the homestead. The homestead, therefore, could not have been invoked against it. The majority opinion strays away from the right path when it would make the superiority of Lewis' claim over the homestead depend upon whether it bore privilege and was recorded.

In *Abbott v. Heald*, 128 La. 718, 55 South. 28, where a second mortgage in favor of which the homestead had been waived came in competition with a first mortgage in favor of which the homestead had not been waived against the proceeds of the sale of the homestead, the court gave the fund to the second mortgage. The judgment of Robinson & Co. was not for one of those debts against which the homestead cannot be invoked. The situation was therefore that had Neely and Robinson & Co. filed third oppositions claiming to be paid by preference over Lewis out of the proceeds of the sale, the total amount would have had to be paid to Lewis, just as was done.

Neely and Robinson & Co. knew this, and that is the reason why they did not file third oppositions, though present at the sale with their lawyers for the purpose of doing so had they seen any opening for them to make their claims good as against Lewis.

With regard to all this, there was at the time, and, in fact, is now, no contest. The counsel for Robinson & Co. do not pretend to say that, had third oppositions been filed by their client and by Neely to claim the proceeds of the sale while still in the hands of the sheriff, these proceeds would not have had to go to Lewis, just as they did go. What they say is that Neely did not, in fact, file a third opposition, and that the homestead right was not, in fact, invoked, and that it is now too late for doing so.

With that contention I agree. But to my mind nothing can be plainer than that Robinson & Co. have gained nothing by coming at this late date to litigate this question which should have been litigated while this fund was in the hands of the sheriff, and was not done simply for the reason that there was no occasion for litigation; the respective rights of the parties being known and recognized. To my mind it is perfectly plain that, if the door to litigating this matter is to be opened at this late hour to Rob-

inson & Co., it must be opened also to their competitors, and that the rights of the parties are to be judged of as of the date when the fund was in the hands of the sheriff for distribution.

On the other points in the case I adhere to the original opinion of the court. *Morris v. Cain*, 34 La. Ann. 665; *Id.*, 35 La. Ann. 769, involved special mortgages. In *Alford v. Montéjo*, 28 La. Ann. 593, the court said that the remedy of the judicial mortgage creditor was by third opposition or hypothecary action "if the defendant's [seizing creditor's] mortgage was not superior in rank." No doubt at all that, where the seizing creditor's mortgage is not superior in rank to a judicial mortgage resting upon the property, the property passes subject to this judicial mortgage, and that the remedy of this judicial mortgage creditor thereafter is by the hypothecary action. Had the mortgage for satisfying which the sale was made in this case not been superior in rank to Robinson & Co.'s mortgage, there could be no doubt whatever of Robinson & Co. being entitled to have recourse to the hypothecary action. But Robinson & Co. were not senior mortgage creditors; they were junior mortgage creditors. Hence the *Montéjo* decision has no application to this case.

Briefly expressed, my views are that, whereas at a cash sheriff's sale the sheriff is not authorized by law to demand and receive from the purchaser the whole price where there are, on the property sold, special mortgages to the satisfaction of which any part of this price would be attributable, he is authorized by law to demand and receive the entire price where there are no special mortgages. This has been so often adjudicated that it has become stereotyped. *Godchaux v. Succession of Dicharry*, 34 La. Ann. 579; *Pasley v. McConnell*, 38 La. Ann. 476. In *La Gourgue v. Summers*, 8 Rob. 175, the court quoted article 710 of the C. P., and said:

"It is clear from this article that the purchaser cannot retain any part of the price except in cases when the property sold is subject to special mortgages, other than the seizing creditor's, and that the amount of the price must be paid to the sheriff, without any regard to the general mortgages."

The sheriff being thus authorized to demand and receive payment of the entire price, and the purchaser being bound to pay it to him, the legal consequence follows as night follows day that the purchaser, by the payment which he thus makes to the person or officer authorized by law to demand and receive payment, liberates both himself and the property he has purchased. And, since he has no control over the sheriff, it can be no concern of his what disposition the sheriff makes of the money. In such a case the sheriff is just as much the duly constituted agent of the junior general mortgage creditors for receiving payment of the sur-

plus as he is the agent of the seizing creditor for receiving payment of the amount called for by the writ; and the mortgages of these junior mortgage creditors are just as much transferred to the proceeds as is that of the seizing creditor. The sheriff is the agent of both for demanding and receiving payment of the price. In my humble opinion, it will not do to hold that the purchaser must pay the whole price to the sheriff, and that he must pay a second time if the sheriff happens not to pay over this price to the junior mortgage creditor. In my humble opinion, the purchaser incurs no such risk as this; if he pays over to the person entitled by law to receive the payment, he and his property are liberated.

In my humble opinion, third persons wishing to accept a mortgage from the purchaser, or to purchase from him, are not required to do more than to consult the record, and ascertain therefrom that the price was paid to the sheriff; and, if the sheriff's deed so recites, they are not required to pursue their investigation any further. The recourse of the junior mortgage creditors to whom the sheriff has not paid the price is against the sheriff and his bond. Any mistake the sheriff may have made in accounting for the price to the wrong person cannot be visited upon this innocent third person dealing with the property on the faith of the record. The law contemplates that these junior mortgage creditors, and all others interested, shall file third oppositions claiming their rights. C. P. 301, 401, 2 and 3.

I attach no importance whatever to the fact that it was at the instance of Oosner that the inscription of Robinson & Co.'s mortgage was canceled. The important question is not at whose instance it was canceled, but whether it was rightfully canceled. The recorder would not have canceled it, no matter at whose instance, unless the law required him to do so. And the law did so require, because the property had been sold at sheriff's sale to satisfy a senior mortgage, and all junior general mortgages had been by operation of law transferred to the proceeds in the hands of the sheriff, and ipso facto ceased to exist upon the property. The cancellation of the inscription was a mere mat-

ter of form. The mortgage itself had ceased to exist.

In my humble opinion, while the dicta of the court in the case of *Fortier v. Slidell*, supra, to the effect that the purchaser may retain the price for the purpose of purging his property of junior general mortgages by means of a concursus, has not been expressly contradicted or overruled in subsequent cases, they are in conflict with all those cases (and their number is legion) in which it has been held that under no circumstances can the purchaser retain any part of the price, in the absence of special mortgages, but must pay the whole of it to the sheriff, and have therefore been repudiated. The necessary and inevitable consequence of article 710, C. P., and of the host of decisions founded upon it which require the purchaser to pay the whole price to the sheriff, is that the junior general mortgages are transferred from the property to these proceeds, in the hands of the sheriff. It simply cannot be that this purchaser could be required to pay twice, or that the sheriff should be the legally constituted agent for receiving this payment, and yet not be the agent for giving an effectual receipt for it. If this is not the law, all I have to say is that it ought to be.

It sounds well enough for this court to say that the purchaser may deposit the money in court, or, in other words, with the clerk of court. But where is the law which authorizes it? Where is the law which constitutes the clerk of court the agent of the mortgage creditor for receiving this money and giving a valid acquittance for it? Suppose the clerk embezzles the funds; whose is the loss? This judicial suggestion might work well enough in the parish of Orleans, where there is a judicial depository into which the clerk is required to pay at once all moneys received by him. But what of the other parishes constituting by far the greater part of the state? That the clerk of court is not authorized to receive payment for a creditor, see *Alexandrie v. Saloy*, 14 La. Ann. 327.

For these reasons and those expressed in the original opinion of the court, I respectfully dissent.

(108 Miss. 342)

BARRETT GROCERY CO. v. WESTERN UNION TELEGRAPH CO. (No. 16859.)
(Supreme Court of Mississippi. March 8, 1915.)
TELEGRAPHS AND TELEPHONES §61—MIS-
TAKE—LIABILITY.

Where plaintiff's telegram, as sent, called for 500 bushels of seed corn, worth \$1.10 per bushel, and, according to the message as received, the addressee shipped an excess of 280 bushels at that price, which the plaintiff, with knowledge of the excess, accepted, and thereafter sold the excess at a loss of 40 cents a bushel, he could not recover the loss.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 49; Dec. Dig. § 61.]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by the Barrett Grocery Company against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

This case was begun by the appellant in the court of a justice of the peace for the sum of \$115.20. On a trial de novo in the circuit court, a peremptory instruction was granted to the defendant, who was appellee here, and this appeal is prosecuted.

The appellant ordered seed corn from the Shenandoah Pure Seed Company, of Shenandoah, Iowa, by wire, sending the following telegram:

"Ship us seventy-five bushels St. Charles White, seventy-five bushels Silver Mine, one hundred and fifty bushels Banner White, two hundred bushels Monoch of Iowa."

This telegram was transmitted correctly from the office at Lexington, Miss., but as delivered to the said company at Shenandoah, Iowa, read as follows:

"Ship us seventy-five barrels St. Charles White, seventy bushels Silver Mine, one hundred fifty bushels Banner White, two hundred bushels Monoch of Iowa."

The telegram, as sent, called for 500 bushels of seed corn, worth \$1.10 per bushel, making a total of \$550. The telegram, as delivered to the sendee, called for 795 bushels. The sendee actually shipped 788 bushels, billed out at \$886.80; the excess shipment being 288 bushels, at \$1.10 per bushel. Appellant could not sell this excess as seed corn, but did sell it as feed corn at 70 cents per bushel, and entailed a loss of 40 cents per bushel on the excess, making a net loss of \$115.20 to appellant.

The draft, accompanied by bill of lading and invoice, was sent to a bank in Lexington, Miss.; and appellant, before receiving the corn, had knowledge of the fact that more corn than he had ordered had been shipped, and testified that he knew he was paying for more corn than he had ordered, but that he needed the 500 bushels for the purpose of filling orders for his customers, and that he took up the draft and received the excess corn because he desired to carry out his contracts with his customers.

The court gave a peremptory instruction for the telegraph company, upon the theory that the appellant knew that he was paying for more corn than he had ordered at the time he accepted it, and was under no obligation to accept or pay for more than he had ordered.

Noel, Boothe & Pepper, of Lexington, for appellant. H. H. Elmore, of Lexington, and Harris & Potter, of Jackson, for appellee.

PER CURIAM. This case is controlled by the case of *Shingleur v. Western Union Telegraph Co.*, 72 Miss. 1030, 18 South. 425, 30 L. R. A. 444, 48 Am. St. Rep. 604, and the judgment of the circuit court is therefore affirmed.

(108 Miss. 334)

AMERICAN TRUST & SAVINGS BANK v. PERKINS. (No. 16858.)

(Supreme Court of Mississippi. March 8, 1915.)

1. ALTERATION OF INSTRUMENTS §30—NOTES—QUESTION FOR JURY.

In an action on a note, held on the evidence, including the note showing an apparent alteration, that whether the alteration was such as to invalidate it, and whether the plaintiff, indorsee, had assented to or ratified any alteration in the bills, were for the jury.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 264-270; Dec. Dig. § 30.]

2. BILLS AND NOTES §443—RIGHT OF ACTION—INDORSEE.

The indorsee of a note by regular indorsement may maintain an action on it in its own name, where there is nothing to show that he was not a bona fide holder for value.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1377-1380, 1383-1392, 1394-1423; Dec. Dig. § 443.]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by the American Trust & Savings Bank against H. E. Perkins. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Noel, Boothe & Pepper, of Lexington, for appellant. Elmore & Ruff, of Lexington, for appellee.

RMED, J. This is an action on a note. It originated in a justice of the peace court. It was begun by filing the note. There was no declaration nor plea. From a judgment by the justice of the peace in favor of the plaintiff, an appeal was taken to the circuit court. Upon the trial of the case in the circuit court the original note was introduced in evidence, whereupon defendant objected to its introduction because an alteration was shown on its face. The original note and a copy thereof were sent up with the record, and are now before us. The note is upon a printed form. It is dated at Cedar Rapids, Iowa, March 1, 1910, and is a promise, for value received, to pay to the Barton-Parker Manufacturing Company, or bearer, the sum

of \$240, at Cedar Rapids, in five installments. The installments are each \$48 in amount, and the printed form shows them as payable in two, four, six, eight, and ten months after date. The alteration of the note was made by writing in indelible pencil the figures "4," "6," "8," "10," and "12" over the printed words "two," "four," "six," "eight," and "ten," respectively. The blanks left in the printed form to be filled were places for date, for post office address and for signature. These blanks were filled by writing in indelible pencil. So it appears from the face of the note that all writing thereon was made in indelible pencil. In the copy of the note all the words and figures are in ink. The note contains the following indorsement written on the back thereof: "Pay to the order of American Trust & Sav. Bank; Barton-Parker Mfg. Co."—which was signed by the treasurer and general manager, and dated April 4, 1910. When objection was made to the introduction of the note because an alteration was shown on its face, the court reserved its ruling. Thereupon one of the attorneys for the plaintiff testified that he first demanded payment of the note from appellee by telephone conversation, and that appellee did not refuse payment, but promised to confer with his business associate and then make reply. The attorney further testified that he called in person upon appellee for the purpose of collecting the note. He presented a copy of it to appellee, who raised no objection to the amount or to the times of its payment, but only complained that the traveling salesman, who sold him the goods for which the note was given, promised not to sell the same kind of goods to any other person in Durant, where appellee was in business, and that the salesman, in violation of this promise, sold to another party. Appellee then admitted that he had accepted the goods, and said he realized that under the contract he was liable for them, but wished to be allowed to pay the amount in installments. The attorney then agreed with him that the settlement should be in installments of \$50, payable every two months. Appellee after this made a payment of \$50, which was duly credited upon the note. In a letter written by the attorneys for appellant on January 23, 1911, to appellee, requesting payment of the note and stating that they were instructed to file suit unless they heard from him by return mail, the note was described, and the times for making the installment payments were given as they appeared in the note after the writing of the figures in indelible pencil over the printed words giving the number of the months. On the next day appellee wrote to the attorneys, making the remittance of \$50, reciting the agreement by the salesman not to sell to another party in the town, and stating that he was willing to settle without suit, and would make further payments of \$50 every 30 or 60 days. It is not shown that the

alleged alterations, whereby the times of payment of the installments were delayed, were in any manner harmful to appellee. At the conclusion of the testimony of the attorney for appellant, in which his correspondence with appellee was introduced, the court instructed the jury to find for the defendant.

[1] Appellee contends that the action of the court below in granting a peremptory instruction for appellee is correct, because (1) "the note sued on showed a material alteration, apparent on its face, which was unexplained;" and (2) "the note is not shown to have been the property of the plaintiff." The execution of the note was not denied by appellee. He only claimed that the note should not be admitted in evidence because there were material alterations apparent on its face which had not been explained. It will be seen that the court did not rule upon the objection when it was made. Thereupon appellant made an explanation of the apparent alterations by the testimony given by its attorney. The evidence shows that appellee was informed of the amount of the note, and the dates when the installment payments were to be made. This information was given by appellant's attorney when he personally presented to appellee a copy of the note, and again when he wrote appellee, describing the note and stating fully that the installment payments were to be made at certain times, being the times shown on the note after the apparent alterations had been entered thereon. The court should have permitted the note, together with evidence regarding its alteration, to go to the jury so that, as judges of the facts, they could determine from the appearance of the instrument itself, considered with, and in the light of, the testimony, whether the alterations were such as to invalidate it. The court should have submitted to the jury the question whether appellant had assented to the alterations or ratified the changes made in the instrument.

[2] We see no force in the contention of counsel that "the note is not shown to have been the property of plaintiff." The note appears to have been regularly assigned by indorsement, and appellant appears to be the indorsee on the instrument. As such it could maintain such action thereon in its own name as could have been maintained by the original payee. The transfer by indorsement was in the usual and ordinary way. There is nothing to show that appellant was not a bona fide holder for value. On the other hand, we find in the correspondence between appellant's attorneys and appellee information given that appellee held the note. This is stated in three different letters. We quote from a letter written to appellee by appellant's attorneys on March 27, 1911:

"In reference to the note given to Barton-Parker Mfg. Co., now held by the American Trust & Savings Bank of Cedar Rapids, Ia.,

on which you have paid \$50.00, total amount due \$240.00, divided into five payments of \$48.00 each, all of which are now due. * * *

Appellee did not in any manner deny this claim, neither in answers to the letters nor in any other way.

The trial court erred in granting the peremptory instruction in favor of the appellee, and the case is therefore reversed and remanded.

SMITH, C. J., not having been present at the conference, expresses no opinion.

(108 Miss. 349)

E. E. FORBES PIANO CO. v. HENNINGTON. (No. 16599.)

(Supreme Court of Mississippi. March 1, 1915.)

SALES § 230—TITLE—EXECUTION.

Where an old piano is given in part payment for a new one, purchaser to keep old one until satisfied with the new one, after acceptance the old piano becomes the absolute property of the seller, and the fact that the wife did not authorize the husband to sign the bill of sale, and that it was not actually signed until after the piano had been seized on execution, did not affect the title.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 650; Dec. Dig. § 230.]

Appeal from Circuit Court, Marion County; A. E. Weathersby, Judge.

Action by the E. E. Forbes Piano Company against L. Hennington. From a judgment for defendant, plaintiff appeals. Reversed, and judgment entered in favor of plaintiff.

Whitfield, McNeil & Whitfield, of Jackson, for appellant. Watkins & Watkins, of Jackson, for appellee.

REED, J. This is the third appearance of this litigation in this court. All of the three appeals have been taken by the Forbes Piano Company, appellant in this hearing. See E. E. Forbes Piano Co. v. Hennington, 48 South. 609, and E. E. Forbes Piano Co. v. Hennington, 98 Miss. 51, 53 South. 778.

This litigation concerns an old piano. It was owned by Mrs. John S. Williams. In the purchase from the Forbes Piano Company of an automatic piano, she sold to them the old piano in part payment for the new one. It was agreed that the old piano should remain in the possession of Mrs. Williams until she received the new instrument and was satisfied with it, when the trade would be completed. She did receive the new piano; it gave perfect satisfaction; and she accepted it. The old piano was also to remain in Mrs. Williams' house until the Forbes Piano Company called for it. While the old piano was still in Mrs. Williams' possession, it was levied on as her property in an execution issued by appellee, L. Hennington, a justice of the peace, in the case of City Grocery Company against her. In the sale under this execution appellee bought the piano.

The Forbes Piano Company brought this action of replevin, claiming that it was entitled to recover the old piano. In the last trial of the case there was a jury and verdict in favor of appellee.

On the first hearing of this case (Forbes Piano Co. v. Hennington, 48 South. 609), it was held by this court that the Forbes Piano Company clearly made out "a perfect title to the property in question, and should have been given a peremptory instruction for same." The case was then reversed and remanded.

On the second appeal (Forbes Piano Co. v. Hennington, 98 Miss. 51, 53 South. 777, Ann. Cas. 1913A, 1216), it was held that Hennington, a justice of the peace, could not legally purchase the property sold under an execution on a judgment rendered by him, and that the sale was void. The case was again reversed and remanded.

In the last trial of the case Mrs. Williams and her husband testified that she did not authorize her husband to execute the bill of sale which was signed by Mr. Williams in his own name, under date of October 23, 1907, conveying the old piano to E. E. Forbes Piano Company. Mr. Williams testified that the bill of sale was not given on the date shown in the instrument, but was actually signed by him in January, 1908, after the piano was levied on and sold. However, we do not see that this testimony will affect the decision in the present hearing. It is beyond question that the old piano was given in the trade as part payment for the new, and that the conditions upon which the transaction of the sale would be completed and binding were fully performed by the delivery of the new piano, its giving perfect satisfaction, and its acceptance. The old piano thereupon became the absolute property of the Forbes Piano Company.

In this action of replevin to try the right of possession to the piano, it was necessary for the appellant to show a good title to the instrument. This has been done. Appellee did not have any right to withhold the piano from appellant. He did not acquire any title to the instrument by virtue of the sale under the execution issued by him as justice of the peace. This was decided on the second appeal of the case.

We note, and deem it proper in this disposition of the case, which we consider final, to mention, that it was shown in the proof in the last trial of the case that no judgment was ever entered in the case of City Grocery Co. v. Mrs. J. S. Williams. The docket of the justice of the peace which was introduced in evidence showed that the case was docketed, but failed to show any judgment in the case, or service and return of the execution under which the sale was made. Under the facts in evidence and the decisions of this court in the former appeals,

the trial court should have given the peremptory instruction to find for plaintiff.

The case is therefore reversed, and judgment here entered in favor of appellant.

(108 Miss. 852)

YAZOO & M. V. R. CO. v. JAMES.
(No. 16522.)

(Supreme Court of Mississippi. March 1, 1915.)

1. COURTS ⇨104—OPINIONS—NECESSITY—STATUTE.

Under Code 1906, § 4918, providing that the opinion of the Supreme Court shall be in writing when the case settles important principles, is to be remanded, or the judgment below is reversed, it is not necessary to file a written opinion, in a case not coming within the statute, merely to enable counsel to file a suggestion of error.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 355-358; Dec. Dig. ⇨104.]

2. COURTS ⇨104—OPINIONS—NECESSITY—“IMPORTANT PRINCIPLE.”

Within Code 1906, § 4918, requiring the Supreme Court to file a written opinion in a case settling important principles, a case settles an “important principle” when it involves the application of a new principle or a new application of an old principle.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 355-358; Dec. Dig. ⇨104.]

3. COURTS ⇨104—OPINIONS—NECESSITY.

In addition to the cases in which written opinions are required by statute, such opinions should be filed when the case involves the application of an old principle, a restatement of which has become necessary, or is one of great public interest and importance.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 353, 355-358; Dec. Dig. ⇨104.]

Appeal from Circuit Court, Claiborne County; H. C. Mounser, Judge.

Action between Martha James, by her next friend, and the Yazoo & Mississippi Valley Railroad Company. From the judgment the railroad company appeals. Motion for written opinion on affirmance of the judgment (67 South. 464) denied.

Mayes & Mayes, of Jackson, for the motion. J. McC. Martin, of Port Gibson, opposed.

PER CURIAM. [1] This cause was decided at a former day of this term without a written opinion, since which counsel for appellant have filed a motion requesting us to render such an opinion, for the reason that they desire to file a suggestion of error, and state that they cannot do this advisedly without a written expression of the court's views.

The cases in which it is provided by section 4918 of the Code that the opinions of this court shall be in writing are: (1) “Cases settling important principles,” (2) “cases to be remanded,” and (3) “cases where the judgment or decree of the court below is reversed.”

[2] The first of these classes may be subdivided into: (a) Cases involving the application of a new principle, and (b) cases in-

volving a new application of an old principle.

[3] To the three classes provided for in this statute there should be added two others: (4) Cases involving the application of an old principle of which a restatement has for any reason become necessary, and (5) cases of great public interest and importance, not coming strictly within any of the foregoing classes.

The case at bar comes within neither of these classes, and therefore a written opinion will serve no good purpose. The time of a court, the docket of which is crowded to the extent that the docket of this court is, should not be wasted in the writing of opinions solely for the purpose of advising a litigant of the reasons upon which the court acted in deciding his case. Moreover, the burden of case law has become unbearable to both bench and bar, and the courts owe it both to themselves and to the bar to refrain from increasing this burden unnecessarily.

If, in determining whether a written opinion should be delivered by us when deciding a case, we should take into consideration the fact that, in the absence of such, counsel for the losing party will be handicapped in filing a suggestion of error, the result would be that in order to treat all impartially we would necessarily be compelled to deliver written opinions in all cases.

Overruled.

(108 Miss. 854)

CURRIE v. BENNETTE. (No. 17807.)

(Supreme Court of Mississippi. March 1, 1915.)

APPEAL AND ERROR ⇨162—APPEAL FROM INSUFFICIENT RELIEF—PAYMENT OF AMOUNT OF DECREE—EFFECT.

One recovering from a decedent's estate a sum less than is claimed is not barred from appealing because receiving on request the amount of the decree purporting to settle separate and distinct controversies.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 179, 981, 982, 984-990; Dec. Dig. ⇨162.]

Appeal from Chancery Court, Harrison County; J. M. Stevens, Chancellor.

Suit by Annette Currie against J. F. Bennette, administrator of B. D. Currie, deceased, and proceedings on objections to the confirmation of the report of appraisers. From a decree granting insufficient relief, plaintiff appeals. Motion to dismiss appeal denied.

L. Brame, of Jackson, and T. M. Evans, of Gulfport, for appellant. U. B. Parker, of Wiggins, and E. J. Bowers, of Gulfport, for appellee.

SMITH, C. J. This is an appeal from a decree in the court below awarding appellant the recovery of a sum of money less than that to which she claims to be entitled. The cause now comes on to be heard on a motion by appellee to dismiss, which motion, by

agreement, has been converted into a plea in bar, for the reason that since the rendition of the decree appealed from appellee had paid to appellant the full amount of money thereby awarded her. This payment was made by appellee pursuant to a request of appellant so to do; and, while appellee claims to have been at the time under the impression that no appeal would be taken, it does not appear that appellant agreed not to do so. Appellee's only complaint along this line seems to be that he was not told by appellant that an appeal would be taken.

Appellant, who is the widow of B. D. Currie, deceased, filed a bill in the court below seeking to recover from appellant, the administrator of his estate, the sum of \$1,423.50, alleged to be due her by this estate. Appellee filed an answer and cross-bill denying appellant's right to recover this money, and praying that she be held to account to him for the sum of \$950 found on the body of B. D. Currie after his death, and appropriated by her, and also for certain money alleged to have been received by her and which belonged to the estate of her deceased husband. Numerous amendments were made in the pleadings by both parties, but the issue was substantially as stated.

An objection had been filed by appellant in the administration proceedings to the confirmation of the report of the appraisers; the objection being that no allowance for the year's support for herself and children had been set apart. These two cases were consolidated and tried as one.

A decree adjudicated each of these controversies separately, awarding to appellant: First, the \$1,423.20 claimed by the estate of her deceased husband, together with interest thereon amounting to \$318.75, making a total of \$1,741.75; second, the sum of \$748 as a year's support for herself and children; third, that she retain the \$950 found on the body of her deceased husband after his death, she having established her right thereto; and, fourth, directing that she account to appellant for the sum of \$1,228.96 collected by her and adjudged to be the property of appellee's intestate—the total amount thus adjudged to be due appellant being \$2,225.95. Appellee was directed to deduct therefrom the \$1,228.96 found to be due him by appellant, and to pay her the balance, amounting to \$1,296.99. It thus appears that the decree appealed from settles several separate and distinct controversies, neither of which is in any wise dependent upon the others; and, in event error shall appear in the adjudication of the issue upon which appellant lost, it will not be necessary, by reason thereof, for the entire decree to be reversed, but only that portion thereof dealing with that issue; the remainder of the decree being permitted to remain in full force and effect. Whether the decree is affirmed or reversed, appellant must recov-

er from appellee at least the amount awarded her in the court below; so that in neither event will injustice be done appellee by not dismissing the appeal. The fact that the payment of this money was requested by appellant is immaterial.

In *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414, the appellant recovered less than he claimed; the amount due him being the only issue involved. He accepted payment of the amount so recovered; then prosecuted an appeal to this court; and it was held that he was not barred thereof by reason of having accepted the amount recovered. If that case was correctly decided, and we think it was, it follows a fortiori that appellant is not barred here.

Overruled.

(108 Miss. 857)

MAGRUDER v. HATTIESBURG TRUST & BANKING CO. et al. (No. 16455.)

(Supreme Court of Mississippi. March 1, 1915.)

1. EQUITY — 195 — PLEADING — "CROSS-BILL."

Code 1906, § 587, provides that a defendant in a chancery suit may make his answer a cross-bill, and may introduce any new matter therein material to his defense. Stockholders of a trust company filed a bill to set aside an agreement, whereby the trust company guaranteed the payment of bonds issued by a foundry company, and also sought to have the trust company relieved of all obligations connected with and growing out of the arrangement. The trust company filed a cross-bill to foreclose a deed of trust given to secure payment of the bonds, and it sought subrogation to the rights of the bondholders as to those bonds which it had taken up under the agreement. *Held*, that a cross-bill by the trustee in bankruptcy of the foundry company, whereby he sought to set aside the deed of trust securing the bonds, and to recover, as preferences, named payments made to the trust company, was not subject to demurrer as introducing new matter not germane to the original bill, for such matters did not violate the rule that a "cross-bill" must be auxiliary to the original bill, so as to complete the determination of the matters in litigation.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 446-449; Dec. Dig. —195.]

For other definitions, see Words and Phrases, First and Second Series, Cross-Bill.]

2. BANKRUPTCY — 299 — TRUSTEES — POWERS OF.

The trustee in bankruptcy of defendant is a proper party to the suit, and should be allowed to appear and interpose necessary defenses by answer and cross-bill.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 448; Dec. Dig. —299.]

3. CORPORATIONS — 478 — DEED OF TRUST — CONSTRUCTION — "FRANCHISE."

A deed of trust described the property conveyed as "all of the following real estate, plants, factories, grounds, charters, machinery rights, privileges, franchises, and other property, to wit: The plants and property now belonging to the company." The deed further described the real estate, the buildings and machinery of the company, and finally declared that it was the intention to convey all the property of every kind and description owned by the company and situated at its plant, except merchandise, mill supplies, locomotives, etc., kept for sale. Code 1906, § 904, declares that a mortgage or deed

of trust conveying the franchise or income or future earnings of any corporation shall not be valid. *Held*, that neither the future earnings nor the "franchise" of the corporation, which is the privilege conferred by the government on corporations to exist, or other powers conferred, were conveyed, for the deed of trust conveyed only that property specifically described.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1871; Dec. Dig. ¶ 478.

For other definitions, see Words and Phrases, First and Second Series, Franchise.]

Appeal from Chancery Court, Forrest County; W. A. Shipman, Special Chancellor.

Bill by Mrs. Mary P. Crane and another against the Hattiesburg Trust & Banking Company and the Watkins Machine & Foundry Company. The trust company filed a cross-bill, and J. C. Magruder, trustee in bankruptcy of the Watkins Machine & Foundry Company, also filed a cross-bill. From a judgment sustaining demurrers to the trustee's cross-bill, he appeals. Reversed and remanded.

T. C. Hannah and J. T. Haney, both of Hattiesburg, for appellant. Hill & Hill, Stevens & Cook, and S. E. Travis, all of Hattiesburg, B. E. Eaton, of Gulfport, and Hathorn & Hearst, of Hattiesburg, for appellees.

REED, J. The original bill of complaint in this cause was filed by Mrs. Mary P. Crane and Mrs. Fannie B. Perkins, nonresident stockholders of the Hattiesburg Trust & Banking Company. Complainants sought the cancellation of a certain contract between the Hattiesburg Trust & Banking Company and the Watkins Machine & Foundry Company, whereby the trust company guaranteed the payment of certain bonds issued by the foundry company, and also sought to have the trust company relieved from all obligations and liabilities connected with and growing out of the business arrangement. The trust company, the foundry company, and the several holders of the bonds were made parties defendant to the bill. It was charged that the trust company was without authority or power under its charter, or under the law, to guarantee the bonds of the foundry company, and that such act, in so doing, was ultra vires, illegal, and void. The foundry company executed a deed of trust on certain of its property to secure the payment of its bonds.

Complainants in their original bill prayed that the contract between the trust company and the foundry company, guaranteeing the payment of the bonds, be canceled, set aside, and held for naught; that a decree be entered against the holders of the bonds for such amounts as had been paid to them by the trust company; that the trust company be enjoined from paying any other of the bonds out of its own funds, and should restore to the foundry company such bonds as had been given as an inducement to enter

into the guaranty; that the trust company be enjoined from undertaking to operate the plant and business of the foundry company, as stipulated in the contract; that, the terms and conditions of the deed of trust having been broken by the foundry company, the same be foreclosed and a receiver appointed, pending the sale, to take charge of and preserve the property included therein if the court deemed best; that the bondholders be enjoined from suing the trust company at law upon the guaranty of the bonds, and for general relief.

The trust company filed an answer which was made a cross-bill, the allegations of which are generally the same as those in the original bill, and the relief prayed for generally the same. It offered to return the bonds of the foundry company to the amount of \$12,000, which had been placed with it as an inducement or bonus to guarantee the bonds and interest. The total bond issue amounted to \$65,000.

The trust company was trustee in the deed of trust executed by the foundry company, and in its cross-bill prayed also for foreclosure of the instrument. It prayed for a decree against the bondholders for the amounts of the bonds, with interest, which it had already paid to them, or that the court would decree that it was the legal and equitable owner of the bonds which had been so paid and taken up. To fully show the relief sought by the trust company relative to the recovery of the amounts already paid out by it in taking up bonds of the foundry company, and relative to the recovery of the amount of certain bonds received from the foundry company for moneys advanced by the trust company for the purpose of paying off creditors of the foundry company existing at the time of the issuance of the bonds, all of which amounts the trust company prayed should be paid first out of the proceeds of the sale of the property under the deed of trust given to secure the bonds, we quote at length from the prayer of the cross-bill as follows:

"Cross-complainant, in addition to the foregoing prayer, specifically prays that the cross-defendants herein, whose bonds and interest coupons cross-complainant has paid as above set forth, shall repay the same together with interest thereon to cross-complainant, the amount thereof to be determined by this honorable court, and that cross-complainant have decree against cross-defendants respectively for the amounts so found to have been paid by them to cross-complainant, with legal interest thereon; that, if mistaken in this, then cross-complainant prays that this court decree that it is a legal and equitable owner of the bonds, and interest coupons so paid by it to cross-defendants, respectively, as hereinabove set forth; and that, out of the proceeds of a sale of the property included in the said deed of trust securing the said bonds, cross-complainant be paid the amount of said bonds, interest coupons, and interest, so received from cross-defendants, as aforesaid, and its bonds amounting to \$_____, received from Watkins Machine & Foundry Company,

for moneys advanced by cross-complainant for the purpose of paying off other creditors of the said Watkins Machine & Foundry Company existing at the time of the issuance of the said bonds, and that all of the same be paid to cross-complainant in full, out of the said proceeds, before any of the other bonds now held by cross-defendants, or any of them, shall be paid. And, if mistaken in this, then it prays that it be decreed to be a legal and equitable owner of said bonds and interest coupons, and that, in a sale and distribution of the proceeds of the property included in said deed of trust, cross-complainant shall share equally with the cross-defendants therein, receiving its pro rata share with cross-defendants of the assets and moneys arising from a sale of the said property included in said deed of trust, share and share alike with cross-defendants herein, if there shall not be enough to pay them all in full."

It will be seen that the relief sought by the trust company in its cross-bill is the cancellation of the contract guaranteeing the payment of the bonds, the foreclosure of the deed of trust given to secure the bonds, and the recovery of the amounts paid in taking up the bonds, and which had been paid in settlement of indebtedness owing by the foundry company, evidenced by bonds held by the trust company, which amounts it asked should be paid out of the proceeds of the sale under the deed of trust, before the payment of other sums secured thereby. Answers were filed by the bondholders to the original bill of complaint and to the cross-bill of the trust company.

Thereafter the foundry company voluntarily went into bankruptcy, and the appellant, J. C. Magruder, was appointed trustee.

Appellant, trustee in bankruptcy, then filed an answer to the original bill and to the cross-bill, and made his answer a cross-bill against the trust company. In this cross-bill he sought, as trustee in bankruptcy, to recover from the trust company, for the benefit of the bankrupt estate, large sums of money which he averred had been received by the trust company from the foundry company from time to time before the bankruptcy, under such circumstances as made the same preferences under the bankrupt laws. He charged that certain sums were paid by the foundry company to the trust company within four months of the time of the adjudication, and with knowledge of the trust company of the foundry company's insolvency, and that such amounts so received constituted preference, and was a fraud upon other creditors. Among the different claims which he propounded for recovery against the trust company were the following: The sum of \$3,800 paid out of the funds of the foundry company for the services of an officer of the trust company rendered the foundry company in assisting in the management of its affairs; a certain amount paid out of the funds of the foundry company for premiums on an insurance policy on the life of T. O. Watkins, which policy was in favor of the trust company; the sum of \$3,000 paid out of the funds of the foundry company to liquidate personal indebtedness of T. O. Watkins to the

trust company; and certain amounts evidenced by accounts assigned by the foundry company to the trust company. In his cross-bill appellant also prayed for the cancellation of a security given by the foundry company to the trust company for the payment of \$7,000, the purchase price of three locomotives, claiming that the trust company received such security with the purpose and intent of being preferred over other creditors. He prayed for an accounting by the trust company for all amounts collected by reason of the assigned claims. He prayed that the court would, by proper decree, direct him, as trustee in bankruptcy, to sell the property included in the deed of trust, and under the direction of the court make distribution of the proceeds.

We quote as follows the concluding paragraph in the prayer of appellant's cross-bill:

"This cross-complainant further prays that this court, upon final hearing hereof, fully determine what amounts the said Hattiesburg Trust & Banking Company is indebted to this cross-complainant, as trustee as aforesaid, and that all moneys so found by this court to be owing by the said Hattiesburg Trust & Banking Company to the said Watkins Machine & Foundry Company, or this cross-complainant, be set off and deducted from the interest, if any interest whatever the said Hattiesburg Trust & Banking Company may have in the proceeds of the said sale of said mortgaged property, except, however, the amount that this court may find that the said Hattiesburg Trust & Banking Company has received from the said Watkins Machine & Foundry Company as a preference over the other creditors of the said Watkins Machine & Foundry Company; this cross-complainant praying that all such moneys, security, and effects that have been assigned or in any way delivered to the said Hattiesburg Trust & Banking Company in payment of or as security for any past due indebtedness, and considered by this court as a preference, be paid direct and in full by the said Hattiesburg Trust & Banking Company to this cross-complainant, and that this court, upon final hearing thereof, enter a decree ordering and directing the said Hattiesburg Trust & Banking Company to pay and deliver to this cross-complainant all moneys or other property that may be in its hands by reason of its having received a preference, or otherwise."

It will be seen that appellant was endeavoring, by his cross-bill, to recover from the trust company amounts which he charged belonged to the foundry company and had been improperly diverted, and amounts which he charged were preferences against the general creditors.

Up to this stage of the proceedings no attack had been made upon the validity of the deed of trust executed by the foundry company to secure its bonds. The bondholders were not made parties to the original cross-bill filed by the appellant. After this an amended and supplemental cross-bill was filed by appellant. In this he charges that the deed of trust includes the corporate franchise, charters, income, and future earnings of the foundry company, and is therefore void as to debts, contracted in carrying on the company's business; and that the bond-

holders have no lien upon the property embraced in the deed of trust, and he sought therein to have the deed of trust declared invalid, and the property devoted to the purpose of paying general and unsecured creditors. The bondholders were made parties to this cross-bill, and it was prayed therein that they be made and considered parties to appellant's original cross-bill.

The case as to one of the bondholders, the Citizens' Bank, was finally disposed of upon demurrer and plea filed by that bank, and no appeal from the decrees sustaining the same has been prosecuted by any of the parties in the case.

The trust company filed a demurrer to appellant's original cross-bill. The other bondholders, with the exception of the Citizens' Bank, filed a demurrer to appellant's original cross-bill and his amended and supplemental cross-bill. These demurrers were sustained by the chancellor, and, from his decree in so sustaining them and dismissing the original and the supplemental and amended cross-bill, appellant has prosecuted this appeal.

[1] We deem it necessary in this consideration to notice specially only two of the grounds of demurrer: First, that which maintains that appellant's cross-bills introduce new matter not germane to the matter involved in the original bill; and, second, that the deed of trust shows upon its face that the corporate franchise of the foundry company was not conveyed therein, and that it is valid.

As to the ground first mentioned, we quote the statement thereof in the demurrer filed by the trust company, as follows:

"It is a departure from and without the scope and purpose of the original cause, and attempts to set up a cause of action entirely and wholly different from the purpose of the original suit, which was merely a proceeding to cancel a guaranty made by the cross-defendant to the First National Bank of Commerce and others, whereas this proceeding is an attempt to raise questions of the right of the cross-defendant to retain certain collections and securities given it by the Watkins Machine & Foundry Company while insolvent; the said trustee seeking by said cross-bill to recover back said collections, and to cancel said securities and assignments as preferences."

In the other demurrer this ground is stated in the following words:

"The said cross-bill and supplemental cross-bill introduce entirely new matter neither necessary for defense nor in any way germane to the matters involved in the original bill."

An answer may be made a cross-bill by the statute (section 587, Code of 1906), wherein it is provided that:

"A defendant in a chancery suit may make his answer a cross-bill against the complainant, or his codefendant or defendants, or all of them; and may introduce any new matter therein material to his defense, and may require the same to be answered."

A cross-bill is auxiliary to the original bill, and is a proceeding to complete the determination of the matters in litigation. *Thomason v. Neeley*, 50 Miss. 810. The matters in

a cross-bill must be germane to those involved in the original bill.

In Ency. Pl. & Pr. vol. 5, p. 629, it is stated that a cross-bill is "to obtain full relief for all the parties touching the matters in the original bill, or to bring every disputed matter fully before the court and grant the defendant or defendants some permanent relief against the complainant, or against other defendants, or against both."

We find in this suit, as shown in the original bill of the stockholders of the trust company and in the cross-bill of the trust company, the main purpose is that the trust company be relieved from the obligations and liabilities growing out of the agreement and business arrangement made between the trust company and the foundry company, whereby the trust company guaranteed bonds issued by the foundry company. To obtain this relief it was sought to have the agreement declared void because ultra vires, and it was further sought to have a foreclosure of the deed of trust given to secure the bonds, so that the application of the proceeds from the sale of the property could be made to the payment of the bonds.

The trust company, in the business transactions with the foundry company, became the holder of some of the bonds. In its cross-bill it sought to be subrogated to the rights of the bondholders as to the bonds which had been taken up by it under the agreement. It further sought a decree of the court directing the payment of the amounts expended by it in taking up bonds and the amounts expended by it in the payment of certain indebtedness owing by the foundry company when the bonds were originally issued. It prayed that such amounts should be paid first out of the proceeds of the sale of the mortgaged property; such payments to be made before any other bonds secured thereby should be paid.

Now appellant, the trustee in bankruptcy, who succeeded to the rights of the foundry company, and also was the representative of the bankrupt's general creditors, by his cross-bill claimed the right to offset such amounts as might be decreed to be owing to the trust company out of the proceeds of the mortgage sale by his claims against the trust company for preference payments and his claims for other amounts which he asserted would be shown owing by an accounting by the trust company. Thus we have presented, in the pleadings in this suit, disputed matters between two of the defendants to the original bill.

It appears that these matters in dispute between these two defendants are germane to the matters involved in the original bill of complaint. They grew out of and logically followed the main purpose of the bill, as hereinabove stated. They are material to the defense, which it is proper for appellant to make. Appellant had the right in this suit to demand affirmative relief, not only

against the complainants in the original bill, but also against the defendant, the trust company. The matters in dispute between these two defendants were proper to be brought fully before the court in order that there might be a complete determination of all the matters in litigation.

We notice in the prayer in the original bill, and also in that of the cross-bill of the trust company, that the court is asked to draw to itself and retain jurisdiction of all matters and controversies touching the rights and liabilities of all of the defendants with reference to the bonds, the validity of the contract of guaranty, and the liability of the trust company to any of the defendants, and it is further asked that the court would render such full and complete equity to all the parties as they might be entitled to. This is in keeping with our view of this case. Appellant claims a liability by the trust company to the estate of the bankrupt and to the creditors of such bankrupt. These claims are proper to be asserted as a defense and offset to the claims of the trust company, which it propounds for payment out of the proceeds of the sale of the mortgaged property. In order to render full and complete equity to all parties, these counterclaims of appellant and the trust company should be permitted to be litigated to an end in this suit. We therefore conclude that this ground is not well taken, and that the demurrer should not have been sustained by reason thereof.

[2] Appellant, as trustee in bankruptcy of the estate of the Watkins Machine & Foundry Company, one of the defendants to the original bill, was a proper party in this suit, and the court was right in permitting him to appear as a party defendant and interpose defense by filing his answer and making it a cross-bill. None of the grounds in the demurrer filed by the trust company are well taken, and the chancellor erred in sustaining that demurrer.

[3] We turn now to the ground in the demurrer, filed by the bondholders, that the deed of trust referred to, which instrument is filed as an exhibit to the original bill, does not embrace the corporate franchise of the foundry company and the charter thereof, and does not convey the income and future earnings of the company, as alleged by appellant, and that the deed of trust upon its face shows that it is valid, and is a subsisting and legally binding lien.

Appellant bases his claim that the deed of trust is invalid because it includes the corporate franchise, charters, income, and future earnings of the company, upon section 904 of the Code of 1906, which reads:

"A mortgage or deed of trust conveying the franchise or income or future earnings of any corporation, no matter when or how such corporation was created, shall not be valid against debts contracted in carrying on the business of the corporation."

A reading of the deed convinces us that appellant is wrong in his contention. It is stated in the instrument that the company had determined to secure the payment of the bonds by executing and delivering to the trustee a deed of trust conveying its plants and properties therein described and set forth. We quote as follows from the description of the property conveyed:

"All and singular of the following real estate, plants, factories, grounds, charters, machinery rights, privileges, franchises and other property, to wit: The plant and property now belonging to the company situated in the city of Hattiesburg, county of Forrest, and state of Mississippi, and more particularly described as follows: Lots seven (7), eight (8)," etc.

Then follows a description of real estate. Then continuing the instrument:

"Together with all the buildings and structures, erections and constructions now or hereafter placed upon the same, to wit: All machinery of every kind and description," etc.

Then follows a description of personal property. The description of property included in the deed of trust then ends as follows:

"It being the intention to convey by this instrument all the property of every kind and description now owned by the said company and situated and being at its plant in the city of Hattiesburg, Mississippi; but all merchandise, mill supplies, locomotives, or other goods and wares kept for sale, barter or trade by Watkins Machine & Foundry Company are expressly excepted from the operation of this deed of trust and are not intended to be embraced herein. It is further understood and agreed that any and all property herein described as embraced in and covered by this trust deed which Watkins Machine & Foundry Company may hereafter acquire and place upon said premises in or about its said plant in the city of Hattiesburg, including all real estate during the life of this trust deed, shall be covered by and included in this trust deed as fully and to all intents and purposes as if the same was accurately described herein."

"To have and to hold the above-described premises, property rights, franchises and appurtenances, unto the said party of the second part, and its lawful successors or assigns forever."

It will be seen that, while the word "franchises" is inserted in the general statement of what is to be conveyed, still no franchise is described, and by the very words of the deed of trust the property conveyed is that which is definitely described in the deed of trust. Such property is first limited in the description to the "plant and property" then belonging to the company, situated in the city of Hattiesburg. It is further limited by the particular description of the real estate included, and then the description of the personal property enumerated. The location of the property is definitely given, and it is also particularly described. A general description may be restricted by a particular one, and the particular description will control.

It will be noted that, wherever the word occurs in the provisions of the deed of trust, it is in the plural, "franchisees," not "the franchise." Where it occurs in other parts of the instrument than the description of the property conveyed, it is preceded by the

word "said," or word of like import, which, of course, refers it back to the description.

The word "franchise" has various significations. The privilege conferred by the government on a corporation to exist is termed a franchise. Different powers granted to a corporation are called franchises. Particular rights and authorities vested in persons are designated franchises. For instance the right to hold and dispose of property is a franchise which may be bestowed on a corporation. This deed of trust is only upon the property therein definitely described, and does not attempt to convey the corporate franchise or income or future earnings of the foundry company.

The ground in the demurrer filed by the First National Bank of Commerce and others, the bondholders, that the deed of trust did not convey the franchise or income or future earnings of the corporation, and was therefore invalid as against debts contracted in carrying on the business of the corporation, is well taken.

This appeal was granted by the chancellor to settle the principles of the cause.

Reversed and remanded.

YAZOO & M. V. R. CO. v. BISHOP. (No. 16797.)

(Supreme Court of Mississippi. March 8, 1915.)

On motion by appellant to amend judgment, and suggestion of error by appellee. Suggestion of error overruled, and motion to amend sustained in part. Reversed generally, and cause remanded.

For former opinion, see 66 South. 425.

Mayes & Mayes, of Jackson, for appellant. Green & Green, of Jackson, and Thos. S. Owen, of Cleveland, for appellee.

REED, J. This case is reported in 66 Southern Reporter at page 425. By referring to the opinion then delivered it will be seen that the court held that it was proper to submit the question of appellant's liability to the jury. It was further held that the verdict was excessive in amount to the extent that it showed passion or prejudice on the part of the jury. The case was thereupon reversed, and remanded for trial as to the amount of damages only, unless appellee entered a remittitur reducing the verdict to \$500.

Since the rendition of that opinion appellant has filed the following motion:

"Now comes the Yazoo & Mississippi Valley Railroad Company, appellant in above cause, and moves the court to amend its order made and entered in this cause, by affirming same at and for the sum of \$500, and that said cause be not reversed and remanded for any purpose, unless rule 13 [59 South. ix] be relaxed, and dispensed with in the instant case, to prevent injustice to this appellant, and the reversal be a general one."

We understand from this motion that appellant desires us to affirm the case for the amount of \$500, or reverse it and remand it for a general trial on all issues.

Appellee is also dissatisfied with the judgment rendered, and has filed a suggestion of error, in which he maintains that the case should not have been reversed on the ground that the verdict is excessive.

In our reconsideration of this case we requested and received from counsel representing appellant and appellee briefs further discussing the question of appellee's right to recover at all on the evidence.

After again reviewing the case, we have determined not to disturb our holding that it was proper to submit the case to the jury on the question of appellant's liability.

The chief question to be answered in determining appellant's liability is whether appellee sufficiently exhibited his ticket to the flagman. He claims, and the flagman denies, that he did.

Because much of the testimony before the jury relative to the exhibition of the ticket consisted of gestures and illustrations by use of the hand and by physical demonstration of what occurred, all of which is uncertain and indefinite to us from the mere words in the testimony, it is not apparent to us exactly what took place between appellee and the flagman. In the nature of things, we are unable to have as clear an understanding of the occurrences as the jury, who saw the gestures and physical illustrations. We make the following quotations from the testimony to illustrate our inability to understand fully what occurred from just the words spoken:

Appellee said:

"I had my ticket in the palm of my right hand; I raised my ticket up that way, and started going in. * * * I took the ticket and stuck it down in front of my hat. * * * I walked up, and had the ticket in my hand, and he said, 'Ticket,' and I just threw up my hand, just in that position, with my ticket that way. Q. You never did open your hand this way? A. Just in this position, and the flagman saw it. Q. Now, Mr. Bishop, wait a minute. Is this the position? A. Something up, but holding it right in the palm of my hand there."

From the testimony of W. E. Hardin, the flagman:

"Q. Did he or not exhibit it to you then? A. No, sir; he held his hand out this way; says, 'I've got my ticket.'"

Did Mr. Bishop sufficiently exhibit his ticket? The proof in this case is such as to carry this question to the jury for answer.

We have also concluded that we were not in error in deciding that the verdict was excessive. It seems plain to us that, viewing all of the facts in the case, it was beyond any reasonable amount.

[2] Counsel for appellee suggest that the infliction of punitive damages in this case was to punish the offender, and to give an example so as to protect the public from similar wrongs. It is our opinion, however,

that the punishment inflicted in this case is out of all proportion to the offense committed.

We have concluded, however, from an extended reconsideration of this entire case, to reverse it generally, and remand it for a trial on all issues. We therefore withdraw that part of the opinion and judgment wherein we reversed and remanded the case, unless a remittitur was entered reducing the verdict to the amount of \$500, and wherein, if remittitur was not entered, the judgment was reversed in so far as it fixed the damage to be recovered, and the case was remanded only for the purpose of ascertaining the amount of such damages.

It follows, therefore, that the suggestion of error by appellee is overruled, the motion to amend judgment by appellant is sustained in part and as indicated in this opinion, and the judgment is reversed, and case remanded for general trial.

(108 Miss. 371)

YAZOO & M. V. R. CO. v. SCOTT.

(No. 16929.)

(Supreme Court of Mississippi. March 1, 1915.)

1. COMMON LAW §1—WHAT CONSTITUTES.

The common law consists of those principles and rules of action which have been from time to time adopted and acted on by the courts when administering justice, in cases not governed by any written law arising out of private disputes of individuals.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 1, 2; Dec. Dig. §1.]

For other definitions, see Words and Phrases, First and Second Series, Common Law.]

2. APPEAL AND ERROR §1178—PARTIAL REVERSAL—ISSUE OF DAMAGES.

At common law in a civil action, the Supreme Court has the power to award a new trial on the issue of damages only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. §1178.]

3. NEW TRIAL §161—CONDITIONS ON GRANTING—"TERMS"—"CONDITION."

That the statute in force prior to Code 1906, § 800, providing that every new trial granted shall be on such "terms" as the court shall direct, read "terms and conditions," is immaterial, as the words are synonymous; "terms" meaning propositions, limitations, or provisions stated or offered, and a "condition" is that which limits or modifies the existence or character of something; a restriction or qualification.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 321-323; Dec. Dig. §161.]

For other definitions, see Words and Phrases, First and Second Series, Condition; Terms.]

4. APPEAL AND ERROR §1178—PARTIAL REVERSAL—ISSUE OF DAMAGES—STATUTORY AUTHORITY.

Under Code 1906, § 800, relating to circuit courts, but made applicable by sections 4909 and 4919 to the Supreme Court, providing that every new trial granted shall be on such terms as the court shall direct, and section 4919, empowering the Supreme Court to render judgment such as the trial court should have rendered, unless necessary that damages be assess-

ed by a jury, and that on remand the trial court shall proceed according to directions of the Supreme Court, the Supreme Court has power to award a new trial on the issue of damages only.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. §1178.]

5. COMMON LAW §11—REPEAL BY STATUTE.

A statute incorporating partially a rule of the common law does not operate as a repeal of the rest of the rule.

[Ed. Note.—For other cases, see Common Law, Cent. Dig. §§ 9, 12; Dec. Dig. §11.]

6. APPEAL AND ERROR §1178—PARTIAL REVERSAL—STATUTES.

That Code 1906, §§ 4944, 4945, by the rule of "expressio unius est exclusio alterius," prohibits the Supreme Court from granting a new trial on the issue of damages only, would not affect such right if it existed by some other statute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4604-4620; Dec. Dig. §1178.]

7. JURY §81—RIGHT TO TRIAL BY—PARTIAL REVERSAL.

To reverse and grant a new trial on the issue of damages only does not violate Const. 1890, § 31, making the right of trial by jury inviolate.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. §31.]

8. CONSTITUTIONAL LAW §816—DUE PROCESS—PARTIAL REVERSAL.

To reverse and grant a new trial on the issue of damages only does not deprive appellant of property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 938; Dec. Dig. §316.]

9. APPEAL AND ERROR §1214—REMAND FOR NEW TRIAL—EVIDENCE ON NEW TRIAL.

Where the court on appeal remands a case on the issue of damages only, evidence as to liability is inadmissible on the new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4715; Dec. Dig. §1214.]

Appeal from Circuit Court, Warren County; H. C. Mounger, Judge.

Action by Henry Scott against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an appeal from a judgment for appellee. The opinion states the facts.

The rule of the Supreme Court referred to in the opinion is as follows:

"Rule 13.—New Trial as to Damages Only.—When a judgment is reversed and a new trial ordered because the damages are excessive or inadequate, and for no other reason, such judgment shall be set aside only in respect of damages and shall stand good in all other respects."

See 102 Miss. 905, 59 South. ix.

Mayes & Mayes, of Jackson, and H. D. Minor, of Memphis, Tenn., for appellant. Hudson & McKay, of Vicksburg, for appellee.

SMITH, C. J. This suit was instituted in the court below by appellee to recover from appellant damages for an injury received by him while in appellant's employ by reason of the negligence of its servants. On the trial of the cause there was a verdict and judgment for appellee for the sum of \$100, from which he appealed to this court, and

obtained a reversal thereof for the reason that the damages allowed him were inadequate. 103 Miss. 522, 60 South. 215. In reversing the judgment, however, the new trial directed was restricted to the ascertainment of damages only, and, in so far as it settled the question of liability, the judgment was permitted to remain in full force and effect. On return of the cause to the court below it was again tried in accordance with the directions of this court, and resulted in the award to appellee of damages in the sum of \$6,750. Appellant's principal assignment of error is that this court was without power in reversing and remanding this cause to direct that it be tried on the question of damages only, and that therefore the court below erred in restricting the trial to that issue.

Two questions arise on this assignment of error: First, has this court, independent of rule No. 13 (59 South. ix), adopted by it some time since, the right to limit the issues when awarding a new trial? and, second, if not, had it the power to assume such a right by the adoption of this rule?

All of the powers with which this court is vested and which are not conferred upon it by the Constitution, either expressly or by necessary implication, are derived: (1) From statutes; and (2) from the common law. Taking up first the second of these sources from which our power is derived, and since it has been held that it "is undoubtedly the rule at common law" that in awarding a new trial because of inadequate or excessive damages the court is without power to limit the issue to the assessment of damages only (Farrar v. Wheeler, 145 Fed. 482, 75 C. C. A. 386), it will not be unprofitable to first answer the question: What is the common law?

In 1 Kent's Commentaries, 471, it is said:

"The common law includes those principles, usages, and rules of action applicable to the government and security of persons and property, which do not rest for their authority upon any express and positive declaration of the will of the Legislature."

In *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, the Supreme Court of the United States, after quoting this passage from Kent, proceeded as follows (italics ours):

"As it does not rest on any statute or other written declaration of the sovereign, there must, as to each principle thereof, be a first statement. Those statements are found in the decisions of courts, and the first statement presents the principle as certainly as the last. Multiplication of declarations merely adds certainty. For, after all, the common law is but the accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes."

In *Forbes v. Scannell*, 18 Cal. 266, it was said, quoting from an opinion delivered by Cushing, when Attorney General, construing a statute, that:

"By 'common law' is intended that law which is to be found in the decisions of the courts of justice of the United States, both federal and state courts, as distinguished from that law which is found in the statute law of the United States and of the several states."

In *Murray v. C. & N. W. Ry. Co.*, 92 Fed. 868, 35 C. C. A. 62, it was said that (italics ours):

"It has always been assumed that the federal courts were endowed with a power and jurisdiction adequate to the decision of every cause, and every question in a cause, presented for their consideration, and of applying to their solution and decision any rule of the common law * * * applicable to the case, and that would aid them in reaching a just result, which is the end for which courts were created. If a case is presented not covered by any law, written or unwritten, their powers are adequate, and it is their duty to adopt such rule of decision as right and justice in the particular case seem to demand. *It is true that in such a case the decision makes the law, and not the law the decision, but this is the way the common law itself was made, and the process is still going on.*"

Numerous other utterances of this character may be cited from the decisions of the courts. Indeed, "the fundamental idea of law is that of a rule or principle underlying a series of judicial decisions." "Courts and Legislation," by Prof. Roscoe Pound; Proceedings of the Bar Association of Tennessee 1912, p. 81.

[1] Discarding, then, the archaic theory characterized by Austin as "the childish fiction employed by our judges that judiciary or common law is not made by them, but is a miraculous something, made by nobody, existing * * * from eternity, and merely declared from time to time by the judges," and expressing the idea embodied in these authorities in slightly different language, the common law consists of those principles and rules of action which have been from time to time adopted and acted upon by the courts when administering justice in cases not governed by any written law, arising out of the private disputes of individuals. The common law thus brought into existence, while, in most respects, the "soul of reason," is not always arrived at by an application of the rules of logic, for its basis in the last analysis is nothing more nor less than expediency (Holmes' "The Common Law," pp. 35 and 68); and it is, after all, but "the product of experience of time, and the necessities of men living under a form of government." Noonan v. State, 1 Smedes & M. 573; Holmes' "The Common Law," index headings "Law" and "Experience." It is not unchangeable, and no one will contend that it is complete and perfect, though it has been and always will be "in constant process of improvement by means of the decisions of the courts in all common-law jurisdictions" (24 Harvard Law Review, 29), and "at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient." Holmes' "The Common Law," p. 1.

In *Noonan v. State*, 1 Smedes & M. 573, it was said that:

"That the common law, like the common atmosphere around every living being, is gladly received by all framers of government, is certainly very true, but that it was adopted to remain perpetual, unaltered, and unalterable, and not to be tempered to our habits, wants, and customs, we conceive was never designed by the wisdom of those who established our fundamental law."

The growth of the common law by means of judicial decisions is nowhere better exemplified than by the cases of *Western Union Telegraph Co. v. Allen*, 66 Miss. 549, 6 South. 461, and *Lumber Co. v. Harrison County*, 89 Miss. 448, 42 South. 290, 873. In the first of these cases this court adopted and acted upon a rule unknown to the early common law, and which had been altogether repudiated by the modern decisions of the English courts. In the course of its opinion the court said, with reference to the growth of the law of common carriers, that:

"The courts then [that is, in the early history of the English law], as the courts now, conscious of the needs of the public, expanded the principles of the law, fitted them to the exigencies of the occasion, and imposed a degree of liability unknown to other contract relations, but required for the safety and protection of the public."

In the second of these cases the court had under consideration the liability of a tenant for years for waste. Under the common law as it was when adopted in this country, a tenant for years was not liable therefor, but this rule of law had been changed in England, and such a tenant made so liable, by the statutes of Marlbridge and Gloucester long prior to the adoption by us of the common law. These statutes, however, were excluded from operation in this country by the provisions of the ordinance organizing the territory of Mississippi, and of the Constitution of 1817 (Schedule, par. 5). *Boarman v. Catlett*, 13 Smedes & M. 152. Nevertheless, the court, after pointing out that the early common-law rule in this regard had been changed by several of its former decisions, and made to conform to the principle contained in these statutes, held the tenant liable. In the course of its opinion the court, among other things, said:

"Over 600 years ago the rule exempting the tenant from waste was considered harsh and unjust towards the lessor, and the very purpose of these statutes was to relieve the law from this species of wrong. To say that this principle has not been adopted as a part of our jurisprudence would be to say that our courts and laws have not kept pace with the development of the law in extracting from it just rules of right."

[2] Returning now to the particular point here under consideration, an examination of the English decisions will disclose that those courts have generally, though not always, declined to limit the issues when awarding a new trial. The ground upon which these decisions seem to proceed is that the verdict of a jury is indivisible, and the judgment

rendered thereon is an entirety, must in all cases be dealt with as such, and therefore must be affirmed or reversed in toto. Why this result should follow when the issues determined by the jury are, in fact, separable, and when no harm will result from retaining the verdict and judgment upon those issues not affected by error, does not appear; and we dare say no good reason can be assigned therefor. *Eddie & Larraby v. East India Co.*, 1 Blackstone, 295, was an action on two bills of exchange in which there was a verdict for the plaintiff on one of them, and for the defendant on the other. In setting aside this verdict because of the error in the finding for defendant, Lord Mansfield said (*italics ours*):

"There is a verdict in part for the plaintiff; * * * but for form's sake we must set the whole verdict aside."

Since the only reason that could be assigned by the greatest of English judges for this practice was that it is required for form's sake, it is fair to assume that no better reason exists. All of the English cases holding that a partial new trial may not be granted that have come under our observation were decided after the year A. D. 1700, and may therefore not be a part of the common law adopted by us, as to which we do not deem it necessary to express an opinion, for the reason that, as we have heretofore pointed out, the common law as it now exists is not necessarily the same as it was when originally adopted. Even the English courts recognize the fact that the common law is not unchangeable, and that the common law of the time of Edward I is not necessarily the same as that of the time of Edward the Confessor, and that the common law of James I is not necessarily the same as that of the time of Edward I. In several of the English cases, however, the indivisibility of the verdict seems not to have been considered as a bar to a partial new trial, as will appear from an examination of *Hutchinson v. Piper*, 4 Taunt. 555; *King v. Mawbey*, 6 T. R. 619; *Thwaites v. Sainsbury*, 7 Bing. 437; *Price v. Harris*, 10 Bing. 331; *Stroud v. Stroud*, 7 M. & G. 417; *Moore v. Tuckwell*, 1 M. G. & S. 607; *Clement v. Lewis*, 3 Brod. & B. 297. Most of the English decisions examined by us in this connection will be found referred to in the case of *Clark v. Railroad Co.*, 33 R. I. 83, 80 Atl. 406, Ann. Cas. 1913B, 356.

All doubt as to the power of the English courts to award a partial new trial, however, has now been cleared up by a rule of court adopted under the present judicature act, which provides that:

"A new trial may be ordered on any question without interfering with the finding or decision upon any other question." *The Annual Practice* (1915) p. 713.

Turning now to the American decisions, it appears from the cases collated in the notes to 2 R. C. L. 287, 4 Ency. L. & P. 662, Smith

v. Whittlesey, 7 Ann. Cas. 114, and *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588, that the right to limit the issues when ordering a new trial is exercised by a large number, if not a majority, of the American courts without any statutory authority so to do.

In the note to *Smith v. Whittlesey* it is said that:

"It seems probable that the practice is a departure from the ancient common law, due to a desire to eliminate unnecessary litigation and expense and made practicable by the discretion with which the appellate court is invested in respect of the granting of new trials. * * * However the practice may have arisen, it is undoubtedly the rule, as stated in the reported case, that in remanding a cause for a new trial, the reviewing court will, when error exists only in respect of one or more of several issues, and the judgment in other respects is free from error, order the trial court to find upon the issues in respect of which the error was made, leaving the other findings to remain as part of the record. * * * As to whether, when the judgment is erroneous only in respect to damages, the court has the right to limit the issues in remanding the case for a new trial to that question, it has been held that it is 'undoubtedly' the rule at common law that the entire verdict must be set aside, and a venire de novo ordered covering all of the questions submitted to the jury. *Farrar v. Wheeler*, 145 Fed. 486, 75 C. C. A. 398. See, also, *Peed v. Brenneman*, 72 Ind. 288. But in a number of cases the courts have, apparently in the absence of statute, limited the inquiry of the jury on the new trial to an ascertainment of damages."

The two cases cited in this note, where it was held that at common law a new trial for the assessment of damages only could not be awarded, are *Farrar v. Wheeler*, 145 Fed. 482, 75 C. C. A. 386, and *Peed v. Brenneman*, 72 Ind. 288. In the first of these cases the court exercised the right to limit the issue by virtue of a statute, no authority was cited for the statement that no such right existed at common law, and it is not clear whether by this statement the court meant the early or the present common law. The second case cites in support of its holding *Clement v. Lewis*, 3 Brod. & B. 297. That case was decided in the Exchequer Chamber in 1822, and it appears from the report thereof that, where error appeared in the assessment of damages only, writs of inquiry were frequently awarded for the correct ascertainment thereof, the verdict and judgment in other respects being permitted to remain; but in that particular case the new trial was not limited to the assessment of damages only, because the verdict, having wholly failed to assess any damages at all, was void. In *Simmons v. Fish*, supra, the Massachusetts Supreme Judicial Court, after reviewing its prior decisions, said:

"This review of our cases demonstrates that this court continuously from early times has exercised the power of narrowing a new trial to specific points in cases where the error committed at the trial was so limited in character as with justice to both parties to be separable from the other issues determined by the first verdict. It has done this as a part of its inherent judicial authority, and not under any

statute. It has exercised the power in a great variety of cases touching divers kinds of issues involved in general verdicts. The guiding principle is that, although a verdict ought not to stand which is tainted with illegality, there ought to be but one fair trial upon any issue, and that parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown."

It will be observed that the court here referred its right to limit the issues to its "inherent judicial authority." This, however, is but another way of saying that it thereby exercised one of its common-law powers; the rule that a court possesses certain inherent powers being derived from the common law.

Looking to the whole body of modern decisions dealing with the question here under consideration, most of which are referred to in the authorities hereinbefore cited, we find that it has often been held, in the absence of statutes so providing, that the issues may be limited when a new trial is awarded. Consequently, that such is now the rule of the common law ought to, and will by us in this connection, be considered as settled. *Lux v. Haggin*, 69 Cal. 385, 4 Pac. 919, 10 Pac. 674.

The right of an appellate court to limit the issues, if separable, when awarding a new trial in equity, has never been questioned, and all of the reasons which support this practice apply with equal force when awarding a new trial at law in a cause wherein the issues are separable. The fundamental distinction between courts of law and equity—that is, that the one acts in rem and the other in personam—that is made to account for most of the differences between the procedure of the two systems cannot serve that purpose here; for in this connection whether the proceeding is in rem or in personam is wholly immaterial in so far as convenience, practicability, right, and justice are concerned. The only practical difference between the two systems in so far as the question here under consideration is concerned is that the issues in equity can be more frequently and easily separated than at law. The practice in which this and other American courts have long indulged of affirming without the consent of the defendant a judgment erroneous only because the damages awarded are excessive, when the plaintiff will agree to remit such portion thereof as will reduce the amount to what the court considers reasonable, is an innovation both upon the early common law and as it exists in England today (*Watt v. Watt*, 2 Ann. Cas. 672), and is probably of more doubtful propriety than is the right here under consideration; for in exercising the former the court substitutes its own judgment as to the amount of damages to be awarded for that of the jury, and permits the recovery thereof without it having ever been awarded by any jury, while in the exercise of the latter it simply submits that question to another jury. If the theory of the indivisibility of a verdict in a case wherein the verdict is erroneous only because of

excessive damages is a bar to limiting the new trial to that issue only, a fortiori it is also a bar to the setting aside of the verdict as to the amount of damages and the entering of a judgment without the consent of the defendant for such an amount as the court considers reasonable. The practice of so doing, however, has not only become thoroughly imbedded in our jurisprudence, but a statute (section 4910 of the Code of 1906) by which the trial court was attempted to be deprived of this right was declared void by this court, on the ground that the right to so control and revise the verdict was a part of "the right of trial by jury" which section 31 of our Constitution provides "shall remain inviolate" (*Y. & M. V. R. Co. v. Wallace*, 90 Miss. 609, 43 South. 469, 122 Am. St. Rep. 321).

The cases wherein this court has limited the issues when awarding a new trial by virtue of the provisions of such statutes as sections 778, 4944, and 4945 of the Code of 1906 are, of course, not in point here, and an examination of our digests does not disclose any other cases in which this right has been exercised. Two cases, however, have come under our observation wherein this right was exercised in the absence of statutory authority therefor, and it may be that there are other such cases buried in our reports.

In *Bedford v. Railroad Co.*, 65 Miss. 385, 4 South. 121, the declaration, in substance, alleged:

"That defendant by carelessness and negligence in running its trains killed two mares and a colt, on February 27, 1887, and injured a gray mare, on March 3, 1887, all the property of plaintiff."

At the close of the evidence the court instructed the jury to find for the defendant, and there was a verdict and judgment accordingly. An appeal being taken to this court, the judgment was reversed in part and affirmed in part, and a new trial awarded upon one issue only; the language of the court in so doing being as follows:

"It was wrong to instruct the jury * * * as to the gray mare. * * * In all else the judgment is affirmed; but, as to the action for killing the gray mare, the judgment is reversed, and a new trial awarded."

In *Taylor v. Barbour*, 90 Miss. 888, 44 South. 988, 122 Am. St. Rep. 328, the plaintiff instituted two different suits before a justice of the peace to recover of the defendant upon two claims, one for \$60, and the other for \$125. On appeal to the circuit court both these suits were consolidated and tried as one. At the close of the evidence there was a peremptory instruction to find for the plaintiff for the amount sued for, and the verdict returned, as it appears in the original record in the case, was in the following language: "We, the jury, find for the plaintiff in the sum of 185.00 dollars"—this being the total of both demands. This verdict was correct in so far as the claim for \$125 was concerned, but was erroneous in so far as it

awarded a recovery on the \$60 claim. It was therefore affirmed in so far as it awarded a recovery on the first claim, and reversed in so far as it awarded a recovery on the second, or \$60, claim, and was remanded for trial on that issue only.

If the theory that a verdict of a jury is in all cases indivisible is correct, then in these cases there should have been a general, and not a partial, new trial, and they were, to that extent, wrongly decided. The truth is that the theory is fallacious; such verdicts being divisible or not according to the circumstances of the particular case. In the cases just cited the issues, though not separated in the verdict, were in fact separable, and the court simply exercised its power derived both from the common law and from the statutes hereinafter referred to of limiting the new trial to those issues with reference to which error was committed on the former trial.

[3, 4] Turning now to the first-mentioned source from which this court derives its powers—that is, the statutes or written law—the right to limit the issues when awarding a new trial is conferred upon it, certainly by one, and probably by two, of our statutes. Section 800 of the Code of 1906 is as follows: "Every new trial granted shall be on such terms as the court shall direct," etc. The only difference between the present form of this statute and its form as it appeared in the earlier Codes (Hutchinson's Mississippi Code, § 73 of chapter 61, page 876) is that it formerly read: "Every new trial granted at law shall be on such terms and conditions as the court shall direct," etc.—the words "and conditions" being now omitted. The words "terms" and "conditions," however, as here used, are synonymous. The word "term" means "that which limits the extent of anything" and, when used in the plural, means "propositions, limitations, or provisions stated or offered, as in contracts, for the acceptance of another and determining the nature and scope of the agreement." A "condition" is "that which limits or modifies the existence or character of something—a restriction or qualification." Webster's New International Dictionary. If the statute read, "Every new trial granted at law shall be within such limitations as the court shall direct," no one would question the right of the court under it to limit the issues. The only difference between a statute so worded and the one here in question is that the latter includes the former, and more. It is simply broader and more comprehensive. It is true that this section of the Code appears in the chapter on Circuit Courts, but the power therein conferred upon the trial court may be exercised by this court on appeal, under sections 4909 and 4919 of the Code.

Moreover, section 4919 seems also to contemplate that this court, in remanding a case to a lower court for a new trial, may

direct that the issues be limited. This section is as follows (italics ours):

"The Supreme Court shall hear and determine all cases properly brought before it at the return term, unless cause be shown for a continuance; and in case the judgment, sentence, or decree of the court below be reversed, the Supreme Court shall render such judgment, sentence, or decree as the court below should have rendered, *unless it be necessary, in consequence of its decision, that some matter of fact be ascertained, or damages be assessed by a jury, or where the matter to be determined is uncertain; in either of which cases the suit, action or prosecution shall be remanded for a final decision; and when so remanded, shall be proceeded with in the court below according to the direction of the Supreme Court, or according to law in the absence of such directions.*"

In *Powell v. Railroad*, 77 Ga. 192, 3 S. E. 757, the Supreme Court of Georgia, in awarding a new trial, limited the issues to the assessment of damages only, and stated that by so doing it exercised the power of direction conferred upon it by section 218, par. 2, and section 4284, of the Georgia Code. These sections are as follows:

"218. (205) (211) Powers Enumerated. The Supreme Court has authority— * * *

"2. To hear and determine all causes, civil and criminal, that may come before it, and to grant judgments of affirmance or reversal, or any other order, direction or decree required therein, and if necessary to make a final disposition of the cause, but in the manner prescribed elsewhere in this Code."

"4284. (219) (4180) Decision Shall be Entered on Minutes. The decision in each case shall be entered on the minutes, and it shall be within the power of the Supreme Court to award such order and direction to the cause in the court below as may be consistent with the law and justice of the case."

The statute under which the United States Supreme Court and the federal Courts of Appeal exercise the right to limit the issues when ordering a new trial reads as follows:

"The Supreme Court may affirm, modify, or reverse any judgment, decree or order of a Circuit Court, or District Court acting as a Circuit Court, or of a District Court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require." *Farrar v. Wheeler*, 145 Fed. 486, 75 C. C. A. 390.

The case relied upon by counsel for appellant as supporting their contention that this court is without the power to limit the issues when ordering a new trial is *Adams v. Carter*, 92 Miss. 579. In that case the plaintiff, having recovered only a portion of his demand, coerced the payment of the amount recovered by means of an execution, and then appealed, whereupon a plea was filed in this court by appellees setting up the payment by them of the amount recovered in the court below as a bar to the appeal. This plea was sustained, and the appeal was dismissed. In its opinion the court, after referring to the fact that we have no statute "authorizing an appeal from a part of a judgment at law in a civil case," stated that a judgment at law is "an entire thing" which must be "appealed from as an entirety,"

and that all it "could possibly do in this case under our procedure would be, in case of error, to reverse the judgment and remand the cause for a new trial in the court below," and concluded by saying that:

"In view, therefore, of the case made by the record, and in view of the wide distinction between the equity and common-law procedure as to this court's power in reversing an equity decree and a judgment at law, and in view of the absence of any statute such as exists in Kentucky and other states, we are constrained to hold that the plea in bar is well taken. It might be well for the Legislature to provide by statute that this court should have the power to affirm in part and reverse in part, as justice might require, where the appeal is from a judgment at law; but, in the absence of such a statute, we are held down to the well-settled rule indicated in appeals from judgments of courts at law."

The Kentucky statute referred to provides that, when a party recovers judgment for a part of his demand, the enforcement of such judgment shall not bar an appeal as to the part not recovered.

It will be observed that the question there presented to the court for decision was not whether or not it had the right to limit the issues when ordering a new trial, but whether or not the appellant was barred of his appeal because of his having accepted the fruits of his judgment; so that the case, therefore, is not determinative of the issue here, though it may be conceded that the court would have decided it otherwise had it been of the opinion that it possessed the power here in question. The nonexistence of this power was assumed by the court apparently without investigation; certainly without citation of authority.

The supposed "indivisibility of a verdict" and "entirety of a judgment," however, have not been permitted to cause an appellant to be barred of his appeal in all of the cases wherein he has recovered and accepted a part of his demand only. The character of the cases in which this result has not been permitted will be found set forth in the brief of counsel for the appellee in *Adams v. Carter*, 92 Miss. at page 584, 47 South. 409, 16 Ann. Cas. 76, and designated by him as the first, third, fourth, and fifth exceptions to the general rule. A partial new trial is not a matter of right, and will be awarded only when the issues are clearly separable, and when no injustice will result therefrom. This fact, it is more than probable, accounts in part for the rule applied in *Adams v. Carter*. If the "indivisibility of the verdict" and the "entirety of the judgment" are valid reasons for not awarding a partial new trial, it must be either because such trials are impossible, or at least impractical, or because injustice will generally result therefrom. The first of these reasons is, of course, absurd; and that the second is without foundation in fact has been demonstrated by the experience of most of the American courts. The truth is that the rule,

if such, in fact, there be, that a judgment at law must at all times be dealt with as an entirety, is purely an arbitrary one, and, when carried to an extreme, as will be demonstrated by an examination of the cases wherein it has been so dealt with, results in many absurdities. Be that as it may, the question decided in *Adams v. Carter*, supra, hereinbefore stated, was not the one here under consideration.

In *McNairy v. Gathings*, 57 Miss. 215, the verdict of the jury was erroneous, in so far as it attempted to assess the amount of damages to be awarded the plaintiff, for the reason it was arrived at by the taking into consideration of an improper element. Upon this judgment a verdict was entered, and afterwards—

"a motion was made by the plaintiff to vacate this judgment and award him a writ of inquiry to assess the value of the cotton. This motion was based upon the theory that, inasmuch as the value of the money paid for the cotton was not in issue by the pleadings, and was a matter with which the jury had no concern, so much of the finding as related to it was to be treated as surplusage, and the verdict regarded as a general finding for the plaintiff, with a failure to assess the damages to which he was entitled. This motion was overruled, but a subsequent motion by the plaintiff to set aside the verdict as being contrary to the law and evidence was sustained, and a new trial awarded. The new trial was had, and resulted in a verdict for the defendant."

The ground upon which a reversal of this judgment was sought was that the court erred "in refusing to award a writ of inquiry upon the former verdict." It was held that the court below was correct both in refusing to award the writ of inquiry and in setting aside the verdict and awarding a new trial. It will be observed that the court was not there requested to affirm in part and reverse in part, but to disregard that portion of the judgment entirely by which it was sought to assess the damages, and to proceed as if the jury had not responded at all to that issue. This the court declined to do, and then, upon request of counsel for the plaintiff, set aside the verdict in toto, and awarded a new trial generally. It may be that both counsel for the plaintiff and the court were of the opinion that, unless the attempted assessment of damages could not be treated as a nullity, the judgment must be affirmed or reversed as an entirety; but nevertheless that was not the point the court was called upon to decide, and consequently it was not before it for consideration. The case therefore is not strictly in point here, and was not cited by counsel for appellant probably for that reason.

[5, 6] In arriving at our conclusion in this matter we have not left out of view the suggestion of counsel for appellant that under the rule of "*expressio unius est exclusio alterius*" the grant of power to this court to reverse partially, contained in sections 4944 and 4945 of the Code, impliedly prohibits it from so doing in cases not coming within the provisions of these sections. In so far as

the right of this court to limit the issues when ordering a new trial is derived from the common law this rule has no application. A great many of our statutes dealing not only with the substantive, but also with the adjective, law consist merely of codifications, sometimes general, but in most cases only partial, of some particular rule or principle of the common law; and, should the courts hold that, when any rule or principle of the common law is by the Legislature partially incorporated into a statute, the remainder of the rule is thereby repealed or annulled, endless trouble and confusion would result, necessitating in all cases a complete codification of the subject dealt with by the statute. In so far as this argument applies to the construction we have placed upon sections 800 and 4919 of the Code, it will be sufficient to say that the rule here invoked has served its purpose when by invoking it we determine that no such right is conferred upon this court by sections 4944 and 4945 of the Code, and that such right, if statutory, must be found in some other statute.

One of the objections of counsel for appellant to the exercise by this court of the right here in question is that it is prohibited from so doing by section 31 of our Constitution, which provides that "the right of trial by jury shall remain inviolate."

[7, 8] There is no merit in this contention, for the reason that appellant's liability was determined by the jury on the first trial, and by limiting the issue on the second trial solely to the ascertainment of damages, the court thereby simply preserved the fruits of the former trial in so far as it was not affected by error. If it be true, as was held in *Y. & M. V. R. Co. v. Wallace*, 90 Miss. 609, 43 South. 469, 122 Am. St. Rep. 321, that the trial court, when, with the consent of the plaintiff, it reduces the amount of damages awarded to what it considers reasonable, and renders judgment therefor without the consent of the defendant, not only does not thereby violate section 31 of the Constitution, but, on the contrary, its right to so control and revise the verdict is a part of "the right of trial by jury" expressly guaranteed by that section, it follows a fortiori that the exercise by the court of the right here in question does not violate that section. It also necessarily follows from that decision that there is no merit in the contention that by the exercise of this right we deprived appellant of its property without due process of law.

Having arrived at the conclusion that this court has the right, both at common law and by statute, to limit the issues when awarding a new trial, it becomes unnecessary for us to determine whether or not, in the absence thereof, rule No. 13, recently adopted by us, and so vigorously assailed by counsel, would be valid.

But it is said by counsel for appellant, in effect, conceding that this court is vested

with the right here in question, it should not have been exercised in the case at bar, for the reason that it appears from the opinion rendered on the former appeal that the reason the verdict was set aside, in so far as it fixed the amount of damages, was that the amount awarded was "so grossly inadequate as to indicate that in arriving at its verdict the jury were influenced by prejudice, passion, or corruption," from which they say that it appears that the entire verdict, and not simply that portion of it awarding damages, was tainted by passion, prejudice, or corruption, and therefore should not have been permitted to stand in any respect.

The right to limit the issues when ordering a new trial should be exercised only when it is clear that no injustice will result from so doing. Particularly is this true when the only error in the verdict is in the amount of damages assessed, and it appears that this error was not the result of any ruling by, or charge from, the trial judge, but was committed solely by the jury itself after retiring to consider of its verdict; for in that case it is more difficult to say that the entire verdict was not affected by the same cause from which resulted the error in the amount of damages. It is manifest, however, from the opinion on the former appeal, that what the court meant was not that it appeared from the record that the entire verdict was tainted by passion, prejudice, or corruption, but simply that the indications were that the inadequate amount of damages awarded was the result thereof. There is no merit, therefore, in this assignment of error, and in reaching the conclusion we have left altogether out of view the "law of the case" rule.

[9] The next assignment of error argued in the brief of counsel for appellant is that "the court erred in excluding from the jury the evidence as to liability." There is no merit in this assignment, for the reason that, under the judgment rendered by us on the former appeal, the court below was without power to permit the question of appellant's liability to be again litigated, so that evidence relating only to that issue was, of course, inadmissible. It is not contended that any negligence on the part of appellee contributed to his injury; consequently no question growing out of our concurrent negligence statute (chapter 135, Laws of 1910) arises in this connection.

Affirmed.

(108 Miss. 899)

HALEY v. STATE ex rel. MORTIMER,
Dist. Atty. (No. 17875.)

(Supreme Court of Mississippi. March 8, 1915.)

COUNTIES 43—SUPERVISORS—VACANCIES—
CONSTITUTIONAL PROVISIONS.

Under Const. 1890, § 1, dividing the powers of the state government into three distinct

departments, legislative, judicial, and executive, section 2, declaring that no person in one department shall exercise any power properly belonging to another department, and that the acceptance of an office in another department shall vacate an office held in another department, section 170, declaring boards of supervisors parts of the judicial department, and sections 227-239, recognizing levee districts as a part of the state government, the board of levee commissioners belongs to the executive department, and the acceptance by a county supervisor of membership on a board of levee board commissioners "of itself and at once" vacated his office as supervisor.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 51; Dec. Dig. 43.]

Appeal from Circuit Court, Leflore County;
F. E. Everett, Judge.

Quo warranto by T. E. Mortimer, District Attorney, etc., against J. L. Haley. Judgment for plaintiff, and defendant appeals. Affirmed.

J. M. Vardaman, of Jackson, and Gardner, McBee & Gardner, of Greenwood, for appellant. O. L. Kimbrough, Co. Atty., of Greenwood, for appellee.

COOK, J. This is a quo warranto proceeding instituted by the state, upon the relation of the district attorney, to oust J. L. Haley, a member of the board of supervisors of Leflore county. The evidence shows that Mr. Haley was duly elected and qualified as a member of the board of supervisors, and was chosen by the board as its president. Afterwards he was appointed by the Governor as a member of the board of levee commissioners for the Yazoo-Mississippi Delta, and qualified as levee commissioner after having approved his bond himself, acting as president of the board of supervisors. The statute provides that the bond of each levee commissioner shall be approved by the president of the board of supervisors of the county of the commissioner's residence. The state contends that, when Mr. Haley accepted the appointment and qualified as a member of the board of levee commissioners, this, of itself, vacated his office as a member of the board of supervisors.

Section 1 of article 1 of the Constitution of this state is in these words:

"The powers of the government of the state of Mississippi shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit: Those which are legislative to one, those which are judicial to another, and those which are executive to another."

Section 2 of article 1 reads this way:

"No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others. The acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments."

By section 170 of article 6 of the Constitution boards of supervisors are made a part of the judicial department of the state.

Article 11 of the Constitution refers to the two most important levee districts, and they are recognized as a part or subdivision of the state government. We think the board of levee commissioners belongs to the executive department, but, whether that be true or not, it is very certain that it does not belong to the judicial department.

Mr. Haley, while holding an office in the judicial department, accepted an office in the executive department, and this "of itself, and at once," vacated his office as a member of the board of supervisors of Leflore county.

Affirmed.

McALLISTER v. TUGGLE. (No. 16615.)

(Supreme Court of Mississippi. March 1, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between J. A. McAllister and Lawrence Tuggle. From the judgment, McAllister appeals. Affirmed.

Mize & Mize, of Gulfport, for appellant. J. M. Morse, Jr., and Geo. S. Dodda, both of Gulfport, for appellee.

PER CURIAM. Affirmed.

TEW v. KOLA LUMBER CO. (No. 16618.)

(Supreme Court of Mississippi. March 1, 1915.)

Appeal from Circuit Court, Covington County; W. H. Hughes, Judge.

Action between J. A. Tew and the Kola Lumber Company. From the judgment, Tew appeals. Affirmed.

R. N. Miller, of Hazlehurst, for appellant. Wells, May & Sanders and J. Sivley Rhodes, all of Jackson, and McIntosh Bros., of Collins, for appellee.

PER CURIAM. Affirmed.

BAILEY v. STATE ex rel. COLLINS, Atty. Gen. (No. 16604.)

(Supreme Court of Mississippi. March 1, 1915.)

Appeal from Circuit Court, George County; T. H. Barrett, Judge.

Proceeding by the State, on relation of Ross Collins, Attorney General, against P. P. Bailey. From the judgment, Bailey appeals. Affirmed.

Deavours & Sharbrough, of Laurel, and Cook & Backstrom, of Lucedale, for appellant.

PER CURIAM. Affirmed.

GILBERT v. STATE. (No. 18068.)

(Supreme Court of Mississippi. March 1, 1915.)

Appeal from Circuit Court, Tallahatchie County.

Proceeding between Christ Gilbert and the State. From the judgment, Gilbert appeals. On motion to docket and dismiss. Sustained.

Ross A. Collins, Asst. Atty. Gen., for the motion.

PER CURIAM. Motion to docket and dismiss sustained.

WESTERN UNION TELEGRAPH CO. v. HUMPHREY & CO. (No. 16110.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Bolivar County. Action between the Western Union Telegraph Company and Humphrey & Co. From the judgment the telegraph company appeals and moves for a rule on the clerk to show why the record has not been sent up. Motion overruled.

J. B. Harris, of Jackson, and D. A. Scott and E. M. Yerger, both of Clarksdale, for the motion.

SMITH, C. J. This motion is in the following language: "Comes the appellant in the above cause and moves the court for a rule on the clerk to show cause why the record in this case has not been sent up to this court."

Since the motion does not contain any allegations from which we can ascertain whether or not the clerk of the court below is in default in not sending up the record, the motion will be overruled, but without prejudice to the right of appellant to file another.

RHODES v. BOND et al. (No. 16624.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between N. Rhodes and B. A. Bond and others. From the judgment, Rhodes appeals. Affirmed.

J. A. Burns, of Biloxi, for appellant. Rushing & Guice, of Biloxi, for appellees.

PER CURIAM. Affirmed.

CITY OF GULFPORT v. HALL. (No. 16612.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between the City of Gulfport and Mrs. H. Hall. From the judgment, the City appeals. Affirmed.

J. L. Heiss, of Gulfport, for appellant. Mize & Mize, of Gulfport, for appellee.

PER CURIAM. Affirmed.

JOHNSON v. MARTIN. (No. 18109.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Oktibbeha County.

Action between C. L. Johnson and J. L. Martin. From the judgment, Johnson appeals. Appeal dismissed.

W. W. Magruder, of Starkville, for the motion.

PER CURIAM. On motion to dismiss appeal. Sustained.

WOODMEN OF THE WORLD v. JOINER.
(No. 17783.)

(Supreme Court of Mississippi. March 9, 1915.)

Appeal from Circuit Court, Copiah County; J. B. Holden, Judge.

Action between the Woodmen of the World and Nora Joiner. From the judgment, the Woodmen of the World appeal. Appeal dismissed.

PER CURIAM. Appeal dismissed.**LYON BROS. v. WISE BROS.** (No. 18084.)
(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Washington County; F. E. Everett, Judge.

Action between Lyon Brothers and Wise Brothers. From the judgment, Lyon Brothers appeal. Motion to docket and dismiss sustained.

Percy Bell, of Greenville, for the motion.

PER CURIAM. On motion to docket and dismiss. Sustained.**LONE STAR RACE PRIDE OF FRIENDSHIP, LOVE, AND HELP v. ANDERSON.** (No. 16918.)

(Supreme Court of Mississippi. March 9, 1915.)

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Action between the Lone Star Race Pride of Friendship, Love, and Help and A. E. Anderson. From the judgment, the party first mentioned appeals. Appeal dismissed.

Dabney & Dabney, of Vicksburg, for appellee.

PER CURIAM. Appeal dismissed.**WASHINGTON COUNTY v. RIVERSIDE DRAINAGE DIST.** (No. 17091.)

(Supreme Court of Mississippi. March 9, 1915.)

Appeal from Circuit Court, Washington County; Monroe McClurg, Judge.

Action between the County of Washington and the Riverside Drainage District. From the judgment, the County appeals. Appeal dismissed.

PER CURIAM. Appeal dismissed.**SAUCIER v. LYON.** (No. 16469.)
(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Chancery Court, Jackson County; T. A. Wood, Chancellor.

Action between M. D. Saucier and E. C. Lyon. From the judgment, Saucier appeals. Affirmed.

H. B. Everitt and Denny & Denny, all of Pascagoula, for appellant. Wells, May & Sanders, of Jackson, and Ford, White & Ford, of Pascagoula, for appellee.

PER CURIAM. Affirmed.**GULF & S. I. R. CO. v. GUNTER.** (No. 16619.)
(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Covington County; W. H. Hughes, Judge.

Action between the Gulf & Ship Island Railroad Company and M. G. Gunter, administrator. From the judgment the company appeals. Affirmed.

Wells, May & Sanders, of Jackson, for appellant. R. N. Miller, of Hazlehurst, for appellee.

PER CURIAM. Affirmed.**DE ROSSETT HAT CO. v. ROGERS.**
(No. 16629.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Wayne County; Jno. L. Buckley, Judge.

Action between the De Rossett Hat Company and A. L. Rogers. From the judgment, the company appeals. Affirmed.

Luther K. Saul, of Waynesboro, for appellant. W. M. McAllister and M. L. Heidelberg, both of Waynesboro, for appellee.

PER CURIAM. Affirmed.**DENSON et al. v. GANNON & SMITH.**
(No. 16860.)

(Supreme Court of Mississippi. March 9, 1915.)

Appeal from Chancery Court, Hinds County; P. Z. Jones, Chancellor.

Action between A. F. Denson and others and Gannon & Smith. From the judgment, the parties first mentioned appeal. Appeal dismissed.

L. Brame and W. C. Wells, both of Jackson, for the motion. Powell & Thompson, of Jackson, opposed.

PER CURIAM. Motion to dismiss sustained.**NOLEN v. HENRY.** (No. 552.)
(190 Ala. 540)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. DEEDS §111—CONSTRUCTION—INTENT.

The law leans against the destruction of a deed for uncertainty of description, and will construe, where it can be done consistently with the rules, so as to effect, and not to defeat, the intention of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 309-315, 334, 335; Dec. Dig. §111.]

2. REFORMATION OF INSTRUMENTS §2 — VOID DEED.

Although a deed may be void on its face for want of a definite description of the land, a court of chancery will reform it upon proper allegation and proof of extrinsic facts.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 2, 3; Dec. Dig. §2.]

3. EVIDENCE §460—DESCRIPTION IN DEED—PAROL EVIDENCE.

A grantor, owning a large body of surrounding land, conveyed 10 acres, to be laid off so as to include a certain shoal on the creek, which in fact was in section 15, the deed describing it as being in sections 16 and 22, to be laid off

so as to include that certain shoal, the land to be surveyed and platted, and a certified plat to become a part of deed to complete a description, in view of the recording of the plat referred to therein, was an uncertain description, which might be aided by parol proof, and which came within the maxim, "Id certum est, quod certum reddi potest."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2115-2128; Dec. Dig. ¶460.]

4. REFORMATION OF INSTRUMENTS ¶32 — BILL—DELAY.

Where land was conveyed to a power company in May, 1909, and conveyed by it to complainant in March, 1913, after the death of the original grantors, complainant's bill, thereafter filed, for reformation of the description in the deed, was not too long delayed.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 119-121; Dec. Dig. ¶32.]

5. REFORMATION OF INSTRUMENTS ¶26—PROCEEDINGS—POSSESSION OF LAND.

To maintain a bill to correct a mistake in the description of land conveyed by deed, it is not necessary that the complainant should be in possession of the land.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 91-100; Dec. Dig. ¶26.]

6. VENDOR AND PURCHASER ¶231 — BONA FIDE PURCHASER—RECORD—CONSTRUCTIVE NOTICE.

A deed executed in May, 1909, conveying 10 acres from a body of surrounding land described as lying in sections 16 and 22, to be laid off so as to include a certain shoal on a creek, and to be surveyed and platted, and a certified plat to be a part of the deed to perfect the description, on record before the plat was filed, sufficiently described the lands to put a purchaser on inquiry, and hence was such constructive notice as to defeat his rights as a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 487, 513-539; Dec. Dig. ¶231.]

7. CORPORATIONS ¶444—DEED OF CORPORATION—SIGNATURE.

A deed of "Big Hillabee Power Company," purporting on its face to be the deed of the company, and reciting that in witness the grantor had set its hand and seal and delivered it by its president, signed, "L. W. Roberts, Pres't Big Hillabee Power Co.," was the deed of the company, since any defect in the signature was such as a court of equity would not permit to defeat the right of the grantee.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1779-1781; Dec. Dig. ¶444.]

Appeal from Chancery Court, Tallapoosa County; W. W. Whiteside, Judge.

Bill by R. L. Henry against Roy Nolen to correct description in deed. From a decree overruling demurrer to the bill, respondent appeals. Affirmed.

George A. Sorrell, of Alexander City, for appellant. Lackey & Rowland, of Ashland, for appellee.

GARDNER, J. Bill filed for reformation of description in certain deeds, referred to therein. Woodlawn Realty &c. Co. v. Hawkins, 65 South. 183. Complainant claims title through a corporation known as Big Hillabee Power Company. It is shown: That

one J. H. Chisolm, who was the owner of the land, conveyed by deed of date May 19, 1909, in execution of which deed his wife, Rebecca Chisolm, joined, to said Big Hillabee Power Company a tract of land consisting of 10 acres, to be laid off so as to include a certain shoal on Big Hillabee creek known as "Lindsey Shoal." That said Chisolm owned a large body of land surrounding the particular land. The description in said deed, a copy of which is made Exhibit A to the bill, is as follows:

"Ten acres of land lying and being in sections 16 and 22, to be laid off so as to include Lindsey shoals on Big Hillabee creek, said land to be surveyed and platted by J. R. Hall, and when surveyed by him and platted, a certified plat by said J. R. Hall shall be and become a part of this deed for the purpose of making the description perfect, and shall be attached to this deed and recorded as a part of this deed, with full water rights to erect a dam of sufficient height to back water to property sold Mr. Pinckard, at Chisolm's Bridge over said creek, with full rights, privileges, easements to, of the use of said stream for the purpose of a water power, said lands and water rights lying and being in township 23 of range 22."

The misdescription sought to be corrected, and the averments in connection therewith, are found in section 12 of the bill, as follows:

"12. Orator further shows to your honor that the Lindsey shoals on Big Hillabee creek, while the same were situated on the lands of J. H. Chisolm, and while the same is near the section line between section 22 and 15, that part of the same is in section 16, and that 10 acres could not be laid off in section 16 and 22 so as to include Lindsey shoals, and while the same is described in the deed from Chisolm and wife to the Big Hillabee Power Company and from the Big Hillabee Power Company to orator as being in section 16 and 22, that it was the intention of the parties in each instance to convey 10 acres of land so situated that the same should be available for the purpose of building a power plant on the said Lindsey shoals, and that neither the agent of the power company nor J. H. Chisolm knew the exact lines where the shoals were located, and that it was by mistake of the parties that the same was described as being in section 16 and 22, and that the description should have been in section 15, and that it was the intention of the vendor to convey 10 acres of land in section 15, which would include the Lindsey shoals, and it was the intention of the vendee to buy 10 acres of land in section 15 including Lindsey shoals, but by mistake as to where the lines were the land described as being in section 16, which by reason of that fact the line of section 22 was so near to the shoals that it was deemed probable by the parties at that time that some part of the 10 acres would necessarily be in section 22; that the description section 22 was put in the original deeds in order that there might be perfect and complete room for the laying off of 10 acres to be used for the best advantage in the development of the water power at Lindsey shoals. And orator avers that the said Roy Nolen was fully informed by the record of said deed that it was the intention and purpose of the parties to said deed that said 10 acres of land should be so laid off as to include such land as would be best suited to the building of a plant for the development of the water power at Lindsey shoals."

The bill further shows that J. H. Chisolm died some time subsequent to May 19, 1909,

and that his wife, Rebecca Chisolm, became the owner, either by inheritance from, or devise by, the husband, as we construe the bill, of all the lands belonging to her said husband; that prior to February 28, 1913, Rebecca Chisolm died, and that in due course of administration the lands of her said estate were sold by the administrator under the order of the probate court, and that as a part of the land ordered to be sold by said administrator was the west half of section 15, township 23, range 22, in Tallapoosa county, on which lands the Lindsey shoals were situated, and at said administrator's sale respondent became the purchaser of said lands, together with other lands then sold, the said 10 acres conveyed by J. H. Chisolm and wife to the Big Hillabee Power Company was not excepted therefrom, but said lands were sold in a body; that the said deed to said power company was on record in the probate office of Tallapoosa county at the time of said administrator's sale.

It is alleged that the said power company, in March, 1913, conveyed to complainant said lands sold to it, by use of the same description as that contained in the deed by J. H. Chisolm and wife to it, and that at that time the surveyor had not filed a plat or description of the 10 acres as provided for in said deed; that in June, 1913, complainant, desiring to perfect said description, procured J. R. Hall, named in the deed to the power company, to make a survey, laying off 10 acres of said lands so as to include the Lindsey shoals, and make a plat of the same, which said Hall did and filed in the probate office, and same has been recorded as a part of the deed.

The question considered and treated as of prime importance by counsel has reference to whether or not the description in the deed sought to be reformed is so uncertain as to render the same absolutely void.

[1-3] It is, of course, well settled that the law leans against the destruction of a deed for uncertainty of description, but will construe the deed, where it can be done consistently with legal rules, so as to give effect to the intention of the parties, and not to defeat it. "Every deed * * * ought to be so construed, if it can, that the intent of the parties may prevail, and not be defeated." Pollard v. Maddox, 28 Ala. 321.

In Cottingham v. Hill, 119 Ala. 353, 24 South. 552, 72 Am. St. Rep. 923, it was said:

"This court has gone as far as any other in admitting parol evidence to sustain the validity of deeds, assailed upon the ground of indefiniteness in the description of the land; but the rule which we have adopted promotes justice, and does not open the door to fraud and perjury. In all cases the writing has been sufficient to show a bona fide sale and conveyance was intended by the parties, and when this appears no injustice results if by parol evidence the precise property intended to be conveyed can be clearly identified."

"Although a deed may be void on its face for want of a definite description of the land, a

court of chancery will reform the deed upon proper allegation of extrinsic facts, and their proof." Greene v. Dickson, 119 Ala. 346, 24 South. 422, 72 Am. St. Rep. 920.

"The general rule, everywhere recognized, is that mere verbal declarations as to what was intended, are not admissible in explanation of the terms of the writing itself. A just exception to this rule, however, is found in parol evidence going to the *identification of the subject-matter*, a principle which seems to have been much favored by the past decisions of this court." Meyer Brothers v. Mitchell, 75 Ala. 475.

"A description which furnishes the means of making it certain by proof is sufficient." Lodge v. Wilkerson, 165 Ala. 302, 51 South. 609.

The description here involved shows the quantity of land to be conveyed and the purpose for which it was purchased. It is by no means what might be termed by some a "roving 10 acres," but its location is fixed on a certain creek so as to include Lindsey shoals. A more definite and particular description is fixed and agreed upon by the parties, as shown in the deed itself, by the agreement for a survey to be made by one Hall, the land laid off in a plat, and same to become a part of the deed, so as to complete and make perfect this description. It was agreed, as shown by the deed itself, that such survey and plat should be attached to the deed and recorded as a part of the deed. The books abound with cases of this character; the facts of each being, of course, different. A review of them here we deem unnecessary. Suffice it to say we are well convinced that the description in this deed is one of those "uncertain descriptions" which may be aided by parol proof, and comes within the maxim, "Id certum est, quod certum reddi potest." Homan v. Stewart, 103 Ala. 644, 16 South. 35; Ala. Mineral Co. v. Jackson, 121 Ala. 175, 25 South. 709, 77 Am. St. Rep. 46; Pollard v. Maddox, supra; Wilkins v. Hardaway, 159 Ala. 565, 48 South. 678; Greene v. Dickson, supra; Cottingham v. Hill, supra; O'Neal v. Seixas, 65 Ala. 80, 4 South. 745; Meyer Bros. v. Mitchell, supra.

[4, 5] It is insisted, however, that the survey and completion of the description thereby should have been accomplished within a reasonable time, no time being fixed, and that it was too long delayed. If it be conceded, without being decided, that this should have been done within a reasonable time, we are of the opinion the bill does not show such unreasonable delay as would defeat the right here sought to be enforced. Nor is it necessary, in order to maintain a bill seeking the correction of a mistake in the description of lands conveyed in a deed, that the complainant should be in possession of the lands. Bieler's Sons v. Dreher, 129 Ala. 384, 30 South. 22.

[6] It is next insisted that the record of the deed was not sufficient notice, and that if a mistake cannot be rectified without impairing the vested rights of innocent third parties, having no notice of the mistake, the

aid of equity will be withheld, citing *Berry, Demobile & Co. v. Sowell*, 72 Ala. 14. Without regard to any consideration of effect of the averment that respondent was a purchaser at a judicial sale, and without any decision upon that feature (*Lindsey v. Cooper*, 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. Rep. 105; *Ezzell v. Brown*, 121 Ala. 150, 25 South. 832), we are of the opinion that the deed of J. H. Chisolm and wife to the power company, which was on record at the time of the purchase by respondent, embraced sufficient description of the subject-matter to put a purchaser on inquiry, and therefore was such constructive notice as to meet the law's requirements. It gave notice to the world that the power company had purchased 10 acres of the land of said Chisolm, which was to be surveyed and laid off for a more perfect description by one J. R. Hall, selected and agreed upon by the parties, so as to include Lindsey shoals; that it was for the purpose of erecting a dam for use of the stream of Big Hillabee creek, for the purposes of water power, with rights and easements to such end. It gives the township and range, but mistakes the section number, placing the 10 acres in sections 16 and 22, while in fact a survey made in accordance with the provisions of the deed shows that the 10 acres laid off so as to include Lindsey shoals is situated in section 15. The plat made shows the section line, and how easily the mistake could occur. The deed gave notice, however, that it did not contain a complete description, but that such was to be perfected by a survey to be subsequently made, and that the purchaser had bought 10 acres, so as to include Lindsey shoals on Big Hillabee creek.

Counsel for appellant cites the case of *Florance v. Morien*, 98 Va. 26, 34 South. 890; but we are of the opinion that case tends to support our conclusion rather than the contrary. It was there said:

"The recorded instrument is sufficient to operate as constructive notice under the registry laws, if the property be so described or identified that a subsequent purchaser or incumbrancer would have the means of ascertaining with accuracy what and where it was, and the language used be such that, if he should examine the instrument itself, he would obtain thereby actual notice of all the rights which were intended to be created or conferred by it."

So here we think the language of this recorded deed was sufficient to give to a subsequent purchaser notice of what was intended to be conveyed, and a survey made in accordance with the very provisions of the deed itself would have disclosed the error as to the sections named, here sought to be corrected.

[7] Counsel further urge that the bill fails to show title to the said 10 acres in complainant, for that the deed of the corporation,

the power company, to complainant, is not signed as in the name of the corporation, but is signed only by L. W. Roberts, president of the Big Hillabee Power Company—citing *Standifer v. Swann & Billups*, 78 Ala. 88; *Mickle v. Montgomery*, 111 Ala. 415, 20 South. 441; *Taylor v. A. & M. Ass'n*, 68 Ala. 229. The deed purports on its face to be the deed of the power company, the corporation. It begins:

"This indenture, made on * * * between Big Hillabee Power Company, by its president, L. W. Roberts, * * * of the first part, and R. L. Henry, * * * of the second part."

And it concludes:

"In witness, the said party of the first part has hereunto set its hand, affixed its seal, and delivered these presents the day and year first above written, by its president, L. W. Roberts, of Fulton Co., Ga.

"[Signed] L. W. Roberts, Pres't.
Big Hillabee Power Co.

"Signed, etc., in presence of

"J. W. Preston, Sr.

"W. P. Felker."

We need not stop to inquire as to whether or not the provisions of the act approved February 20, 1911 (Gen. Acts 1911, p. 31), are applicable to the above deed. This we do not determine, as it is unnecessary. In the fifth paragraph of the bill it is alleged that the said corporation conveyed said property to complainant. The above objection, therefore, relates only to a matter of form, and in a court of equity the defect would not be such as to render the bill subject to the demurrer. Assuming full authority to act, and the bona fides of the sale to complainant, a court of equity would not permit the mere defect in execution of the deed to defeat the right of the complainant. As was said in *Taylor v. A. & M. Ass'n*, supra:

"Equity will treat the subject-matter, as to collateral consequences and incidents, in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been; not as the parties might have executed them. * * * This power existing, and its exercise having been attempted, the parties are not to be disappointed, and their just rights defeated, merely because, from inadvertence, or from ignorance, or mistake as to the method which ought to be pursued to bind the association, passing its estate and interest in the lands, there is a defective execution of the power."

The maxim that equity will treat that as done which ought to have been done would, in such case, have controlling effect.

We have reviewed the questions presented by counsel in brief, and we conclude that the learned chancellor decreed correctly in overruling the demurrer to the bill, and his decree is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and DE GRAFFENRIED, JJ., concur.

(190 Ala. 273)

**BIRMINGHAM RY., LIGHT & POWER CO.
v. HASS. (No. 814.)**(Supreme Court of Alabama. Nov. 7, 1914.
hearing Denied Dec. 17, 1914.)**1. CARRIERS — 271 — SETTING DOWN PASSENGERS — CARRYING BEYOND DESTINATION.**

In an action against a street railroad company for carrying a passenger beyond her destination, where there was evidence that plaintiff had given, at two different street crossings, signals to stop which were not heeded, she could recover for the negligent failure to stop at her place, since a passenger on a street car does not take passage for any designated place, but is entitled to ride to the end of the route if desired, and requested charges excluding recovery for failure to stop at the second crossing were properly refused.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1067-1071; Dec. Dig. — 271.]

2. TRIAL — 244 — INSTRUCTIONS — SINGLING OUT EVIDENCE.

In an action for carrying a street car passenger beyond her destination, requested charges, that in arriving at the cause of plaintiff's alleged sickness the jury should consider the walk she took in the rain before boarding the car and the walk she would have had to take if she had been let off at the proper street, were objectionable as singling out parts of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. — 244.]

3. TRIAL — 240 — INSTRUCTIONS — ARGUMENTATIVE INSTRUCTIONS.

A requested charge that, if the passenger had a cold and was sick on the morning after she had been obliged to walk back through the rain and thereafter, she could not recover damages therefor, unless the jury were reasonably satisfied from the evidence that the walk, caused by being carried past her destination, was the proximate cause of the sickness, and it could not be the proximate cause unless the sickness would not have arisen if she had not been carried by, was argumentative and properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. — 240.]

4. TRIAL — 260 — INSTRUCTIONS — REQUESTS — REPETITION.

Requested charges, which were fully covered by charges elsewhere given, were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. — 260.]

5. CARRIERS — 276 — PASSENGERS — CARRYING BEYOND DESTINATION — ADMISSIBILITY OF EVIDENCE.

In an action for carrying a street car passenger beyond her destination, where plaintiff testified that she gave the signal to stop one block before the street she desired "because they have been in the habit of carrying me by there several times," it was error not to strike the portion of the testimony as to the habit, since such previous breaches of duty by unidentified employes of the company could not show a habit on the part of the particular employes, and thereby tend to show the probability of the breach complained of.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1078, 1079; Dec. Dig. — 276.]

Appeal from City Court of Birmingham;
Hugo L. Black, Special Judge.

Action by Mrs. Annie May Hass against the Birmingham Railway, Light & Power Company for damages caused by the com-

pany carrying her beyond her destination. Judgment for plaintiff, and defendant appeals. Transferred from Court of Appeals. Reversed and remanded.

The gravamen of the complaint is that plaintiff became and was defendant's passenger on said car to be carried by it to a point on said line, to wit, Park avenue, in the city of Birmingham, which said Park avenue was at said time and on said occasion a regular stopping place on defendant's said line for the discharge of its said passengers; that plaintiff was carried a long distance past her said destination, and as a proximate consequence thereof plaintiff was compelled to walk back to her destination, and, rain falling, plaintiff was made wet, her clothing injured, plaintiff was made sick, etc. Plaintiff avers that defendant was guilty of negligence in and about carrying plaintiff beyond her destination, etc. Plaintiff's evidence tended to show that Park avenue bisected the blocks between Sixth and Seventh avenues; that she lived on Seventh avenue, and her destination was her home; that, before reaching Park avenue, she signaled the conductor with the bell, and the conductor rang the bell for the motorman to stop the car; that he did not stop at Park avenue, and she rang the bell again before the car reached Seventh avenue; that it ran on without stopping until it reached Eighth avenue, where plaintiff left it in the rain without an umbrella; and that she shortly thereafter contracted a cold and bronchitis, and was sick for several weeks. The evidence tended to show, also, that, had she alighted at Park avenue, she must have walked half a block in the rain to get to her home. That plaintiff stated, not in response to any question, that she signaled Park avenue, first "because they had been in the habit of carrying me by there several times." The defendant's motion to exclude this statement because immaterial, irrelevant, and incompetent, was overruled. The following charges were refused to defendant:

(1) If the jury believe from the evidence that plaintiff did not signal the conductor to stop at Park avenue until the car was passing Park avenue, you must return a verdict for defendant. (2) If you believe from the evidence that plaintiff did not signal the conductor in time for the car to stop at Park avenue, your verdict should be for defendant. (3) In arriving at the cause of plaintiff's alleged cold and sickness, the jury is authorized to consider the walk plaintiff took in the drizzling rain from Avenue E and Twenty-Second street, to Avenue F and Twentieth street, if she took such a walk, and the walk she would have had to take from Park avenue, to her home in the rain, if she would have taken such a walk. (4) Even though plaintiff had a cold and was sick on the morning after she alleges she was carried by Park avenue, and made to walk back to her home on Seventh avenue from Eighth avenue, and even though plaintiff had a cold thereafter, yet the jury could not award her any damages for her alleged sickness unless they are reasonably satisfied from the evidence that the walk took from

Eighth avenue, back to Seventh avenue, was the direct and proximate cause of said illness, and the said illness and cold could not have been proximately caused by being carried by Park avenue, unless the said cold and sickness would not have arisen if plaintiff had not been carried by. (5) Unless you believe from the evidence that plaintiff's alleged sickness was proximately caused by her being carried by her station, you cannot award her damages for her said sickness, and, for her alleged sickness to have been proximately caused by her being carried by, it must have been directly caused thereby. (6) Under the evidence and pleadings in this case, you cannot award plaintiff any damages for the car's not stopping at Seventh avenue on the occasion she complains of. (3) You cannot return a verdict for plaintiff under count 1 of the complaint. (9) In arriving at the direct, proximate cause of plaintiff's alleged cold and sickness, you are authorized to consider the fact, if it be a fact, that she walked from Avenue E and Twenty-Second street to Avenue F and Twentieth street, in the rain, and the fact, if it be a fact, that plaintiff had to get on the car in a rain without an umbrella. (10) The court charges the jury that, in arriving at the cause and extent of plaintiff's cold and sickness, the jury may take into consideration the facts, if it be a fact, that, if plaintiff had alighted from the car at Park avenue, she would have had to walk to Seventh avenue and to her home in the rain.

Tillman, Bradley & Morrow and Frank M. Dominick, all of Birmingham, for appellant. Harsh, Beddow & Fitts, of Birmingham, for appellee.

SOMERVILLE, J. [1] It is a matter of common knowledge that passengers on street cars do not take passage for any designated place, and that upon the payment of the customary fare they are entitled to ride to any point between termini of the route traveled by the particular car. In other words, their destination is any stopping place at which they decide to leave the car. It was therefore immaterial whether the plaintiff originally intended to leave the car at Park avenue or at Seventh avenue. If they were regular stopping places, or if the cars customarily stopped there on signals from passengers, the plaintiff was entitled to change her mind and alight at either place; and the defendant's negligent failure to allow her the opportunity to alight at either place, upon reasonable notice from her, was equally a violation of its duty. This being so, charges 1, 2, and 6 were properly refused to the defendant.

[2] Refused charges 3, 9, and 10 are objectionable in that they single out parts of the evidence.

[3, 4] Refused charge 4 is argumentative, and, moreover, was fully covered by given charge 7.

Refused charge 5, even if not misleading, was also fully covered by given charges 4 and 7.

There was no error in the refusal of these charges.

[5] We think, however, that the trial court erred in refusing to exclude the statement of the plaintiff that she signaled Park avenue

first "because they have been in the habit of carrying me by there several times." This clearly means no more than that on a few previous occasions (which are wholly undefined as to time and circumstances) some of the defendant's servants (not necessarily the ones on this car on this occasion) carried her by Park avenue. Such previous breaches of duty, in no way related to the instant breach, are not admissible to show the probability of the instant breach, as charged by the plaintiff. *Baulec v. N. Y. Ry. Co.*, 59 N. Y. 356, 17 Am. Rep. 325; *Warner v. N. Y. Ry. Co.*, 44 N. Y. 465; *Mich. Cent. Ry. Co. v. Gilbert*, 46 Mich. 176, 9 N. W. 243; *Maguire v. Middlesex Ry. Co.*, 115 Mass. 239; *Jones on Evidence*, § 165; 29 Cyc. 610. See, also, in illustration of the principle, *C. of G. Ry. Co. v. Brokerage Co.*, 122 Ga. 646, 50 S. E. 473, 69 L. R. A. 119; *McGuire v. Kenefick*, 111 Iowa, 147, 82 N. W. 485.

We do not mean to now hold that a uniform course of conduct by any person, amounting to a settled habit, is never relevant to show what such person probably did on a particular occasion. See 1 Wigmore on Evidence, §§ 92, 96, 97; 29 Cyc. 610. Such evidence is often admitted, though sometimes rejected—dependent, of course, upon the circumstances of the case, the party offering it, and the ultimate fact to be shown thereby. See 1 May. Dig. 490, § 1081 et seq.

As pointed out, we have not here a case of habit, and the error was doubtless prejudicial to the defendant in the estimation of the jury.

For the error noted, the judgment will be reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(190 Ala. 595)

ALABAMA WHITE MARBLE CO. v. EUREKA WHITE MARBLE QUARRIES. (No. 568.)

(Supreme Court of Alabama. Dec. 17, 1914. Rehearing Denied Jan. 21, 1915.)

EJECTMENT §15 — TITLE OF PLAINTIFF — GRANTEE OF FOREIGN CORPORATION.

A foreign corporation, which has not complied with the law governing the right of foreign corporations to do business in the state, cannot pass title to a grantee to authorize him to maintain ejectment against a record title holder, whose title also passed through the foreign corporation.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 59-62; Dec. Dig. §15.]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Action by the Alabama White Marble Company against the Eureka White Marble Quarries. From a judgment for defendant, plaintiff appeals. Affirmed.

H. H. McClelland, of Monroeville, for appellant. Felix L. Smith, of Rockford, and Thetford, Blakey & Strassburger, of Montgomery, for appellee.

MAYFIELD, J. Appellant sued appellee, in an action of statutory ejectment, to recover 98 acres of land situated in Coosa county. The lands were described as the Hastie place, and Lloyd H. Hastie was admitted to be the common source of title.

Appellant's chain of title was deed from Lloyd H. Hastie and wife to John A. Bishop, dated March 21, 1907; a deed of date December 26, 1908, from John A. Bishop and wife to the Bishop's Alabama Marble Company, a corporation organized under the laws of the state of Delaware; a deed from the Bishop corporation, of date February 12, 1914, to appellant corporation.

It was admitted that the Bishop Company was a foreign corporation and had not complied with the Constitution and statutes of Alabama, as for doing business in this state.

The appellee's chain of title was a mortgage from John A. Bishop and wife to Lloyd H. Hastie, the common source of title, of date March 21, 1907, duly executed and recorded May 6, 1907; proceedings in the chancery court of Coosa county, instituted October 19, 1909, by Lloyd H. Hastie, against John A. Bishop et al., to foreclose the above-described mortgage; the deed from the register in chancery to A. F. Crider, Geo. A. Sorrell, G. J. Sorrell, of date August 22, 1910; next a quitclaim deed from George A. Sorrell and wife to E. G. Bond, as trustee, of date December 22, 1911; a quitclaim deed from G. J. Sorrell and wife to E. G. Bond, as trustee, of date December 18, 1911; a like deed from A. F. Crider and wife to the same trustee, of date November 29, 1911; a like quitclaim deed from John A. Bishop and wife to E. G. Bond, as trustee, of date November 20, 1911; a like deed from the Bishop's Alabama Marble Company, the Delaware corporation, to E. G. Bond, trustee, of date November 20, 1911; a deed from E. G. Bond, trustee, to the appellee corporation, of date May 12, 1912.

On this chain of title, and some other evidence as to the organization of the corporation and transfer of stock and bonds thereof from one to the other, unnecessary to here mention, the case was tried by the circuit court without the intervention of a jury, and judgment was rendered for the defendant (appellee here), from which judgment plaintiff (appellant) prosecutes this appeal.

We agree with the trial judge that defendant was entitled to recover under the undisputed evidence in this case, and we find no reversible error. The fact that the Delaware corporation had not complied with the laws of this state as to the right to do business in this state cannot, under the evidence as shown by this record, confer a legal title upon

the plaintiff, nor authorize it to maintain ejectment for the lands in question. This record shows that the chain of title of both parties passed through the Delaware corporation; but, if this were not true, the defendant has shown the better title to the land in question, and was entitled to recover.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(190 Ala. 196)

IVEY v. CITY OF BIRMINGHAM.
(No. 756.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. DEDICATION ⇨31 — STREETS — PLATTING LAND.

An owner of land could not impose his dedication of a street upon the public, by platting the territory and disposing of lots according to the plat, there being no acceptance by the public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 64, 65; Dec. Dig. ⇨31.]

2. DEDICATION ⇨37—ACCEPTANCE—USER.

Acceptance of the dedication of a street by platting may be shown by long-continued user by the unorganized public as of right, and the length of time of such user, from which an acceptance may be implied, does not depend on the law governing prescription, but is controlled entirely by circumstances of each case; the main question being whether the public convenience would be materially affected by a denial of the enjoyment.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 73, 74; Dec. Dig. ⇨37.]

3. MUNICIPAL CORPORATIONS ⇨759—STREETS—DUTY TO USE CARE—BRINGING HIGHWAY WITHIN LIMITS.

Where a way has become completely impressed with the character of a highway before annexation to a city, then the municipal authorities, by bringing it within the corporate limits and leaving it open for travel, become bound to exercise reasonable care to keep it in safe condition for travel.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1595-1600; Dec. Dig. ⇨759.]

4. MUNICIPAL CORPORATIONS ⇨767—STREETS—DEFECT—DITCH.

A ditch in a street is a defect for which the municipality is chargeable under the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1623; Dec. Dig. ⇨767.]

5. MUNICIPAL CORPORATIONS ⇨822 — DEFECTS IN STREET—INSTRUCTIONS—"HIGHWAY."

An instruction that a city was under duty to keep a highway brought within the city limits in repair, etc., is not erroneous, in that a highway might be private, since the term "highway" imports a public way.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1758-1762; Dec. Dig. ⇨822.]

For other definitions, see Words and Phrases, First and Second Series, Highway.]

6. MUNICIPAL CORPORATIONS — §759—STREETS — EXISTENCE OF HIGHWAY—IMPROVEMENT.

That the public authorities improved a part of a highway brought within the corporate limits, and assessed the cost against adjoining property, is prima facie evidence of an adoption of the highway within the limits as a street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1595-1600; Dec. Dig. §759.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by John B. Ivey against the City of Birmingham for damages suffered by reason of a ditch being left open and unguarded. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Charge 1, refused to plaintiff, is as follows;

A city, by bringing a highway within its corporate limits and leaving it open for public travel, becomes bound to use ordinary care to maintain it in a reasonably safe condition for such travel.

The following is charge 20, given for defendant:

Even though you believe from the evidence that the city passed an ordinance providing for the construction of certain street improvements, to wit, sidewalk, curb, and gutter, grading and macadamizing that part of Thirty-Fourth street from Clairmont avenue, to Willow avenue, and that the city let a contract and constructed such improvement between said point, and for 100 feet north of Willow avenue graded or smoothed off Thirty-Fourth street, and even though you further believe that the city assessed the cost of making such improvement against the abutting property owners, this without more would not constitute an acceptance of that part of Thirty-Fourth street lying between the Georgia Road and Hill avenue, and would cast no duty upon the city to repair or keep in repair that part of Thirty-Fourth street north of Hill avenue.

The following is the abstract of the evidence offered:

Plaintiff introduced evidence in said cause on the trial thereof tending to show that on the 5th day of October, 1912, after night, he disembarked from a street car at the corner of Thirty-Fourth street and avenue F, which street car at that point ran along Avenue F, sometimes called Georgia Road, and that plaintiff's destination was the residence of a family living on the west side of Thirty-Fourth street in the block next south of Avenue F; the avenues in said city, according to its regular plan, being named by the name of the letters of the alphabet, beginning with A, and running south consecutively to and beyond the letter G; that said Thirty-Fourth street, according to the plan of said city of Birmingham, crossed the whole of said city from north to south, and that the crossing of said Thirty-Fourth street and Avenue F was open to vehicles at the time of said accident, though it was rough; that from the said street car on Avenue F plaintiff started south along the west side of Thirty-Fourth street on a path or sidewalk regularly used by pedestrians; that he inquired of the people living in the house on the corner of said

Avenue F and Thirty-Fourth street as to the residence of the family whose residence he was seeking, and was told that they lived a few doors south, whereupon plaintiff continued walking up the west sidewalk or path in said Thirty-Fourth street, being the western edge thereof, and while so walking in the dark, the said street not being lighted up at all, he fell into a deep ditch, which he did not know existed, he having never been in that neighborhood before, and in consequence of the fall received the injuries and damages set out in the complaint. The ditch was from 7 to 15 feet deep and from 4 to 5 feet wide, and ran parallel to and about 4 feet from the western property line on the western margin of said Thirty-Fourth street and adjoining or within a few inches of the eastern margin of said path or sidewalk. The point where plaintiff fell into said ditch was about 25 feet southward from the south line of Avenue F, and between Avenue F and Avenue G as extended, but Avenue G, though cut through on both sides of that block, was not cut through or extended through that block.

Some 23 years before plaintiff was injured on the occasion complained of George C. Arrington, whom the evidence tended to show was then owner of the property including said block, had said property surveyed, mapped, and plotted, and had filed said map for record in the office of probate judge of Jefferson county, marking the streets, avenues, and alleys thereon including said Thirty-Fourth street, from said Avenue F southward through said block and beyond, and had had said plot and map legally recorded after having acknowledged the same, and had the surveyor's certificate, as required by law, put upon same; said map having been filed as aforesaid 23 years before said accident. From that time to the time of said accident said Thirty-Fourth street through said block had been used by the public at all times, by pedestrians and wagons, and as automobiles came into use by automobiles; but the traffic thereon was very limited in number. There was evidence tending to show that Thirty-Fourth street, from Hill avenue, to avenue F, was impassable, and that vehicles could not go up and down; that at the time of said dedication the said plot was not in the city of Birmingham, but was contiguous thereto, but long before, to wit, two years before, said accident the city of Birmingham extended its corporate limits, so that same included said plot including said Thirty-Fourth street in said block; that said ditch existed to the depth of several feet in said Thirty-Fourth street at the time of the extension of said corporate limits so as to include said Thirty-Fourth street therein, but that it was at said time not nearly so deep, but gradually from the washing of rains got deeper and deeper; that said ditch was not, on the occasion of said injury, or had not

been at any time, lighted or guarded; that vehicles used as a driveway that part of said Thirty-Fourth street in said block between the said ditch and the eastern edge of said Thirty-Fourth street; that on the western side of said Thirty-Fourth street, facing said street and facing east, there were nine residences in said block, all the lots being built upon; that on the eastern side of said street, facing west, there were but two; that all of these houses, but one, had been built and used as residences for many years, and for several years before the corporate limits were extended to include them, which was done, as stated, about two years prior to said accident; that the grade of said Thirty-Fourth street, going south from said Avenue F towards where Avenue G, if extended, would cross, was quite steep; that about 100 feet from said Avenue F, a (comparatively narrow) street called Hill avenue ran into said Thirty-Fourth street from the west at an oblique angle, but did not cross, and that on the east, about 110 feet from said Avenue F, an alley at right angles to said Thirty-Fourth street ran into said Thirty-Fourth street in said block, but did not cross same; that Willow avenue ran into said Thirty-Fourth street from the west (but did not cross) at a point the equivalent of about two blocks south of said Avenue F, and that no other streets or alleys were actually cut into said Thirty-Fourth street from said Avenue F south to said Willow avenue; that said Thirty-Fourth street ran down the south side of the hill to Clairmont avenue, along which was another street car line, being the Mountain Terrace line, which was about three blocks south of the Avondale car line, which last-named car line was the one hereinbefore mentioned running along Avenue F; that the legal and regular authorities had been complained to by citizens of Birmingham living in said blocks on Thirty-Fourth street as much as a year before the said accident happened, and had been requested to remedy the dangerous conditions existing in said Thirty-Fourth street, between Avenue F and Hill avenue, but had not done so; that the street department of said city of Birmingham, under the direction of its street commissioner (who was the duly and legally constituted officer for that purpose), had about six months before said accident opened said alley and rendered it passable for pedestrians and vehicles into, but not across, said Thirty-Fourth street at said point about 110 feet south of said Avenue F, and at another time said city, acting under ordinance, had repaired and macadamized that part of said Thirty-Fourth street from said Mountain Terrace car line on the south to a point about 110 feet north of said Willow avenue, but said ordinance did not include that part of Thirty-Fourth street between Avenue F and Hill avenue, and had charged the property owners as provided by law with the costs thereof; that said city, in charging the costs

thereof, charged a part of said costs against several property owners on said Thirty-Fourth street north of said Willow avenue, and as far north as 100 feet north of said Willow avenue, for the cost of paving the street intersection; that the said city forces had also at said time used the street department scrapers and convicts working on the streets to dig same with picks and shovels and with said scrapers, in some degree to smooth over the surface of that part of said Thirty-Fourth street used by vehicles from the point where said macadam ceased on down to said Avenue F; and that at one time prior thereto, before the last-mentioned work was done, some iron pipe was laid in said ditch and same covered with dirt, but said ditch was never filled up, and said dirt was soon washed out, but it was not shown that said pipe was laid by said city of Birmingham, nor by whom same was laid.

Plaintiff further introduced evidence on said trial tending to show that defendant never had prohibited the use of said Thirty-Fourth street at any point south of said Avenue F, and never had warned or notified the public, or plaintiff, or any one, against the use thereof, and never had barricaded or otherwise physically closed said street, or attempted to prevent the public from using same, and that defendant never had, by ordinance, resolution, or other proceedings, attempted to close or vacate said street at the point where plaintiff was injured, or at any point in question in this cause. Plaintiff thereupon introduced evidence tending to show that he had filed with the city clerk a claim for damages in accordance with the provisions of section 1181 of the Code.

Defendant on said trial introduced evidence tending to show that it had done no other than said work of macadamizing and laying sidewalk on said Thirty-Fourth street, but had smoothed the roadway of Thirty-Fourth street to a point about 100 feet north of said Willow avenue, and that defendant never had, by any ordinance, resolution, or other proceeding of its governing body, recognized said Thirty-Fourth street from said Avenue F south to where said street was macadamized as above stated; that defendant never had actually taken any cognizance of said part of said Thirty-Fourth street; that said part of said Thirty-Fourth street was very steep, and not passable by vehicles, and that there was no passable crossing where said Thirty-Fourth street and said Avenue F cross; that before the part of Thirty-Fourth street in question in this cause was taken within the corporate limits of defendant's municipality the said part of said Thirty-Fourth street was not within the corporate limits of any existing municipality; that Willow avenue is about 700 feet from the point of the accident; that from Avenue F to Hill avenue, the hill is very steep; that Hill avenue is 25 or 30 feet higher than Avenue F, and on account of this natural

steepness it is impracticable to be used and maintained as a street, and that Street Commissioner Gafford stated to several citizens, who requested him to work the street, that he would not undertake to do any work between Avenue F and Hill avenue, unless the city governing body expressly ordered it, and that neither he, nor his department, nor any one working under him, ever undertook or did any work of any kind on that part of Thirty-Fourth street between Hill avenue and Avenue F, which was the portion of Thirty-Fourth street at which plaintiff received his injury; that the work done on the alley leading into Thirty-Fourth street is south of the point where Hill avenue runs into said Thirty-Fourth street, and said work did not extend into Thirty-Fourth street, but stopped at the east line of Thirty-Fourth street, where said alley intersects it, and was done so that merchants could get on top of the hill, the route below Hill avenue being impracticable.

Harsh, Beddow & Fitts, of Birmingham, for appellant. Romaine Boyd and M. M. Ullman, both of Birmingham, for appellee.

SAYRE, J. Appellant sued the city of Birmingham for damages on account of physical injuries suffered by him when he fell into a ditch, alleging with appropriate detail that the municipal authorities of the defendant city had negligently allowed said ditch to be and remain in Thirty-Fourth street, whereby he was injured. Errors are assigned upon the rulings of the trial court in giving and refusing special charges requested in writing by the parties.

Very clearly it appears that the result of the trial was made to turn upon the inquiry whether Thirty-Fourth street at the point where plaintiff received his injury was at the time a public street of the city of Birmingham in such sort as to impose upon the municipal authorities the duty of keeping it in a fit condition for public travel. This inquiry was submitted to the jury's decision as a question of fact, and the charges drawn into question were designed to elucidate the principles of law to be observed by the jury in determining the answer on consideration of the evidence, which will be stated by the reporter substantially as it is to be found stated in the transcript of the bill of exceptions. We have only to consider whether there was error in the court's ruling as to any one of these charges.

[1, 2] Charge 1, requested by plaintiff and refused by the court, would have been useful to plaintiff in the event the jury found that the status of Thirty-Fourth street—or that part of it about which we need be concerned—as a highway had been established before its incorporation into the city of Birmingham. The owner of the property through which this street was originally laid off could not impose his

dedication of the street upon the public by platting the territory and disposing of lots according to the plat. He thereby made it a way, irrevocable as to purchasers; but to devolve upon the public the duty of maintaining the way as a public road or street it was necessary that there should be an acceptance by the public of the dedication. Such acceptance, for one way, may be shown by long-continued user by the unorganized public as of right. The length of time of such user, from which an acceptance may be implied, "does not depend upon the principles of law governing prescription, but is controlled entirely by the circumstances of each case, the main question being whether the public convenience and accommodation would be materially affected by a denial or interruption of the enjoyment." *Benton v. St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561, note, pages 609, 621; *Mobile v. Fowler*, 147 Ala. 403, 41 South. 468; 1 *Elliott on Roads & Streets* (3d Ed.) §§ 170, 171. Under the evidence in this case it was for the jury to say whether Thirty-Fourth street had been accepted by the public as a highway previous to its incorporation into the city of Birmingham.

[3] If that part of Thirty-Fourth street upon which the injury occurred had been completely impressed with the character of a highway when the territory through which it had been laid off was annexed to the city, then the municipal authorities, by bringing it within the corporate limits and leaving it open for travel, became bound to exercise reasonable care to keep it in safe condition for travel. *Frankfort v. Coleman*, 19 Ind. App. 368, 49 N. E. 474, 65 Am. St. Rep. 412; note to *Elam v. Mt. Sterling*, 20 L. R. A. (N. S.) 575.

Appellee cites and quotes *McCain v. State*, 62 Ala. 138, as follows:

"A town, created and incorporated as this [Anniston] was, out of rural territory, having, perchance, its public roads adapted to its wants and convenience as a rural community, cannot be bound by any principle of law to adopt and keep up, as a public street, every public road or highway that may have been in use before the change. * * * We think the corporate authorities were authorized to abolish the street, or, to refuse to recognize it as a public street, for not repairing which the appellants were indicted."

This language was used in a case in which the municipal authorities had passed an ordinance abolishing or discontinuing a road that had been brought into the incorporated town—a case which turned upon the inquiry whether the municipal authorities had power to pass such an ordinance. It does not expressly or by implication deny—to state the case at hand—that if Thirty-Fourth street had been accepted by the public as a highway prior to its incorporation into the municipal territory, it became the duty of the city to care for it or by some act of public notoriety to disown it. There was no evidence tending to show the last-named alter-

native, and, we take it, plaintiff was entitled to have the law stated in respect to the first without reference to the last.

[4] Appellee advances the idea that the ditch was not a defect for which the municipality was chargeable under the statute. The argument is based upon the opinion of the Court of Appeals in *Bessemer v. Whaley*, 8 Ala. App. 523, 62 South. 473. But that argument has been disposed of by us in *Bessemer v. Whaley*, 65 South. 542. If Thirty-Fourth street was a public street in the city of Birmingham at the time of plaintiff's hurt, then the ditch was a defect in the street, to remedy which defendant ought to have exercised itself. Nor do we find anything in *Benton v. State ex rel. Girard*, 168 Ala. 175, 52 South. 842, in necessary conflict with what we have said.

[5] Appellee also criticizes the charge under consideration, for that it predicated municipal duty in respect of highways without qualification, whereas highways may be private, in which case the public authorities owe no duty. The first section of Elliott's Roads and Streets, to which many adjudicated cases are cited, answers this contention in this language:

"Ways are either public or private. A way open to all the people is a highway. The term 'highway' is the general name for all kinds of public ways, including county and township roads, streets and alleys, turnpikes and plank roads, railroads and tramways, bridges and ferries, canals and navigable rivers. In short, every public thoroughfare is a highway."

We are of the opinion that the refusal of charge 1 was reversible error.

[6] It cannot be the subject of dispute that the city adopted a part at least of Thirty-Fourth street, between Avenue F and Clairmont avenue as a public street and exercised jurisdiction over it. The fact that the authorities improved a part of the street, assessing the cost against adjoining property by virtue of the statute which grants that power to municipal corporations, is susceptible of no other explanation. In the circumstances shown in the bill of exceptions, we think this fact should have been received as prima facie evidence of an adoption of the entire street between these avenues. Appellee cites *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612, and some other earlier Missouri cases to sustain its position; but that case has been overruled on the point at issue. *Benton v. St. Louis*, 217 Mo. 687, 118 S. W. 418, 129 Am. St. Rep. 561. Our opinion on this point seems to be sustained by the reasoning of a majority of the courts that have considered the question and to be enforced by the logic of undisputed facts. See note to *Benton v. St. Louis*, 129 Am. St. Rep. 617.

Charge 20 should have been refused.

We need not follow the assignments of error further. We have said enough to indicate our opinion as to the questions involved.

The judgment will be reversed, and the cause remanded for another trial.

Reversed and remanded.

McCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 388)

MINGE v. CLARK et al. (No. 544.)

(Supreme Court of Alabama. Nov. 7, 1914.
On Application for Rehearing,
Dec. 17, 1914.)

1. CORPORATIONS §99—ISSUANCE OF STOCK—STATUTORY PROVISIONS.

Const. 1901, § 234, and Code 1907, § 3467, prohibiting a corporation from issuing stock except for money, labor done, or property actually received, and making all fictitious increase of stock void, prevent a court from aiding in the enforcement of any contract the execution of which involves a disregard of the provision, and, so far as it is appropriate to protect stockholders from improper discriminations in accepting payment for stock, the provision will be given such effect as to accomplish this purpose.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. §99.]

2. PLEADING §214 — DEMURRER — ADMISSIONS.

A demurrer to a pleading admits the truth of the allegations thereof.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. §214.]

3. PLEADING §180 — PLEAS—REPLICATION—DEPARTURE FROM COMPLAINT.

Where a complaint sought a recovery for breach of contract to sell corporate stock, and defendant set up a breach by plaintiff by his refusal to deliver, a replication that defendant had failed to do something else which was no excuse for plaintiff's failure to deliver was a departure from the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 858-884; Dec. Dig. §180.]

On Application for Rehearing.

4. CORPORATIONS §99—STOCK—CONTRACTS—VALIDITY.

A contract contemplated that practically all of the paid-in capital of a corporation, amounting to \$12,000, should be distributed to the stockholders, and the capital stock of \$50,000 should be reduced to \$38,000, and that the new stock, which had but little, if any, real value, should be sold to defendant for a substantial price. Held, that the contract of sale was invalid, as involving an issue of stock within the prohibition of Const. 1901, § 234, and Code 1907, § 3467, declaring that no corporation shall issue stock except for money, labor done, or property actually received, and plaintiff could not sue for defendant's breach of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 444-446; Dec. Dig. §99.]

Appeal from Circuit Court, Marengo County; John T. Lackland, Judge.

Action by John H. Minge against W. C. Clark and others for breach of contract. From a judgment for defendants, plaintiff appeals. Affirmed, and application for rehearing denied.

The following is count A:

Plaintiff claims of defendants the further sum of \$5,000 for that heretofore, on, to wit, April 1, 1913, the Faunsdale Oil Mill was an Alabama

corporation having a capital stock of \$50,000, and consisting of 500 shares of the par value of \$100 each, and plaintiff was the owner and holder of 185 of such shares. On said day it was agreed by and between plaintiff and defendants that if the appropriate action of the stockholders and directors of the corporation could be secured to divide among the stockholders \$12,000 of the money then in the treasury of the corporation, and to reduce the capital stock from \$50,000 to \$38,000; that plaintiff, after receiving his part of the \$12,000 distribution, should sell to the defendants, and defendants would buy from plaintiff, his entire interest in the corporation for the sum of \$4,440, to be paid by defendants to plaintiff in cash immediately upon said appropriate action of the stockholders and directors authorizing such reduction and distribution of capital stock being taken. Such appropriate action was duly taken on, to wit, April 20, 1912, and plaintiff did then and there offer to transfer and assign and set over to defendants his entire interest in said corporation and the certificates of stock therein standing in his name, subject to his right to receive his pro rata part of the \$12,000 distributed and called upon defendants to pay him therefor the said agreed price thereof; and this they failed and refused to do, and have since continuously failed and refused to do; hence, this suit.

Plea 7

The alleged contract of sale from plaintiff to defendants, which is the foundation of this suit, was and is null and void, in this: In the year 1911 a corporation was organized in the state of Alabama under the name and style of the Faunsdale Oil Mill, and a large amount of the stock of said corporation was issued to plaintiff in this cause, and it is for an alleged contract of sale of all or a part of said stock by plaintiff to defendant which is the foundation of this suit. And defendant avers that the issuance of said stock to defendant was contrary to, and in violation of, section 234 of article 12 of the Constitution of Alabama, in this: That said stock was not issued for money, labor done, or property actually received.

Replication 3 is as follows, which is filed to plea 7, and other pleas, separately and severally:

That defendants were estopped to set up as a defense to this action any inadequacy in payment of said subscription to the capital stock of the Faunsdale Oil Mill, for that on, to wit, August, 1911, plaintiff and defendant Clark made the contract, of which a copy is hereto attached and made a part hereof, and pursuant to said contract, in August, 1911, organized a corporation under the laws of the state of Alabama, by filing the proper certificate in the office of the probate judge of Marengo county, and gave the corporation the name of the Faunsdale Oil Mill. Pursuant to said attached contract, said corporation immediately upon incorporation issued capital stock which purported to be fully paid up for \$50,000, divided into 500 shares of the par value of \$100 each. Three hundred and eighty shares were issued to Minge, and persons of his designation, and for this stock he paid by the conveyance to the corporation of the oil mill described in the attached contract, and referred to in the plea. One hundred and twenty shares of this stock were issued 110 shares to W. C. Clark, and 10 shares to H. W. Cranford, at the request of said Clark, and, upon this stock being issued to Clark, he placed in the treasury of the corporation \$12,000 for working capital. Immediately and contemporaneously with the organization of the corporation, and pursuant to the attached contract, Minge transferred to Clark 130 shares of that portion of the stock which was issued to him, so as to make the stockholding of Clark and his nominee stand

at one-half of the total capitalization. This transaction was fully executed and completed before September 1, 1911. Subsequent to this transaction, the mill was operated through the crushing season of 1911-12, and in, to wit, March, 1912, I. P. Pruitt, with full knowledge of just how the corporation was organized, and just how and in what the stock subscription was paid, entered into an arrangement with Clark under which they agreed to purchase the entire interest of J. H. Minge in the corporation after the exact sum of money which was originally paid into the corporation had been withdrawn and distributed among the stockholders, as stated in count A of the complaint, and, with a view of accomplishing this purpose, the said Pruitt and Clark, acting together, induced Minge to consent to said reduction of the capital stock, and notices for the meeting by which the same was reduced was issued by said Pruitt, acting in the capacity of secretary and treasurer of the corporation.

London & Fitts, of Birmingham, and E. E. Taylor, of Linden, for appellant. Davis & Fite, of Jasper, and George Pegram, of Faunsdale, for appellees.

MAYFIELD, J. Appellant sued appellees to recover damages for the breach of an agreement by which the defendants had agreed to purchase stock in a corporation from the plaintiff. The complaint contained the common counts, and one count for the purchase price for the sale and delivery of the stock, but the real cause of action is set out in Count A of the complaint.

This is an appeal on the record, and no point is made, except as to the sufficiency of special pleas to count A, and as to the replications to these special pleas. The reporter will set out count A, plea 7, and replication 3, which will show the real questions of law involved on this appeal.

[1] The main defense set up by the special pleas was that the agreement by which plaintiff agreed to sell the stock involved a violation of section 234 of the Constitution, and of section 3467 of the Code, which is a restatement of the constitutional provision. The constitutional provision reads as follows:

"No corporation shall issue stocks and bonds except for money, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased except in pursuance of general laws, nor without the consent of the persons holding the larger amount in value of stock, first obtained at a meeting to be held after thirty days' notice, given in pursuance of law."

This section has been several times construed by this court, and its object, purpose, and effect declared. In Fitzpatrick's Case, 83 Ala. 604, 606, 607, it was said by Stone, C. J.:

"The Constitution, in terms, inhibits the issue of fictitious stock; that is, stock which has no valuable thing, or corporate assets, to rest on, and of which it is the representative. If it represents nothing, and has nothing to stand on, it is fictitious, it is fraudulent, it is unconstitutional."

"It behooves constituted authority to keep well abreast with the many inventions which modern cupidity has wrought out, and which, perhaps, more than any other agency, have called into exercise pernicious principles which

threaten the overthrow of organized government. In this highly conservative, yet restraining, spirit, the principle, constitutional and statutory, on which this case mainly hinges, had its origin, and finds its justification. Let us not, by timid interpretation, impair the strength of this bulwark erected by our Constitution makers against the frauds which have become the reproach of the age we live in."

The same provisions were again construed in *Tutwiler's Case*, 89 Ala. 391, 7 South. 398, to the same effect, and again in *Elyton Land Company's Case*, 92 Ala. 407, 9 South. 129, 12 L. R. A. 307, 25 Am. St. Rep. 65. In all these cases these provisions were held to have been intended "to prevent the court from lending their aid for the enforcement of any contract or obligation the execution of which involves a disregard of those regulations, and that, so far as they are appropriate for the protection of stockholders from improper discriminations in accepting payments for stock, those regulations are accorded such effect and operation as to fully accomplish this purpose of their enactment."

These cases have been repeatedly followed, and we have no disposition to depart therefrom.

[2] If these special pleas complained of were true—and on demurrer they must be so treated—the court will not enforce such agreement, either specially, or by the award of damages for the breach of such executory agreement. To enforce such agreements would be to ignore and disregard the declared purpose of the constitutional and statutory provisions.

The replications, in so far as they were not general, were no answers to the plea. In fact, it would be difficult to conceive of a special replication which could confess and avoid pleas which set up, as a defense, that the plaintiff was attempting to have the court aid him in enforcing an agreement or contract which both the Constitution and the statutes prohibited and in terms declared to be void. The plaintiff insists that the contract or agreement relied upon is not void as to these parties, but only as to the corporation, its stockholders, and its creditors; that the agreement is not void as between these parties.

We cannot agree to this contention. It is made to appear from the pleas and the replications that the parties to this action were parties to the agreement to effect the very thing which the Constitution and the statutes forbid. If the contract was executed, the courts would not relieve either from his bargain because the agreement was void; but, as it is executory, and the plaintiff is seeking to have the courts aid him in enforcing it, they will decline to lend him such aid, although the defendants were parties to such illegal agreement.

The special replications to these pleas were no answer thereto. The replications, as well as the pleas, showed that plaintiff was attempting to recover damages of the

defendants, because they would not perform and carry out an agreement which was clearly in violation of the constitutional and statutory provisions in question.

[3] There were other special pleas, setting up a breach by the plaintiff in that he refused and failed to deliver the stock. To this plea or pleas, the plaintiff replied that the defendants had failed to do something else, which was no excuse for the failure to deliver the stock purchased. Such replications would be a departure from the case alleged in the count which the pleas answered, and would allow a recovery for a different breach than the one complained of in the count.

There was no error in any of the rulings on the pleadings for which the plaintiff (appellant here) can recover. To have allowed a recovery in this case, on the face of the pleadings, would have aided one of the parties to enforce a contract which was expressly prohibited and declared void by both the Constitution and the statutes of the state.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

On Application for Rehearing.

PER CURIAM. [4] Counsel for appellant have evidently mistaken the opinion and holding of the court. It is not decided, and was not intended to be said in the opinion, that a sale of stock in a corporation was void, because, when the stock was issued, it was issued in violation of the constitutional provision or statute, if the stock actually had some value. This case is not like the case of *Beltman v. Steiner Brothers*, 98 Ala. 241, 13 South. 87, but is like the case of *Williams v. Evans*, 87 Ala. 725, 6 South. 702, 6 L. R. A. 218, which was distinguished from the *Beltman Case* in the opinion in the latter case, where it was said:

"This case is clearly distinguishable in the matter under consideration from that of *Williams v. Evans*, 87 Ala. 725 [6 South. 702, 6 L. R. A. 218]. The enforcement of the contract there sued on necessitated and involved the doing of an illegal act. The plaintiff had subscribed for stock in a corporation which undertook to issue \$5 of stock for every dollar of its actual capital. Before the stock was issued, however, plaintiff sold \$1,000 (or 10 shares) of the original stock, and gave the defendant an order on the corporation to issue to defendant 50 shares of said company's stock, which was the amount called for by the \$1,000 of original subscription, and to transfer the same to the defendant on the books of the company. The sale of this stock to be issued, the illegal issuance being necessary to a consummation of the contract of sale, was held invalid; the decision being expressly put on this ground, and the court saying: 'A contract which contemplates the violation of a statute, or a Constitution, as a mode of executing such contract, is illegal and void. It is based on an unlawful consideration, and, if executory, cannot be enforced.'" *Beltman v. Steiner Bros.*, 98 Ala. 241, 248, 13 South. 87, 89.

That is the exact case shown by this record. While the original stock of this corpo-

ration had been issued, there was no contract to sell this original stock. The contract sued on was to take out of this original corporation nearly, if not quite, all of its paid-in capital, give it to the plaintiff, and then issue new stock, or scale the old, from \$50,000 to \$38,000, thus depriving the new issue of stock of nearly, if not quite, all of its real value; and then, and only then, was there to be a sale of stock by the plaintiff to the defendant. In other words, there was to be no sale of stock unless this contract, which involved a violation of the Constitution and statutes, was carried out. The contract sued on clearly contemplated a violation of the Constitution and statutes in taking out of the capital stock practically all that had been paid in, which had any real value, and in issuing new stock in lieu of the old, which would practically have no real value, though nominally the amount of \$38,000, instead of \$50,000, as originally organized. In other words, stock was to be issued and sold nominally to the amount of \$38,000, in lieu of the original \$50,000, which had but little, if any, real value. The \$12,000 to be taken out of the capital of the corporation, represented nearly all the value of the \$50,000 of the original stock. Taking this \$12,000 out, would leave the remaining \$38,000 without much, if any, real value.

It was evidently just such preferences as this that the Constitution and the statutes were intended to prevent.

(190 Ala. 229)

**BIRMINGHAM RY., LIGHT & POWER CO.
v. COLBERT. (No. 812.)**

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

**1. APPEAL AND ERROR §1040 — HARMLESS
ERROR—PLEAS.**

In a motorman's action for injuries from a collision of his car and railroad engine, defendant, under a plea charging that plaintiff was negligent in that he made no effort to stop his car until too late, had the full advantage of plea setting up a violation of its rule as to stopping at crossings and waiting for signal, and of plea referring to the speed of the car when he first undertook to stop it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. § 1040.]

**2. TRIAL §84 — RECEPTION OF EVIDENCE —
OBJECTIONS.**

In such action, where motorman's negligence in not making an effort to stop the car until too late was in issue, evidence of another motorman, who had often been over the route, as to the regular place of beginning to stop the car between the last stop and the crossing, was admissible; the specific objection that it was not shown that plaintiff stopped at that place being inapplicable to the question as to the regular place to begin to stop.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 211-218, 220-222; Dec. Dig. § 84.]

3. TRIAL §142—AFFIRMATIVE CHARGE.

The affirmative charge should never be given, where the evidence is open to a reasonable inference of a material fact unfavorable to the

right of recovery by the party requesting the charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.]

**4. APPEAL AND ERROR §882—ESTOPPEL TO
ALLEGED ERROR—INSTRUCTIONS—ADMISSIONS.**

In a motorman's action for injury, the defendant's request to charge that if the evidence was believed, and there was a finding for plaintiff, he could not be awarded more than nominal damages for decreased earning capacity, was a concession that the complaint claimed damages for "decreased earning capacity."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.]

**5. DAMAGES §37 — "LOSS OF TIME" — "DE-
CREASED OR DIMINISHED EARNING CAPAC-
ITY."**

"Loss of time" and "decreased or diminished earning capacity," as elements of damage in actions for personal injuries, are not synonymous; "loss of time," in such cases, signifying the loss of those earnings which accrue from employing time in labor or business, importing a materially distinct conception from "decreased or diminished earning capacity," which distinction, unless observed, might sanction a double recovery (citing Words and Phrases, Second Series, Loss of Time).

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 37.]

**6. DAMAGES §144 — PLEADING — LOSS OF
TIME—DECREASED OR DIMINISHED EARNING
CAPACITY.**

Loss of time and decreased or diminished earning capacity from a personal injury are special damages and, to be recoverable, must be specially claimed in the complaint; and an allegation that, because of the injury, plaintiff "was rendered for a long time unable to work and earn money," only meant that he lost time from his labor.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 410; Dec. Dig. § 144.]

7. DAMAGES §163—EARNING CAPACITY.

The law implies some diminished earning capacity from permanent injury.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.]

**8. DAMAGES §163—PERSONAL INJURY—LOSS
OF TIME.**

Since the loss of time may not result in any damage whatsoever, the law does not imply even a nominal damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 454-459; Dec. Dig. § 163.]

**9. DAMAGES §12—NOMINAL DAMAGES—PER-
SONAL INJURIES — EVIDENCE — DECREASED
EARNING CAPACITY.**

In a motorman's action for personal injury, where there was evidence of permanent injury and impaired future earning capacity, but no data from which compensatory damage for decreased earning capacity could be fixed, except the evidence of a wage earned at the time of the injury and between the injury and the trial, the defendant was entitled to an affirmative instruction against the award of more than nominal damages for decreased earning capacity.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 31; Dec. Dig. § 12.]

**10. TRIAL §248 — CHARGE — ABSTRACT
CHARGE.**

Where special damages for diminished earning capacity were claimed and, in view of the evidence tending to show a permanent injury, a charge that, if the jury believed the evidence and found for plaintiff, it could not award him

more than nominal damages for decreased earning capacity, was not abstract.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 582, 583; Dec. Dig. ¶ 248.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by James W. Colbert against the Birmingham Railway, Light & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The substance of the complaint sufficiently appears, as does plea 3, from the opinion of the court. Pleas 4 and 6 are as follows:

(4) To each count of the complaint severally and separately defendant says that, at the time of said collision, the defendant had a rule in force requiring the motorman in charge of each car crossing the said crossing, at which the said collision occurred, to stop the same before causing the car to go upon the said crossing, and not proceed across the said crossing until being signaled to do so by the conductor of the car, and plaintiff knew of the existence of the said rule, and also knew that, in order to stop the said car, it would be necessary to commence making efforts to do so earlier than would be the case had the alleged defect not existed, and he also knew of the existence of the said defect, and nevertheless plaintiff deferred making any effort to stop the said car until it was too late for him to stop the same with the appliances on the said car for stopping the same, in the condition in which they then were, and which condition was then known to plaintiff, and plaintiff thereby proximately contributed to his said alleged injury.

(6) To each count of the complaint separately and severally defendant says that plaintiff knew of the alleged defect, and that, by reason thereof, it was likely or probable that said car, when run at the rate of speed and in the manner in which it was being run when plaintiff first undertook to stop the same at the time of said collision, could not so be stopped with the appliances at hand for the stopping of the same before some part of the said car got onto the said crossing, at which the said collision occurred, and knowing that a rule of defendant required him to stop the said car before any part thereof got onto the said crossing and to defer crossing said crossing until signaled to do so by the conductor of the said car, which rule was then and there in force, and knowing that there was danger of colliding with an engine or train on the railroad on which said engine was being run when said collision occurred if he undertook to cross said crossing without such signal, and plaintiff voluntarily and without any necessity therefor ran said car at the speed and in the manner in which it was being run when he first undertook to stop the same as aforesaid, thereby proximately contributing to his alleged injuries, when he could, as he well knew, have run the same before any part thereof got onto the said crossing, and thereby have avoided said collision, although the said defect existed.

Tillman, Bradley & Morrow and Frank M. Dominick, all of Birmingham, for appellant. Harsh, Beddow & Fitts, of Birmingham, for appellee.

GARDNER, J. This action was brought by the appellee, employed by the appellant as a motorman on one of its street cars, for injuries sustained in a collision of said car, which was at the time being operated by said appellee as such motorman, with an en-

gine on the track of the Louisville & Nashville Railroad; the said accident occurring at the crossing of the two tracks.

The complaint originally contained four counts, but counts 3 and 4 were charged out by the court at the request of the defendant (appellant here). Counts 1 and 2, upon which the cause was submitted to the jury, were framed under subdivision 1 of the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. 1913, § 8657]); the first relying for recovery upon the defective brakes on the car, and the second upon the defective car itself.

The defendant interposed a number of pleas of contributory negligence. Demurrers were sustained to pleas 2, 4, 5, 6, 7, and 9, and issue was joined on pleas 1 (the general issue), 3, 8, and 10.

[1] The rulings of the court sustaining demurrers to pleas 4 and 6 constitute the first four assignments of error.

Plea 3 charged the plaintiff with negligence which proximately contributed to his alleged injuries in this:

"Plaintiff, knowing of the existence of the alleged defect, and knowing that, in order to stop the said car before it would get in such a position as to be struck by any engine or train which might cross the crossing at which the said collision occurred, efforts would have to be made earlier than would be the case had such defect not existed, negligently deferred making any effort to stop the said car soon enough to prevent the same from getting into such a position as to be struck by the said engine, as alleged therein."

The negligence charged is in substance that the plaintiff waited until too late to attempt to stop the car; that he deferred making any effort to stop the car until too late.

A careful examination of pleas 4 and 6 convinces us that the gist or substance of these pleas is the same as that of plea 3, expressed in different language. It is insisted, however, that pleas 4 and 6 set up a violation of a rule of the company as to stopping at such crossing and waiting for signal to cross, etc. While this is true, yet such averments are joined with averments of the character found in plea 3, and would therefore be of no avail without proof also of those of such character as in plea 3. The pleas, therefore, relieved defendant of nothing required by plea 3, but required proof of substantially the same matter, and these averments but added greater burden to the defendant.

The fact that the rule added precautions as to starting again after stopping is immaterial, of course, when no stopping is shown. True, plea 6 makes reference to the speed of the car at the time plaintiff first undertook to stop the same, but such averments of the plea show that they are rather of evidential character of the same matter set up in plea 3; that is, in substance, that plaintiff commenced stopping the car too late.

It is therefore unnecessary that we pass upon the sufficiency of pleas 4 and 6, as we are of the opinion that the defendant received the full benefit thereof under plea 3, which did not impose upon defendant some of the burdens of each of said pleas, and which imposed no burden not imposed by both of the others. If there was any error in the ruling of the court as to said pleas—a question not determined—it was without injury.

[2] Whether or not the plaintiff deferred making any effort to stop the car until too late was made an issue by the defendant's pleas. The witness Underwood, who had been a motorman for more than two years and had run over this route a great many times was asked by plaintiff where was the regular place to begin to stop the car, between Twenty-Ninth avenue (the last stop) and the Louisville & Nashville crossing. The question was objected to upon the ground that it called for immaterial, irrelevant, incompetent, and illegal testimony. If there was a regular stopping place known to this witness, it cannot be said to have been immaterial and irrelevant under the issues in the case. If the question could be said to be objectionable for assuming that there was a regular stopping place, no such objection was interposed. The specific objection that it was not shown that plaintiff stopped at that place on the occasion complained of was not applicable to the question as to what was the regular place to begin to stop for the crossing. There was no error in the ruling of the court. The witness answered, "I should judge about halfway." This answer of the witness is now insisted upon by counsel for appellant, as a basis for the affirmative charge for the defendant, when taken in connection with the testimony of the plaintiff as to what point he first began to stop the car; the insistence being that this evidence clearly and fully establishes the averments of plea 3.

[3] The affirmative charge should never be given where the evidence is open to a reasonable inference of a material fact unfavorable to the right of recovery by the party requesting the charge. *Carter v. Fulgham*, 134 Ala. 238, 32 South. 684; 5 Mayf. Dig. p. 150. It will be observed that the witness made no effort to fix the regular stopping place with anything approaching mathematical certainty, and the plaintiff in one part of his testimony stated that when "he began to stop it might have been about halfway, or a little before or a little after; couldn't say positively." A discussion, however, of the evidence would here serve no good purpose. We have carefully considered it, and, in the light of the above well-understood rule, we are convinced that there was no error in the refusal of the court to give the affirmative charge as to either count of the complaint.

The court refused to give to the jury, upon defendant's request, the following written charge:

"(4) The court charges the jury that if you believe the evidence in this case, in the event you find for the plaintiff, you cannot award the plaintiff more than nominal damages for decreased earning capacity on account of the injuries he complains of."

[4] The brief for appellant, filed on original submission, must be taken as conceding that the complaint claimed damages for "decreased earning capacity"; and the charge quoted must be accepted as evincing a like concession by defendant on the trial. Because of these thus evinced deliberate concessions on the part of defendant (appellant), the propriety of the court's action in refusing charge 4 is reviewed upon the premise so made.

[5, 6] This statement is here interposed with the purpose of averting the committal of this court, in any degree, or by any implication, to the proposition that loss of time and decreased or diminished earning capacity, as elements of damage in actions for personal injuries, are synonymous. Such possibly proximately resulting consequences of a personal injury, wrongfully inflicted, are special damages, and must, if recoverable, be specially claimed in the complaint. *Dowdall v. King*, 97 Ala. 635, 12 South. 405; *Slaughter v. Met. St. Ry. Co.*, 116 Mo. 269, 23 S. W. 760. Here the averments are that plaintiff's "health and physical stamina were greatly and permanently impaired," in consequence of the injury; also, that, because of the injury, he "was rendered for a long time unable to work and earn money." The former allegation unquestionably affirms that he suffered permanent impairment in respect of health and physical stamina. The latter allegation, quoted ante, could only mean that he lost time from his labors; the duration thereof being averred as having been for a long time. Loss of time, in such circumstances, signifies the loss of those earnings which accrue from employing time in labor or business, and in legal parlance imports a materially distinct conception from another legal phrase, viz., diminished or decreased earning capacity (power)—a distinction that if not taken and observed would, in many cases, lead to the manifestly unjustifiable sanction of a double recovery. On this matter the following authorities may be consulted: *Blue Grass Traction Co. v. Ingles*, 140 Ky. 488, 131 S. W. 278, 281-283; 3 Words and Phrases, Second Series, p. 187; *Knittel v. Schmidt*, 16 Tex. Civ. App. 7, 40 S. W. 507; *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415; *Slaughter v. Met. St. Ry. Co.*, 116 Mo. 269, 23 S. W. 760; *Houston Ry. Co. v. Hartnett* (Tex. Civ. App.) 43 S. W. 773, 775; *S. & N. Ala. R. Co. v. McLendon*, 63 Ala. 266, second headnote; *A. G. S. R. R. Co. v. Yarbrough*, 83 Ala. 238, 3 South. 447, 3 Am. St. Rep. 715; *M. & O. R. R. Co.*

v. George, 94 Ala. 199, 222, 10 South. 145; 13 Cyc. pp. 46-48.

[7-9] Recurring to the question presented by the concessions stated, our opinion is that the trial court erred in refusing the quoted charge. It made express reference to decreased earning capacity, and would have restricted the recovery therefor to nominal damages. *B. R., L. & P. Co. v. Friedman*, 65 South. 939, 941, 942. Here there was evidence tending to show permanent injury, and in consequence thereof impaired future earning capacity. If the jury so found, then the plaintiff was entitled to only nominal damages therefor, unless the evidence afforded data wherefrom compensatory damage for decreased earning capacity might be ascertained. There was no evidence presenting data from which the monetary value of plaintiff's decreased earning capacity could be ascertained. The evidence of the wage earned previous to and at the time of the injury and between the date of the injury and the trial could have no tendency or effect to show the monetary equivalent of decreased earning capacity proximately resulting, if so found, from the permanent injury suffered. Such evidence may have an effect to show the proximate result of the injury in respect of loss of time by contrasting the amount of earnings before the injury and the diminution thereof, up to the time of trial, because of the temporary inability to labor, etc., wrought by the injury. The law implies some diminished earning capacity from permanent injury; but the monetary value thereof is regarded as nominal, unless the data tending to show the actual value of such diminished earning capacity is furnished. But since the loss of time may not, as in *B. R., L. & P. Co. v. Simpson*, 67 South. 385, and in *Mallette's Case*, 92 Ala. 209, 9 South. 363, result in any damage whatsoever the law does not imply an even nominal loss. The noting of the indicated distinction between loss of time and decreased earning capacity will serve to bring clearly to view the complete harmony between the rulings in the *Simpson Case*, *supra*, and the *Bush Case*, 175 Ala. 49, 59, 56 South. 731. It has been finally settled in this jurisdiction that, in order to deny to the defendant an affirmative instruction against the awarding of compensatory damages for loss of time or for diminished earning capacity, there must be evidence presenting data wherefrom the monetary value of such proximate consequences of personal injury may be ascertained by the jury. *S. S. S. & I. Co. v. Stewart*, 172 Ala. 516, 55 South. 785; *Bush's Case*, *supra*.

[10] It has been suggested that the quoted charge was abstract, and hence that it was refused without error. Treating the complaint as bearing the claim of special damage for diminished earning capacity, and

noting the phase of the evidence which tended to show a permanent injury, it is manifest that the charge was not abstract.

For the error indicated, the judgment of the court below is reversed, and the cause remanded.

Reversed and remanded. All the Justices concur.

(190 Ala. 290)

SLOSS-SHEFFIELD STEEL & IRON CO. v. PROSCH et al. (No. 807.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. EXPLOSIVES ⚡8—INJURY TO PROPERTY—CARE USED IN STORAGE.

If defendant, in quarrying, was under the necessity of using dynamite, the law cast the duty on him to keep, handle, and use it in a reasonably safe and careful manner.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 8; Dec. Dig. ⚡8.]

2. NEGLIGENCE ⚡108—PLEADING—ALLEGATIONS OF NEGLIGENCE.

When, in an action in tort, the duty of the defendant to act is shown, the negligent performance of that duty may be alleged in the complaint in the most general terms.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 174, 175, 179, 180; Dec. Dig. ⚡108.]

3. EXPLOSIVES ⚡8—INJURY TO PROPERTY—CARE IN KEEPING AND STORING.

If defendant, operating iron and smelting furnaces and also quarrying rock, kept a large quantity of dynamite near and in dangerous proximity to a thickly settled community, in a building or magazine situated close to a railroad track operated by it, and close to large slag piles, where hot slag was deposited by it in its operations, and where hot slag was carried from its furnaces close by the explosives by engines hauling hot pots containing slag, defendant was *prima facie* guilty of maintaining a nuisance.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 8; Dec. Dig. ⚡8.]

4. EXPLOSIVES ⚡8—INJURY TO PROPERTY—PLEADING.

A count alleging that defendant stored dynamite "in or near said town," and also that it was "in near proximity to many persons and buildings," sufficiently alleged the danger.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. § 8; Dec. Dig. ⚡8.]

5. NUISANCE ⚡3—EXPLOSIVES—NEGLECT IN STORING.

One who keeps stored indefinitely, in a thickly settled neighborhood, large amounts of high explosives, such as dynamite, which is liable to explode and do serious injury to surrounding persons and property, maintains a nuisance, though the manner of such keeping is characterized by no special negligence.

[Ed. Note.—For other cases, see *Nuisance*, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. ⚡3.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by Louis Prosch and others against the Sloss-Sheffield Steel & Iron Company, for damages to plaintiffs' residence by the explosion of dynamite. Judgment for plaintiffs, and defendant appeals. Affirmed.

The following are the counts of the complaint directed to be set out:

(1) Plaintiff claims of defendant \$5,000 damages, because he says that on, to wit, May 2, 1906, defendant was engaged in operating certain stone quarries at North Birmingham, Ala. to wit, at Twenty-Fourth avenue and Twenty-Third street, and defendant, in the course of its operations of said mines, did use quantities of dynamite powder and other dangerous explosives, and it thereupon became and was the duty of defendant to keep, handle, and use said explosives in a reasonably safe and careful manner. Plaintiff alleges that defendant wholly failed in its said duty, and negligently and carelessly stored large quantities of said explosives in a dangerous place in the said town of North Birmingham, where, by reason of its being so negligently and carelessly stored in such dangerous and improper place, the same exploded on, to wit, the day aforesaid, and as a result of the said explosion a certain residence owned by plaintiff in the said town of North Birmingham was wrecked and shattered, and the plastering thereof loosened and broken and caused to fall off, and windows and glass fronts were broken and shattered, and the walls were cracked and weakened, and the chimneys were shattered and cracked and broken, so that plaintiff had been caused great expense for repairs, and that said building has been permanently injured, so that it cannot be restored to its original condition without entire rebuilding, all to plaintiff's damage in the sum of \$5,000 as aforesaid.

(3) Plaintiff claims of defendant the further sum of \$5,000 damages because he says that on, to wit, the day aforesaid, plaintiff was the owner of a certain residence situated in North Birmingham, Ala., which is a thickly settled community and a legally incorporated municipality, and on, to wit, the day aforesaid, defendant, which is a corporation engaged in operating iron smelting furnaces, and also engaged in quarrying large quantities of rock, within the city limits of said North Birmingham, for its use in said furnaces, had negligently deposited or stored at, to wit, Twenty-Fourth avenue and Twenty-Third street, in said North Birmingham, a large quantity of dynamite and powder for its use in said quarrying, and on, to wit, the day aforesaid, the said explosives were stored in large quantities in a certain magazine or house that was used by defendant for keeping the same, and, by reason of defendant's said negligence, an explosion thereof occurred, which shattered and wrecked said residence owned by plaintiff, the plastering thereof was loosened and broken and caused to fall off, the windows and glass fronts were shattered and broken, and the chimneys were cracked, broken, and shattered, so that plaintiff has been put to great expense for repairs, and the said building has been permanently injured, so that same cannot be restored to its original condition without entire rebuilding, all to plaintiff's damage, as aforesaid, in the sum of \$5,000.

(5) Plaintiff claims of defendant \$6,000 damages because he says that on, to wit, May 2, 1906, defendant was engaged in operating a stone quarry in or near the town of North Birmingham, and had stored in a certain magazine or warehouse owned by it, in or near the town of North Birmingham, a large quantity of dynamite and other dangerous explosives, which were liable to explode with a force beyond any human agency to control or power to resist. And plaintiff alleges that defendant's servants or employes then and there in charge of said explosives were negligent in the manner of keeping said explosives in that the same were stored or kept in a place where the surrounding conditions were such that said explosives would probably explode.

(6) Plaintiff claims of defendant the further

sum of \$5,000 damages because he says that on, to wit, May 2, 1906, the defendant was operating a stone quarry in or near the town of North Birmingham, and operating said quarry used large quantities of dynamite and other explosives, and plaintiff alleges that defendant kept large quantities of dynamite in a small wooden building in or near said town and in near proximity to many buildings and persons whose property and lives would be in danger by an explosion of said dynamite and other explosives. And plaintiff alleges that said explosive known as dynamite is of a chemical composition, such as render probable an explosion thereof without any extraneous cause as a result of its composition or some chemical change therein with such violence as to endanger the lives and property of persons in the vicinity. And plaintiff alleges the defendant's agents, servants, or employes then and there in charge of said quarry and magazine, well knowing the fact that dynamite was an explosive of such nature as aforesaid, did negligently keep a large quantity of said explosive in said magazine, in excess of what was necessary for the operation of its said quarry, in a small wooden building in or near the town of North Birmingham, well knowing that, in the event of an explosion of said dynamite, the property and lives of persons residing in the vicinity of said magazine would be in danger. And plaintiff alleges that the said dynamite did explode on, to wit, the day aforesaid, with such violence that a certain house or residence owned by plaintiff, and in which he was at that time residing, was greatly shattered and broken, and the plastering loosened and broken, and windows and glass shattered, and walls and chimneys shattered, and was partly removed from its foundations, and the furniture and carpets were broken, defaced, and damaged, and plaintiff was put to great expense in and about repairing said house or residence and contents, and said house or residence has been permanently damaged, all to plaintiff's damage in the sum of \$5,000, as aforesaid. The house referred to in this count is the same house referred to in the original complaint.

(9) Plaintiff claims of defendant the further sum of \$5,000 damages because he says that on, to wit, May 2, 1906, defendant was operating a stone quarry in or near the town of North Birmingham, and in operating said quarry used large quantities of dynamite and other explosives, and plaintiff alleges that defendant kept large quantities of dynamite in a small wooden building in or near the corporate limits of said town, and in near proximity to many buildings and persons whose property and lives would be in danger by an explosion of said dynamite and other explosives. And plaintiff alleges that said explosive known as dynamite is of a kind known that will probably explode without any cause known to experts in dynamite and such explosives to be a cause of such explosions with such violence as to endanger the lives and property of persons in the vicinity. And plaintiff alleges that defendant's agents or servants then and there in charge of said quarry or magazine, well knowing the facts that dynamite was an explosive of such nature, and that it will probably explode without any such aforesaid known cause, did negligently keep a large quantity of said explosive in said magazine, which was a small wooden building, in or near the town of North Birmingham, well knowing that, in the event of an explosion of said dynamite, the property and lives of persons residing in the vicinity of said magazine would be in danger. And plaintiff alleges that the said dynamite did explode on, to wit, the day aforesaid, with such violence that a certain house or residence owned by plaintiff was greatly shattered and broken, and the plastering loosened and broken, and windows and glass shattered, and walls and chimneys shattered, and was partly removed from its foundations,

and the furniture and carpets were broken, defaced, and damaged, and plaintiff was put to great expense in and about repairing said storehouse and residence, and contents, and said house or residence has been permanently damaged, all to plaintiff's damage in the sum of \$5,000, as aforesaid. The house referred to in this count is the same house referred to in the original complaint filed in this cause.

(13) Plaintiff claims of defendants \$5,000 as damages because they say that on, to wit, May 2, 1906, defendant was engaged in operating a stone quarry in or near the town of North Birmingham, and had stored in a certain magazine or warehouse owned by it, in said town, a large quantity of dynamite, to wit, 650 pounds, which dynamite was liable to explode with a force beyond human agency to control or to resist. And plaintiffs allege that the said quantity of explosive was kept by the defendant, as stated, in a thickly settled portion of the town of North Birmingham, where there were in proximity many buildings and persons, and where the said explosive was liable to explode and do injury to such persons or property. And plaintiffs allege that on, to wit, the day aforesaid, the said dynamite so kept by defendant in said house did explode, and as a result of said explosion a certain house owned by plaintiffs in the said town of North Birmingham was wrecked and shattered, and the plastering thereof shattered and broken, and the windows and glass were broken, and the walls and chimneys were shattered and broken, and the said building was partly thrown from its foundations, and said building has been permanently injured, and the furniture, carpets, and other contents of said building were damaged as a consequence of said explosion, which said building was located at the time of said explosion a long distance from where said explosion occurred, to wit, 1,000 feet, and which said house or building is the same house referred to in the original complaint in this cause.

(14) Plaintiffs claim of defendant the further sum of \$5,000 as damages, because they say that on, to wit, May 2, 1906, the defendant had a large quantity, to wit, 650 pounds, of dynamite stored in a building located in the town of North Birmingham in said state and county, and in near proximity to many buildings and persons whose property and lives would be in danger by an explosion of said dynamite. And plaintiffs allege that said explosive known as dynamite is of a chemical composition, such as renders probable an explosion thereof without any extraneous cause with such violence as to endanger the lives and property of persons in the vicinity. And plaintiffs allege that defendant's agents, servants, or employees then and there in charge of said dynamite or building containing said dynamite, well knowing the fact that dynamite was an explosive of such nature as aforesaid, did negligently keep a large quantity, to wit, 650 pounds, of said explosive in said magazine in a small wooden building in said town, and about 1,000 feet from a house belonging to plaintiffs and located in said town, and that on, to wit, the day aforesaid, the said dynamite did explode with such violence that said house belonging to said plaintiffs, and in which they were at that time engaged in business, was greatly broken, shattered, and injured, and the furniture and fixtures and stock of goods therein were damaged, and plaintiffs were put to great expense in and about repairing said house, all to their damage in the sum aforesaid, and plaintiffs alleged that said house is the same house heretofore described and referred to in the original complaint in this cause.

Tillman, Bradley & Morrow and Charles E. Rice, all of Birmingham, for appellant. Haley & Haley and T. M. Bradley, Jr., all of Birmingham, for appellees.

DE GRAFFENRIED, J. The questions presented to us by this record challenge the sufficiency of certain counts of the appellees' complaint, when tested on demurrer. The questions presented are of importance, and for that reason the reporter will set out, in his report of this case, counts 1, 3, 5, 6, 9, 13, and 14. The counts referred to will, when read in connection with this opinion, illustrate its full meaning.

[1, 2] 1. Dynamite is, in its nature, a powerful explosive. Its value rests exclusively in that one quality, and if it be true that the appellant, in quarrying, was under the necessity of using dynamite, powder, and other dangerous explosives, the law cast the duty upon the appellant "to keep, handle, and use said explosives in a reasonably safe and careful manner." This proposition is recognized as sound in all the cases. *Whaley v. Sloss-Sheffield Steel & Iron Co.*, 164 Ala. 216, 51 South. 419, 20 Ann. Cas. 822; *Kinney v. Koopman & Gerdes*, 116 Ala. 310, 22 South. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119; *Rudder v. Koopman & Gerdes*, 116 Ala. 332, 22 South. 601, 37 L. R. A. 489; *Judson, Ex'r, v. Giant Powder Co.*, 107 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. In actions of tort, when, in the complaint, the duty to act is shown, the negligent performance of that duty may be alleged in the complaint in the most general terms. *Sou. Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35. The first and fifth counts were sufficient.

[3] 2. If the defendant was engaged in operating iron smelting furnaces, and was also engaged in quarrying rock, and if, near and in dangerous proximity to a thickly settled community, it kept stored in a building or magazine, situated, as is alleged in the third count of the complaint, close to "a certain railroad track owned and operated by defendant, and close to certain large slag piles, where hot slag was deposited by defendant in the course of its operations of said furnaces, and where hot slag was carried from defendant's furnaces close by said explosives by engines hauling hot pots containing slag, "a large quantity of dynamite powder, the defendant was certainly *prima facie* guilty of maintaining a nuisance. Human experience indicates that where large quantities of such explosives, as dynamite and powder, are stored in isolated places and are carefully guarded by persons of skill, explosions, from unforeseen and unknown causes, sometimes occur, and, if the defendant selected the place named in the complaint for its magazine or house in which to keep stored large quantities of dynamite and powder, it selected a place where such an explosion as the one described in the complaint might reasonably be expected to occur. The reason which underlies some of the cases cited in *Kinney v. Koopman & Gerdes*, *supra*, and *Rudder v. Koopman & Gerdes*, *supra*, in which the courts held that, under certain

conditions, a person who kept high explosives stored in a city or town was not necessarily guilty of maintaining a nuisance, cannot be applied to the conditions which are shown by this complaint to have surrounded the house or magazine in which the plaintiff charges that the defendant kept its dynamite and powder stored.

Out of respect to necessity, public and private, electricity and steam, which are also dangerous agencies, are in constant use in our cities, towns, and villages and upon our public highways. The use of these agencies entails upon human life and property some modicum of danger which human skill and foresight cannot prevent, and which must be traced to inevitable accident. These dangers, inherent in the most careful use of such agencies, must be submitted to "in order that the greater good of the public be conserved and promoted." The care with which the law requires the conductors of electricity to be insulated and placed beyond the reach of the average man in his customary use of our streets and highways, and the care which the law exacts of those who use steam power to maintain properly constructed, equipped, and inspected engines, are indications of the rigid adherence by the law to that salutary declaration of the law that, to use the language of Chief Justice Stone, "there is a limit to this duty (on the part of the citizen) to yield, to this claim and right to expect and demand. * * * 'Sic utere tuo,' in such conditions, is enjoined by social obligations and by law." *Tennessee Coal, Iron & Railroad Co. v. Hamilton*, 100 Ala. 252, 14 South. 167, 46 Am. St. Rep. 48.

It may be that it is possible for a magazine for the storage of large quantities of dynamite and powder to be so constructed and operated, at places similar to that described in the complaint, as to render it probably not more dangerous to surrounding property and to the lives of human beings than a similar magazine would be situated in a place not so exposed, but, if so, the defendant has the burden of so showing. Presumptively there was inherent danger in the place mentioned in the complaint.

"Presumptions arise from the doctrine of probabilities. The future is measured by the past, and presumptions are created from the experience of the past. What has happened in the past, under the same conditions, will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown." *Judson v. Giant Powder Co.*, supra.

That the defendant was unfortunate in the selection of the place for its magazine we think is most obvious, and we unhesitatingly hold that the third count of the complaint was free from demurrer.

3. What we have above said disposes of the assignments of error based upon the action of the court below in overruling the demurrer to the second count of the complaint.

4. In the above case of *Kinney v. Koopman*

& Gerdes, this court, through Coleman, J., said:

"We are of the opinion that a count prima facie sufficiently shows a want of due care, which charges the storing of large quantities of gunpowder in a wooden building in a populous place in the city of Cullman."

In the above case of *Rudder v. Koopman & Gerdes*, this court, through Head, J., said:

"The defendants kept, in a wooden store, in a thickly settled portion of the incorporated town of Cullman, where there were, in proximity, many buildings and persons, large quantities of dynamite and gunpowder, liable to explode and do serious injury to such persons or property. It did explode, by the burning of the house in which it was kept, with such force and violence as to cast fire brands several hundred feet, and destroy the property of the plaintiff. Upon proof of these facts, the defendants are responsible."

[4] While in count 6 the plaintiff alleges that the wooden building in which the explosives were stored was "in or near said town," it also alleges that it was "in near proximity to many buildings and persons," etc. The reason, therefore, of the rule which was declared by Mr. Justice Coleman in *Kinney v. Koopman & Gerdes*, supra, and by Mr. Justice Head in *Rudder v. Koopman & Gerdes*, supra, applies to count 6. For this reason, as well as for the reasons set out in section 1 of this opinion, count 6 was free from demurrer.

5. We see but little substantial difference between count 6 and counts 9, 10, 11, and 12. They come directly within the reason of the rules above announced, and the demurrers to these counts were properly overruled.

[5] 6. The question presented by the demurrers to counts 13 and 14 is simply this: Is a person, under the law, guilty of maintaining a nuisance, who keeps stored indefinitely, in a thickly settled neighborhood, large amounts of high explosives, which are liable, as dynamite is liable, to explode and do serious injury to surrounding persons and property, provided the manner of such keeping is characterized by no special negligence?

While there are expressions in some of our older cases (see *Kinney v. Koopman & Gerdes*, supra; *Rudder v. Koopman & Gerdes*, supra; *Collins v. A. G. S. R. R. Co.*, 104 Ala. 390, 16 South. 140), which may indicate a contrary view, we are of the opinion that such a keeping is in fact and in law a nuisance. Lord Holt was right. He spoke in the interest of human life and human repose and the rights of private property when he said:

"Though gunpowder be a necessary thing and for the defense of the kingdom, yet, if it be kept in such a place as is dangerous to the inhabitants or passengers, it will be a nuisance."

When Lord Holt made use of the above expression, the explosive force of gunpowder was, in comparison with the force of modern explosives, as was the speed of a then sailing vessel to the speed of a modern hydroplane. While modern methods of preserving these high explosives have probably improved, we are inclined to believe that many of the opin-

ions of common-law judges on the subject now in hand would never have found their way into the books, if, when they delivered those opinions, explosives had possessed those highly dangerous qualities which now belong to them. A modern bomb possesses, probably, as much explosive force as anciently belonged to a barrel of gunpowder, and, in applying the rules of the common law to present conditions, we must not lose sight of the real reasons which underlie those rules and apply them in accordance with their purpose rather than in accordance with their mere letter. We direct attention to the wording of the rule as we deduce it from what we regard as the sound declaration of our own cases on the subject and from what we regard as the rule which has been declared by the best adjudicated cases in other states, viz.: That he who keeps stored, indefinitely, in a thickly settled neighborhood, large amounts of high explosives which are liable, as dynamite or gunpowder or other high explosives are liable, to explode and do serious injury to surrounding persons and property, is guilty of maintaining a nuisance, although the manner of such keeping is characterized by no special negligence. This is certainly the holding in *Rudder v. Koopman & Gerdes*, supra, and, as there seems to be doubt upon the subject, we might as well now definitely declare the rule. This rule, by its terms, excludes the idea that, if explosives are not kept in such large quantities in a thickly settled community as to do serious injury to surrounding persons and property if they explode or if they, although in such large quantities, are not kept indefinitely in such community, such a keeping is a nuisance. In such instances, for the man, who keeps or has such explosives temporarily in his possession, to be held liable for injuries resulting from their explosion, there must be shown, to use the language of this court in *Rudder v. Koopman & Gerdes*, supra, "some special negligence in the manner of keeping them."

It may be that the storage for indefinite periods of large quantities of high explosives in a thickly settled community would be more convenient to their owner than to keep them stored elsewhere. It may be that a requirement that he shall keep such a place of deposit at a point which subjects the public to less danger in the event of an explosion will entail upon him some inconvenience and expense in keeping supplied, at his place of business, with his usual needs. The needs of the individual must give way to the higher demands of the public for protection against all needless possible, not probable, sources of danger in their lives and in their property. It is the public demand, not the mere private need, for electric lights, electric cars, telephone and telegraph lines, which justifies, in the sight of the law, the imposition upon any human being of the slight modicum of danger

which is attendant upon the maintenance of electric conductors upon our streets and upon our highways. The law should be as careful in conserving the rights of the public in the perfect security of their lives and property as are business men when they go about making their investments. We hardly think a business man would run the risk of placing a handsome edifice by the side of a magazine filled with high explosives if he could find some other convenient place to build it, or that he would be likely to take such a place as a place of residence for himself and family. When the public good requires the use of a particular force which possesses inherent danger to the public, the law will, under appropriate safeguards, permit its use, although it may, now and then, cause, by inevitable accident attendant upon its use, loss of life or property. It will not, however, to suit the mere convenience of a private individual, permit him to keep that which, because of its dangerous qualities, is fraught, in the mere keeping, with grave possible dangers to the property and people of a town or city, indefinitely in a place where, if an explosion occurs, the public will be the sufferers. If the business of the private individual is such as to require the use of dangerous utilities, the law, to meet the requirements of his business, permits him, under restrictions, to use such utilities, but it will not permit him to add even a possible danger to the lives and property of the public by keeping indefinitely, for convenience merely, large quantities of high explosives in such a place as that, if an explosion occurs, property and human life will probably be destroyed. *Rudder v. Koopman & Gerdes*, supra.

In our opinion counts 13 and 14 were not subject to demurrer, and the judgment of the trial court is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(136 La. 625)

No. 20189.

HILL v. CAZE.

(Supreme Court of Louisiana. Jan. 25, 1915.
Rehearing Denied Feb. 23, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \Leftrightarrow 162—DISMISSAL—ACQUIESCENCE IN JUDGMENT—HUSBAND AND WIFE.

Where the defendant appealed from a judgment decreeing a separation from bed and board, and ordering the sale of the community property for the purposes of effecting a partition between the parties, and the defendant, during its pendency, accepted her share of the proceeds of the sale of the community property, *held*, that she had acquiesced in the judgment, and her appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 179, 981, 982, 984—990; Dec. Dig. \Leftrightarrow 162.]

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; Charles T. Wortham, Judge.

Action by James Hill, husband, against Mrs. Marie Caze, wife. From judgment for plaintiff, defendant appeals. Appeal dismissed.

Prentice E. Edrington, Jr., of New Orleans, for appellant. Guion, Lambremont & Herbert, of Litcher, for appellee.

On Motion to Dismiss.

LAND, J. In this cause judgment was rendered in favor of the plaintiff decreeing a separation from bed and board, and a dissolution of the community theretofore existing between the parties, and a partition of the community property by licitation. The defendant was granted a devolutive appeal from the judgment.

The plaintiff has moved to dismiss the appeal on the ground that since the rendition of the judgment the defendant has acquiesced therein by voluntarily participating in a complete settlement of the community under the terms of the judgment, as shown by copy of notarial act annexed to the motion. The recitals of this act show that the community property was sold for cash for the purposes of effecting a partition; that the notary to whom the parties had been referred drew up a project of partition showing the amount accruing to each party; that, on objection being made by the attorney of defendant, the proceedings were suspended subject to the further action of the court; but that later the parties themselves signed an instrument as follows, to wit:

"The parties hereto agree to accept in full settlement of their respective right in and to the above partition the amounts following:

To James Hill:..... \$266.07
To Mrs. James Hill..... 279.08

—and hereby declare themselves satisfied herewith and acknowledge receipts of said amounts this day paid."

The party against whom judgment has been rendered cannot appeal, "if he have acquiesced in the same, by executing it voluntarily." Code Practice, art. 567. In several cases it has been held that there is acquiescence where the judgment is partially executed.

In *Williams v. Duer*, 14 La. 523, the plaintiff partially executed the judgment by furnishing a bond of indemnity. The court held that he had acquiesced in the judgment as a whole. See to same effect *Williams v. Bank of Louisiana*, 7 Rob. 320, and *Cobb v. Parham*, 4 La. Ann. 150. In *Succession of De Egana*, 18 La. Ann. 59, the court said:

"It cannot be controverted that, under the laws and jurisprudence of this state, the party who voluntarily executes, either partially or in toto, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies either partially or in toto, the execution of that judgment, is not permitted to appeal from it"—citing authorities *supra* and others.

In *Flowers v. Hughes*, 46 La. Ann. 436, 15 South. 14, the court held that the receipt by the appellant of a portion of his share in a partition was fatal to his pending appeal from the decree of partition, although in receiving the money he reserved his right of appeal.

There can be no doubt that the defendant acquiesced in that part of the decree dissolving the community and ordering a partition of all of its property.

Having acquiesced in a portion of the judgment, the defendant lost her right of appeal from the judgment as a whole.

The argument that these are two separate decrees or judgments is without force.

"Separation from bed and board carries with it separation of goods and effects." Civil Code, art. 155.

Hence the dissolution of the community and the partition of its effects are mere legal consequences of the separation *a mensa et thoro*. There was but one cause of action—that is, the demand for a separation—and the other relief was incidental to the main demand. In accepting her share in the partition the appellant availed herself of the benefit of the decree of separation, without which there could have been no partition.

We therefore think that the motion to dismiss should be sustained.

Appeal dismissed.

No. 21009.

(136 La. 627)

STATE v. FULCO.

In re STATE ex rel. MABRY, Dist. Atty.
(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 23, 1915.)

(Syllabus by the Court.)

HABEAS CORPUS \Leftrightarrow 46—JURISDICTION—CITY COURT.

The city court of the city of Shreveport is not authorized by the Constitution or by statute to issue the writ of habeas corpus.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 36; Dec. Dig. \Leftrightarrow 46.]

Proceedings by the State against Sam Fulco. Fulco was released under a writ of habeas corpus, and the State, on the relation of W. A. Mabry, District Attorney, applies for certiorari, prohibition, and mandamus. Order of release set aside.

See, also, 65 South. 240.

Wm. A. Mabry, Dist. Atty., of Shreveport, for applicant. L. C. Blanchard, of Shreveport, City Judge, pro se.

SOMMERVILLE, J. The writ of habeas corpus is a well recognized and established process, resting upon constitutional and statutory provisions. The state Constitution provides for the issuance of the writ as an existing remedy in the cases to which it properly applies, and designates the courts which may use it. The city court of the

city of Shreveport was created by Act No. 103 of 1898, p. 129. This act, and the article of the Constitution, No. 96, which authorized the establishment of the court, do not confer upon that tribunal the right or power to issue the writ of habeas corpus; and therefore it has not the right or power.

The supervisory authority of the Supreme Court was properly invoked in this case.

It is therefore ordered, adjudged, and decreed that the order issued by the respondent judge, releasing Sam Fulco from the custody of the sheriff under the writ of habeas corpus applied for by him, be annulled and set aside.

(136 La. 628)

No. 20935.

STATE v. SYAS.

In re SYAS.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 23, 1915.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW \S 13—SANITARY REGULATION—DEFINITION OF OFFENSE—VALIDITY OF STATUTE.

Act No. 173 of 1912, \S 2, amending Act No. 192 of 1898, \S 7, authorizing municipal boards of health to pass health and sanitary ordinances for the disposition of fecal matter, and prescribing a penalty for violation of such ordinances, sufficiently defines the offense to be created.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 13, 14; Dec. Dig. \S 13.]

2. CONSTITUTIONAL LAW \S 63—DELEGATION OF POWER—MUNICIPAL CORPORATIONS—SANITARY ORDINANCE—VALIDITY OF STATUTE.

Act No. 173 of 1912, \S 2, amending Act No. 192 of 1898, \S 7, authorizing municipal boards of health to pass sanitary ordinances for disposition of fecal matter, and prescribing a penalty for any violation of such ordinances, is not invalid because it denounces a penalty for an offense not created by itself but to be created thereafter by one of its governmental agencies.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 108-114; Dec. Dig. \S 63.]

3. CONSTITUTIONAL LAW \S 299—DUE PROCESS OF LAW—IMPRISONMENT FOR DEBT—SANITARY REGULATIONS.

An ordinance which was enacted under authority of Act No. 173 of 1912, \S 2, amending Act No. 192 of 1898, \S 7, and provided that fecal matter should be taken care of by the sanitary force, and fixed a charge of 50 cents per month for such service for each family, payable each month in advance, and imposed a fine or imprisonment for violation of the ordinance, did not amount to using criminal process or imprisonment for enforcing the payment of a civil obligation, in violation of Const. art. 2, or of Const. U. S. arts. 5, 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. \S 851, 852, 858-862, 867-869; Dec. Dig. \S 299.]

Felicia Syas was convicted of violating a city ordinance, and applies for certiorari and prohibition. Application denied.

P. S. Pugh and L. H. Pugh, both of Crowley, for applicant. Harry W. Gueno, of Crowley for respondent.

PROVOSTY, J. Section 7 of Act No. 192 of 1898, as amended by Act No. 173, p. 313, \S 2, of 1912, gives authority to municipal boards of health to pass health and sanitary ordinances for the disposition of fecal matter, and prescribes a penalty of not less than \$10 and not more than \$25, or imprisonment for not more than 30 days, or both said fine and imprisonment, for any violation of such ordinances.

In pursuance of this authority the board of health of the city of Crowley adopted an ordinance forbidding open closets and establishing a bucket system, providing a vidangeur service for the periodical emptying and disinfecting of the buckets, fixing a charge of 50 cents per month for such service for each family, payable each month in advance not later than ten days after the first of the month, and imposing a fine of not less than \$2.50 and not more than \$25, or imprisonment at the discretion of the court, for a violation of the ordinance.

The relator was prosecuted under this ordinance, and was sentenced to pay a fine of \$10, or 20 days' imprisonment. This sentence was based not on the ordinance, but on the statute; the ordinance, in so far as imposing a penalty, was held to be unauthorized and null.

[1, 2] Relator contends that by said statute the Legislature has undertaken to do a thing it cannot do, namely, denounce a penalty for an offense not created or defined, by itself, but to be created, or defined, thereafter by one of its governmental agencies.

The statute in effect says that whoever shall violate an ordinance of the board of health shall be punished thus and so. The offense consists in the violation of an ordinance of the board of health. We do not see what further definition than this could be necessary. The question of whether the Legislature may denounce a penalty for the violation of the rules and regulations which it authorizes one of its governmental agencies to make was considered, and decided affirmatively, in U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563, and Light v. U. S., 220 U. S. 523, 31 Sup. Ct. 485, 55 L. Ed. 570.

[3] Next it is contended that the operation of said ordinance in conjunction with said statute amounts to using criminal process, or imprisonment, for enforcing the payment of a civil obligation; and that the doing of this is in violation of article 2 of the state Constitution and of articles 5 and 14 of the federal Constitution.

This 50 cents per month is not a civil obligation; it is the cost of removing and disinfecting the bucket of relator's premises at the periods fixed in the ordinance. Instead of imposing this sanitary measure upon relator herself, the ordinance provides that it shall be attended to directly by the board of health through its vidangeur force, and that the relator shall defray the cost of this service by means of this monthly payment. If the fail-

ure of the relator to attend to this sanitary measure might have been made punishable by imprisonment, we see no good reason why her failure to perform the equivalent, namely, paying this cost, should not be thus punishable. And if the board of health deemed it to be in the public interest that this sanitary measure should be attended to directly by the public authorities, in order to insure its being properly done, we do not discover in the matter anything but a mere ordinary exercise of the police power.

The next contention is that the said charge is unreasonably large. Whether it is so or not was a matter for evidence; and none was offered on that point.

The next contention is that only two of the five members of the board of health voted for said ordinance; and that therefore it was never adopted. There is an admission to the contrary in the record. And the same admission covers and refutes the contention that said ordinance was never promulgated.

The order nisi herein is therefore recalled, and the present application is now denied at the cost of the relator.

(136 La. 631)

No. 19830.

HAMILTON v. MOORE.

In re MOORE.

(Supreme Court of Louisiana. June 30, 1914.
On Rehearing, Feb. 23, 1915.)

(Syllabus by Editorial Staff.)

1. HUSBAND AND WIFE \S 152—WIFE'S SEPARATE ESTATE—DEBTS OF HUSBAND.

A contract by which a married woman seeks to bind her separate property for a debt of her husband is null, no matter what its form may be.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 596-602; Dec. Dig. \S 152.]

2. MORTGAGES \S 37 — ABSOLUTE DEED AS MORTGAGE—PAROL EVIDENCE.

Parol evidence may be introduced by a wife to show that a sale of her separate property, absolute on its face, was in fact a mortgage to secure a debt of her husband.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. \S 37.]

3. LIMITATION OF ACTIONS \S 44—PRESCRIPTION—SALE OF LANDS—VALIDITY—VENDOR IN POSSESSION.

Prescription does not run against an action or exception attacking the validity of a sale of land, where the vendor was at all times in possession of the land.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 220-230, 232; Dec. Dig. \S 44.]

On Rehearing.

4. HUSBAND AND WIFE \S 202—WIFE'S SEPARATE ESTATE—DEBTS OF HUSBAND.

Where a wife sells her separate property, receives the price, and with it pays her husband's debts, the purchaser acquires a valid title.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 737, 945; Dec. Dig. \S 202.]

5. LIMITATION OF ACTIONS \S 95—PRESCRIPTION — VOID CONVEYANCE — ACCRUAL OF RIGHT OF ACTION.

Where a wife did not know that the instrument she signed was a sale, but thought it a mortgage, the purchaser is not protected by the prescription of 5 or 10 years against an action of nullity by the plaintiff in possession.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 337, 473, 474; Dec. Dig. \S 95.]

Monroe, C. J., dissenting.

Certiorari to Court of Appeal, Parish of Union.

Certiorari by George W. Moore, to review a judgment of the Court of Appeals, parish of Union, which affirmed a judgment for the plaintiff in an action by Mrs. Barbara D. Hamilton against George W. Moore. Judgment of the Court of Appeals affirmed on original hearing and on rehearing.

J. Burrough Crow, of Farmerville, for applicant. Sholars, Elder & Benoit, of Monroe, for respondent.

PROVOSTY, J. Plaintiff sues to have a cash sale, absolute on its face, made by her to the defendant, of improved real estate decreed to have been a contract of security for a debt of her husband, and as such null, and to have the inscription of same in the book of conveyances of the clerk's office erased.

She does not allege error, nor fraud, nor marital coercion, nor inadequacy of price, but simply that the real nature of the contract was as just stated, and that she continued in possession and has done so up to the present time.

[1] An exception of no cause of action was filed, and of course was properly overruled, since any contract by which a married woman may have sought to bind her property for a debt of her husband is null, no matter what its form may be.

The district court and the Court of Appeals found the facts to have been as stated by plaintiff, and gave judgment in her favor.

[2] This proof was made by oral evidence. Defendant objected to it on the ground that it varied and contradicted the written act of sale. In *Leblanc v. Bouchereau*, 16 La. Ann. 11, where the same objection was made in a similar suit, the court said:

"This is not an action to annul a simulated conveyance; but one to declare invalid a contract, in appearance legal and binding, but covering a violation of a prohibitory law. It is well settled that incapacitated persons, when seeking to be relieved from the effects of engagements, contracted by them in fraudem legis, are entitled to show the real nature of the transaction"—citing *Thibodeaux v. Herpin*, 5 La. Ann. 578, where the right of a married woman to prove by parol that an absolute sale made by her to a third person was a disguised donation to her husband, was recognized.

In *Chaffe & Bro. v. Oliver*, 33 La. Ann. 1008, where parol evidence was offered by a married woman to show the true character

of a mortgage given by her for a debt of her husband, as she alleged, the court said:

"She is not confined to counter letters and interrogatories on facts and articles, but may resort to parol evidence."

Douglass v. Douglass, 51 La. Ann. 1456, 26 South. 546, is another case of an absolute sale the true nature of which the wife was allowed to show by parol. A large number of cases are there cited, and the rule on this point is authoritatively announced. *Caldwell v. Trezevant*, 111 La. 410, 35 South. 619.

[3] The sale was made in 1882, and this suit was instituted in 1911, and defendant pleaded prescription of plaintiff's right of action. But prescription does not run against the party in possession. "*Quæ temporaria ad agendum perpetua sunt ad excipiendo.*" *Hennen Dig. p. 1235*, Nos. 5, 7, 8.

"This rule," said this court in *Delahoussaye v. Dumartrait*, 16 La. 91, "which is derived from the Roman jurisprudence, has often been improperly applied, and made to cover direct demands under the name and form of exceptions. It is now, however, well understood to exist only in favor of a defendant in the possession or exercise of the property, right, or position attempted to be taken from him. If, for instance, a vendor is left in possession of property after a sale of it which might have been annulled on the score of lesion, he may remain silent as to this defect in the contract, and reserve to himself the right of pleading the nullity of the sale, by way of exception, whenever he shall be sued by the purchaser for the delivery of the property; until then he has no interest to bring a suit; he might consider the contract as a nullity, and believe that the purchaser will never call for its execution; hence the maxim, '*Posidenti non competit actio sed exceptio.*' If, on the contrary, such a vendor had delivered the property, and suffered the purchaser to remain in possession a length of time sufficient for the prescription of the action of rescission, he could not afterwards, by bringing a petitory action, thus compel the purchaser to produce his title, and then by way of exception ask for its nullity or rescission."

Defendant also pleaded estoppel; but it is too well settled to need citation of authority that estoppel has no application to the case of a married woman seeking to be relieved from contracts of security for a debt of her husband.

Judgment affirmed.

On Rehearing.

O'NIELL, J. [4] If the plaintiff had sold her paraphernal property, received the price, and with it paid her husband's debts, the purchaser of her property would have a valid title. But he has admitted in his testimony that he had no negotiations whatever with Mrs. Hamilton; that he bought the property to accommodate Mr. Hamilton, to enable him to pay certain judgments which had been rendered against him; that, when the deed was prepared and before it was signed, he paid the \$400 to Mr. Hamilton, and only knew that Mrs. Hamilton would sign the deed because Mr. Hamilton told him she would. He (defendant) then went with Mr. Hamilton to the latter's residence. Mr. Hamilton went into the room where his wife

was, and after a while returned with her, and she signed the instrument. The property was the plaintiff's home, and she and her husband and children continued to occupy it as such after as before the deed was signed. The defendant admits that Mr. Hamilton continued paying the taxes on the property until his death; and there is no contradiction of the evidence that Mrs. Hamilton has paid the taxes regularly since her husband's death.

[5] The defendant offered no evidence to corroborate his testimony that he paid the \$400 to Mr. Hamilton, nor to corroborate his statement that Mr. Hamilton paid him rent at \$50 a year. He testified that he advanced Mr. Hamilton on his crops, and that the latter owed him between \$700 and \$800 at the time of Mr. Hamilton's death. Hence it is not satisfactorily shown that the financial transactions between the defendant and Mr. Hamilton amounted to anything more than debits and credits on the defendant's books, of which Mrs. Hamilton had no knowledge.

When the witness Anderson had closed his negotiations with Mrs. Hamilton for the purchase of the timber on this land, he examined the records, learned that the title stood in the name of the defendant, and so informed the plaintiff. Her immediate demand upon the defendant to reconvey the property to her and her prompt action to annul the deed are in consonance with all the evidence that she did not know she had signed a conveyance of her property to Mr. Moore until Mr. Anderson discovered it and informed her.

Under these circumstances, the defendant is not protected by the prescription of 5 or 10 years against the action of nullity by the plaintiff in possession. She had no knowledge of the character of the deed and did not ratify it, either expressly or tacitly, after her husband's death. The decisions cited by defendant's counsel in the cases of *Vaughan v. Christine*, 3 La. Ann. 328, *Lafitte v. Delogny*, 33 La. Ann. 659, *Brownson v. Weeks*, 47 La. Ann. 1042, 17 South. 489, *Munholland v. Fakes*, 111 La. 931, 35 South. 983, *Doucet v. Fenelon*, 120 La. 18, 44 South. 908, and *Hamilton v. Hamilton*, 130 La. 302, 57 South. 935, are founded upon facts entirely different from the present case and have no application here.

The decree heretofore rendered in this case is reinstated and made the final judgment herein.

MONROE, C. J., dissents and hands down reasons. PROVOSTY, J., concurs, and hands down a separate opinion.

Statement of the Case.

MONROE, C. J. (dissenting). The material allegations of the petition whereby this suit was begun are as follows:

"That, on the 23d day of June, 1882, petitioner, with the assistance and authorization of her

husband, William H. Hamilton, now deceased, executed an act under private signature, purporting to sell to George W. Moore a certain tract of land * * * for \$400 in cash. * * * That, in truth and in fact, petitioner did not * * * sell or convey the * * * property * * * by said purported act of sale, * * * but still owns and is in the actual possession of said property, and has so owned and possessed the same continuously ever since a date long prior to said purported act of sale. That the real cause and consideration for which petitioner executed said purported act of sale was the loan of a certain sum of money by the said George W. Moore to petitioner's said husband, to secure the payment of which petitioner was induced to execute said purported act of sale, which was designed and intended by petitioner and her said husband and by the said George W. Moore only as a mortgage on the above described property and to have no other effect than to secure the payment of said loan. That said purported act of sale, as well as the mortgage that said act was intended to give, was, and is, absolutely null and void, ab initio, for the reason that petitioner could not lawfully mortgage her said separate property to secure her husband's debts in the manner attempted in said act. That after the execution of said purported act of sale, petitioner's said husband, before his death, fully repaid and discharged the above-mentioned loan of money and all other indebtedness owing by him to the said George W. Moore, so that the mortgage which said act was intended to give, even if legal and valid, was extinguished and ceased * * * :

"That, even if said mortgage had been legal and valid, and even if the indebtedness secured thereby had never been paid, said mortgage and said indebtedness have been prescribed by the prescription of 3, 5, and 10 years, which petitioner now specially pleads as a release therefrom. * * * Wherefore, petitioner prays that * * * George W. Moore be duly cited, * * * and, after due proceedings, that there be judgment, * * * decreeing the purported act of sale * * * to be, not an act of sale, but merely an act intended to mortgage the property therein described to secure a loan of money, made by the said George W. Moore, to petitioner's said husband; further decreeing said act and the mortgage which said act was intended to give to be absolutely null and void ab initio; * * * further decreeing the indebtedness which said act was intended to secure to have been fully paid and satisfied; further decreeing said indebtedness, if not paid, to have been prescribed, * * * and said mortgage, even if valid, to have been prescribed; ordering that said purported act of sale be canceled and erased from the records; * * * and condemning the said George W. Moore to pay all costs."

Defendant filed exceptions of no cause of action, estoppel, and prescription, and answered, affirming the verity of the contract of sale, as evidenced by the instrument attacked by plaintiff, further alleging that he allowed William H. Hamilton and his wife, plaintiff herein, to remain on the property in consideration of an annual rental of \$50, which was paid by said Hamilton up to the time of his death, and that thereafter he demanded rent from plaintiff, but that she has neglected to pay the same, and that he has allowed her to remain upon the property from a feeling of compassion for the widow of his relative and friend, and to pay the taxes as part consideration for its use, but that he is now entitled to, and demands, rent, at the rate of \$50 per annum. He further

alleges that plaintiff has never set up the claim which she now advances until recently, and since timber buyers have been making offers for old field timber on the land, and that she has been influenced to bring this suit by her son, or sons, who think they will profit thereby.

As stated in the opinion heretofore handed down by this court, plaintiff "does not allege error, nor fraud, nor marital coercion, nor inadequacy of price," to which it may be added that, so far from making those allegations, or either of them, she alleges affirmatively that she executed the particular contract evidenced by the instrument signed by her, but that "the real cause and consideration * * * was the loan of a certain sum of money, * * * to secure the payment of which petitioner *was induced to execute said purported act of sale*, which was designed and intended by petitioner and her said husband, and by the said George W. Moore as a mortgage."

In other words, the allegation is, not that she was induced to execute an act of sale, in the belief that it was an act of mortgage, but that she executed such an act knowing it to be an act of sale, and yet designing and intending that it should operate as a mortgage to secure a debt of her husband. Plaintiff has testified (subject to defendant's objection, that she had not alleged undue marital influence); that unwillingly and under the direction of her husband she signed a "paper," which was not read to her, but which she admits was the deed here in question. She was then asked, "Did you and Mr. Moore make any trade of any sort with reference to this land?" which was objected to as not best evidence and an attempt to prove title to real estate by oral testimony, and was admitted "subject to objection"; the note of evidence containing the entry, "Same objection and ruling to apply to all testimony of like nature hereinafter sought to be introduced," and no further objection or ruling being shown.

Plaintiff further testified that they (she and her husband and family) remained in possession of the land, that her husband paid no rent, and that she paid none after his death; that he during his life, and she afterwards, paid the taxes; that her husband told her that he and defendant, one night at defendant's house, had burned up the deed in question, and told her just before his death that the loan for the security of which the deed had been executed had been paid; that she did not know that it was "in this shape" until she was so informed by Mr. Anderson (who gave her the information shortly before the institution of this suit); that defendant told her twice that "he had nothing in the world against my [her] land"; that "It was all done away with"; that "he had no claim against me [her]" at all. "He told me [her] that afterwards, since my

[her] husband's death." Question, by defendant's counsel:

"You don't recall a single instance where you or your husband paid Mr. Moore any money back on this alleged mortgage? A. I had nothing at all to do with it. (By plaintiff's counsel.) Q. The defendant's counsel asked you about how you knew that your husband had paid up his debts. I wish you would state what Mr. Moore said to you, if anything, to make you think so. * * * A. Told me that he didn't have a thing in the world against me, that I didn't owe him anything, and that was one reason why I thought I was out of debt. I had been paying my taxes and trying to keep out of debt. Q. What did you know about your husband paying Mr. Moore rent with pork or yearlings? A. I haven't any recollection of anything at all. (Cross-examined.) Q. Do you remember his ever transferring any cattle or pork? A. No, sir. Of course the cattle belonged to me, and I always managed it. Q. Don't have any recollection? A. No, sir. Q. Your husband managed your affairs? A. Yes, sir."

Plaintiff did not testify that she made any objection, in the presence of the defendant, to signing the deed, nor did she, at any time, say that her husband, or the defendant, told her that the instrument was an act of mortgage and not of sale, or that it was to operate as a mortgage, or even that she then so believed. The instrument itself is short, plainly written, and in general appearance rather resembles a common-law deed. Part of plaintiff's testimony reads as follows:

"Q. You understood that you were signing a deed when you were signing this instrument? A. No, sir [referring to her husband] just called me in, and I told him I didn't want to sign it—I knew how the money was going for whisky, and I didn't want to sign it. I tried to talk him out of it, but I went in after he made me."

From which and other evidence it appears that whatever objection plaintiff may have made was made out of the presence of defendant. Plaintiff offered no tax receipts and adduced no testimony to show that during the 26 years between the date of the registry of the deed and the date of the institution of this suit the property was not assessed, according to law, in the name of defendant, as the registered owner.

William Anderson (called by plaintiff) testified in part as follows:

"I had bought timber for the Summit Lumber Company from Mrs. Hamilton on this land. * * * On this land in question in this suit. In examining the title, I found that the owner of record was G. W. Moore. I went then and saw Mrs. Hamilton and told her about it, and at her request I went to see Mr. Moore, to see if he would make a deed back to Mrs. Hamilton. He refused to do so, and claimed that he had loaned Mr. Hamilton money, and it had not all been repaid, and that was about all the conversation. Q. Did he say that to you in that conversation—that the deed in question * * * was taken to secure a loan of money? A. He stated that it was taken to secure a loan of money, and said that this money was for the purchase price of this Scott place; said it had not all been repaid. Q. What other reason did he give you for refusing to reconvey the property to Mrs. Hamilton? A. No other reason."

The following appears on the cross-examination:

"Q. When you saw Mr. Moore at Bernice and told him what you wanted, didn't he say that he didn't know whether he had a deed to that land until he looked up the numbers? A. He asked me if it was so, or how many, and I gave him the numbers. Q. Didn't he say that he would have to look up the numbers before he knew whether he had a deed or not? A. My recollection is that he told me that Mr. Hamilton hadn't paid him that amount of money; that this was for money loaned Mr. Hamilton. Said he didn't know how much; he would have to look it up. * * * The only thing I heard him say about the Scott tract of land was this money was loaned."

It may be here remarked that the "Scott tract" to which the witness refers is shown to be a tract of 60 acres adjoining the tract here in dispute, which was purchased by Hamilton on January 11, 1889, nearly seven years after the sale to defendant of the tract in dispute, from which it is evident, either that defendant, in talking to the witness, confused two transactions that had taken place seven years apart, or that the witness misunderstood him; and, from the testimony of defendant, the theory last mentioned seems the more probable.

Thomas H. Hamilton, plaintiff's son, testified that his father died in 1901 (witness being then, say, 29 years of age); that he had lived with his father until he attained majority (or until 1893), when he moved away; that after his father's death he (again) lived on the place for about two years, after which he lived about three miles away; that he knew nothing of any payment of rent by his father to Mr. Moore, nor of any effort on the part of Mr. Moore to collect rent from any of the family; that his mother paid the taxes on the land after the death of his father, the witness making most of the payments (for his mother, as I understand him); that they have several tax receipts, showing payments by his father during his life; that a few months after the death of his father he had a conversation with defendant about the latter's business with him; and that within a few months prior to the institution of this suit he spoke to defendant, upon two other occasions, upon the same subject. I make the following excerpts from his testimony in regard to the several interviews thus mentioned, to wit:

"Q. Some two or three months after your father's death did Mr. Geo. W. Moore have a conversation with you about his business with your father? A. Yes, sir. Q. What did Mr. Moore tell you in that conversation? A. Told me that Ma didn't owe him anything, balance; said that there was some land notes, but they were out of date, and he was going to bring them to her right away. Q. In that conversation, what did he tell you about being the owner of the tract of land in question? A. Didn't say what tract of land; said he had some mortgages or land notes. * * * Q. Recently, in the spring of the year [1911] * * * did you see Mr. Moore in regard to this tract of land? A. Yes, sir. Q. What did you propose to him at that time? A. The first time I saw him, I only inquired of him about it; told him I had come to get him to sign the deed; he wanted to look at his books and come down and see

Ma, and settle with her. Q. In that conversation, did he tell you what the cause was for taking this deed from your mother? A. Yes, sir. Q. What did he say it was? A. Said it was for borrowed money, and that his deeds and notes were all out of date. * * * Q. A few days later, did you have another conversation with him? A. Well, two or three weeks. * * * Q. Did you call on him again for the deed? A. Yes, sir. Q. What did he answer? A. He said he would go and see Ma; said he did not know when he would come. I told him it was no use to go to Ma, for we didn't owe him anything. I also knew he wouldn't come without Uncle John Hamilton with him. I told him it wasn't worth while for any one of them to come to Ma's; that she wouldn't do anything about having the settlement, but, if he would let me know, I would come up there; that it wouldn't be worth while for me to wait on him any longer; that I would enter suit on him inside of three or four days if he didn't sign the deed. I also told him I had the deed in my pocket—a blank deed. Q. In this second conversation, did he ever give you any further information as to what this loan of money was for? A. Told me, at that time, he didn't know, but possibly it was for the Scott land. But I know that I was a big boy, plowing, when Pa bought the Scott land. Q. In any of these conversations, did Mr. Moore ever claim to you that he had actually ever bought the land from your mother and was the true owner of it? A. No, sir; he told me that he only taken a deed to it for \$400, and that Pa owed a debt here in town to some Jew, and that he failed to make a crop, and that in 1882, he was furnishing him, and that the Jew over there was about to sue him, and he furnished him that much money and taken a land note against the place. He went on to tell me about Ma refusing to sign the deed. Q. He didn't claim that he loaned money to your mother, or anything, for her debt? A. No, sir. (Cross-examined.) * * * Q. Didn't Mr. Moore tell you on that [the first] occasion that he had some notes against the estate, but that they had run out? A. Yes, sir. Q. Didn't he tell you that he wouldn't try to collect them out of your mother? A. Yes, sir; he told me that Ma didn't owe him a nickel in the world. A. Didn't you all say something about the Scott tract at that time? A. No, sir. Q. You know that Mr. Moore held a mortgage against that? A. Yes, sir. Q. Why is it that you, as an heir of your father, permitted this deed to be on record for so long a time, yet claiming that it is a mere mortgage, without taking some steps, before this late day, to have it canceled? A. I didn't know anything about it. * * * Q. And you state that you told Mr. Moore that it wouldn't do any good to talk to your mother; why was that? A. She didn't think that she owed him anything, and wasn't going to pay him anything. * * * Q. Your mother had some little land outside of this? A. Sixty acres or 100 acres. * * *

The deed here in question bears date June 23, 1882, and was recorded July 20, 1886. The Scott place was acquired by Hamilton, by purchase from Mrs. Sallie G. Scott, on January 11, 1889, for \$275, for which amount he gave a note, secured by mortgage on the property, and made payable January 1, 1890. Defendant offered the note in evidence, and testified that he paid the money for it to Scott's attorney. He also offered a note for \$200, dated February 13, 1890, and purporting to be signed by defendant and her husband, and testified that he let Hamilton have \$200 in money, and that he and his wife give the note. He further offered a note for \$77.91,

dated March 11, 1895, and signed by Hamilton, and testified that he acquired that, also for value. He testified that neither of the notes has ever been paid, and his testimony on that point is uncontradicted. He further testified that, if he spoke to Anderson or Thomas H. Hamilton about a mortgage, he referred to the mortgage on the Scott place, securing the note for \$275, and that when he told Mrs. Hamilton and Thomas H. Hamilton that Mrs. Hamilton owed him nothing—that the notes held by him had "run out"—he referred to the notes held by him and offered in evidence, and that he refused to deed the land here in controversy back to Mrs. Hamilton, because he owned it. He further testified that he paid Hamilton the \$400, being the price of said land, in the clerk's office at Farmerville; that the payment was made when the deed was written up and in the presence of Mr. Heard, who wrote it; that he paid the money to Hamilton, instead of paying it to his wife, because he was his wife's manager and he wanted the money to settle up a judgment; that the deed was not signed at the clerk's office, but that they went to Hamilton's house that night, when it was signed by Mrs. Hamilton, in the presence of the witness, and without persuasion or coercion on the part of Hamilton, or objection on the part of Mrs. Hamilton, so far as the witness knew; that he bought the land for the accommodation of Hamilton, and that no part of the price paid for it has ever been returned to him; that nothing was said about the transaction being one of loan and mortgage; that he allowed Hamilton to remain on the land because he agreed to pay \$50 per year as rent for the use of it, and that he (Hamilton) paid the rent for 17 years, at the rate, at first, of \$50, per year, but at a lower rate afterwards, when the crops were short; that he took no rent notes from Hamilton and gave him no receipts; that, in 1890 Mrs. Hamilton let witness have seven yearlings for that year's rent, and that for another year's rent Hamilton let him have 600 pounds of pork; that Hamilton last paid rent in 1901 shortly before he died, the payment having been made at witness' house; that witness did not state to Anderson that the deed here in question was only a mortgage to secure a loan, but told him that he had a mortgage on 60 acres of the Scott land, and had a deed to 160 acres; and that he did not know which of the tracts he (Anderson) wanted to know about. He further testified that Hamilton was his wife's brother, and that he allowed Mrs. Hamilton to remain on the place, after the death of her husband, because he felt sorry for her.

Opinion.

As plaintiff does not allege that she was influenced in her action by fraud, error, or marital coercion, she could not, if she were an ordinary person, be permitted to prove,

otherwise than by a counterletter, or interrogatories on facts and articles, that the written instrument executed by her, and purporting to convey title to real estate, was intended for another purpose. But, as a married woman attacking a contract, the purpose and effect of which she alleges is to create a mortgage upon her property for the security of a debt due by her husband, she enjoys the benefit of a different rule, and may prove the real nature of the contract, though it be in writing, by oral, as well as written, evidence. The door was therefore properly opened to her to prove, if she could, by parol evidence or otherwise, that the contract here in question, though in the form of a sale, was intended as a mortgage, to secure the debt of her husband, since it was unnecessary for the admission of such proof that she could allege either fraud, error, or coercion. Though afforded the opportunity, however, she has not proved that the contract was intended as a mortgage. She and the defendant were the only persons called to the stand who were capable of testifying, of their own knowledge, on that subject. She has failed to testify that the contract was intended as a mortgage. He has testified that it was not so intended, but was intended as a sale. The idea, then, seems to be that though it was open to plaintiff, as a witness, to testify directly in support of her allegation:

"That the real cause and consideration for which petitioner executed said purported act of sale was the loan of a certain sum of money by the said George W. Moore to petitioner's said husband, to secure the payment of which petitioner was induced to execute said purported act of sale, which was designed and intended by petitioner and her said husband and by the said George W. Moore only as a mortgage * * * and to have no other effect than to secure the payment of said loan"

—and though she failed so to testify, and failed to say on the stand that at the time of its execution anything was said, or intimated, by her husband or defendant, to the effect that the contract was intended as a mortgage, that intention is now established by her testimony and that of her son and of the witness Anderson as to certain statements, or admissions, which defendant is said to have made at different times, and more particularly within a few months preceding the institution of this suit, or about 29 years after the contract was made, and which admissions are said to find corroboration in the circumstance that defendant has allowed his alleged vendor, and after him his family, to remain in undisturbed possession of the property.

The statements which are thus attributed to defendant would seem to imply that, though he was steadily refusing to reconvey the property in question to plaintiff, he had no hesitation in admitting that he really had no title, that his pretended sale was a mortgage, and that the debt which it had been given to secure had long since been

paid, or become prescribed. But we think it quite evident that there was a misunderstanding. The witnesses were ignorant of the fact that defendant held the note of \$275, which had been secured by mortgage on the "Scott" land, the note of \$200, executed by plaintiff and her husband, and the note of \$77.61, and that he had allowed those notes to become prescribed; and when he, referring to them, said that he held some land notes, etc., but that they had run out, they (the witnesses) erroneously assumed that he was speaking of the only matter to which their attention had been directed, and that he was making the admissions, as to the contract here in question, as stated above. It is clear, however, under the circumstances that defendant's admissions that plaintiff owed him nothing, had no bearing upon the title to property acquired from her, under a regularly executed and recorded act of sale, for a consideration shown to have been paid in cash, and not shown to have been inadequate, and more especially as the supposed admissions mainly relied on are said to have been made nearly 30 years after the execution of said act and in the same conversations in which defendant refused to reconvey the property. Plaintiff and her son (the latter being 40 years old when he gave his testimony) rather seek to create the impression that they did not know, or learn, of the registry in 1886 of the act in question, but, it is not intimated in the pleadings, the evidence, or the argument that the assessor failed from that time to assess the property in the name of the registered owner, and as plaintiff's son testifies that he paid the taxes most of the time during her father's life, as I understand him, and plaintiff paid them afterwards for 10 years, it is difficult to conceive how they could have prevented themselves from acquiring that information. The supposed corroborating circumstances are equally as ineffective as the testimony to which we have thus referred. Defendant appears to have been a business man in easy circumstances, whose wife was the sister of plaintiff's husband, who, upon the other hand, is shown to have been embarrassed with debt during so much of his life as is disclosed by the record, and to have died in that embarrassment. The inference from the evidence is that in 1882, when the contract here attacked was entered into, he owned no property, and his wife owned none, save that which was the subject of said contract, and thereafter acquired none, save the "Scott" place, the entire purchase price of which was represented by the note for \$275, which was paid by defendant, and held by him until it became prescribed. From the best information conveyed by the record then, I conclude that, if defendant had taken possession of the property here in dispute, upon the execution of the act of 1882, plaintiff's husband and family would have been homeless. I do not find, therefore, that his

statement that he bought the property for the accommodation of his brother-in-law, that he allowed him to remain upon it under an agreement that he should pay rent, and, though he did not always comply with the agreement, that he allowed his family so to remain after his death, has in it any element of improbability. Our learned Brethren of the Court of Appeal, by whom this case was most carefully considered, found it strange that defendant should, as he says, have collected rent from Hamilton for 17 years, and yet that Hamilton's family should know nothing of it. The topic was probably not an agreeable one, as between the husband and wife, and Hamilton may have found that the less he said about it the better. Defendant testified positively that plaintiff herself turned over to him seven yearlings for the rent of the year 1890. Plaintiff testified that she had control of the cattle, but that she does not remember that circumstance. She may have forgotten it. But if she felt sure that it did not happen, it appears to me that she would have said so, and I accept the affirmative testimony of defendant as conclusive of that question. Upon the whole, I am of opinion that the contract here attacked was intended to be, as it purports to be, a contract of sale, and if the evidence coming from plaintiff were alone to be considered, that would be the end of the case. But defendant has testified that he paid the price of the property to plaintiff's husband, rather than to plaintiff, because the husband required it in order to settle a judgment which had been rendered against him, not in favor of defendant, but of some third person. He also testified that plaintiff's husband was her manager, and plaintiff admits it, and we do not understand that there would be any question of his authority, under ordinary circumstances, to receive the proceeds of paraphernal property sold by her. The questions which remain in the case therefore are: (1) Whether upon the petition of a widow whose husband has been dead for more than 10 years, alleging that a contract, entered into by her with his authorization, purporting to be one of sale of her paraphernal property, was intended as a mortgage to secure his debt, and as such void, and praying that it be so decreed, plaintiff is entitled to judgment, where it appears, from the evidence and from the admission of the defendant, that the contract was intended to be one of sale, but that the price to defendant's knowledge was to be applied to the payment of the husband's debt to a third person, and with plaintiff's consent was delivered to the husband for that purpose; (2) whether, considering the action to be one to annul a sale, upon the grounds stated, it is barred by the prescription of either 5 or 10 years.

1. The first of the questions mentioned is one which, though considered on several occasions, has but once been the subject of a

definite conclusion by a majority of the court, which has been made the basis of a judgment.

In *Courtney v. Davidson*, 6 La. Ann. 455, Mr. Justice Preston referred to certain cases in which it has been held that "in whatever form the wife might disguise her suretyship for her husband, she was not bound by the contract," and also to the *Senatus Consultum Velleianum* of the Roman law, to the effect "that the wife could recover back property sold by her to her husband's creditors in payment of his debt." But he proceeded (and so far as he was concerned made the view as thus expressed the basis of his judgment) as follows, to wit:

"None of these authorities expressly embrace the present case, in which the wife sold property, not to her husband's creditors in discharge of his debts, but to one who was not his creditor, partly for cash and partly for an obligation to take up her husband's debts, and now seeks to recover, not the property, but to compel the purchaser to pay the price a second time. And in deciding the case we are unwilling to extend the incapacity of the wife to contract, with a view to aid her husband, beyond that which is declared in the Code, in the articles cited [referring to articles 1784 and 2412, now 1790 and 2398]. She is incapable of binding herself as his surety, and will be relieved from all obligations to that effect. But our Code does not restrain her, with the authority of her husband, from alienating her paraphernal property, and, when disposed of, imposes no restriction upon her use of the proceeds, more than any other money belonging to her. The courts, therefore, can impose none; and perhaps the freedom of trade, good faith, and the true interests of society render it desirable that none should be imposed. It seems to me opposed to the real welfare of families that the husband should be involved in, and harassed with, honest debts, contracted perhaps in effort to improve the condition of his family, with a wife rich in money, but rendered incapable by law of relieving him."

The conclusion of the learned judge was that the plaintiff, then before the court, was not entitled to recover. Mr. Justice Rost was, however, of opinion that she might have recovered the property, but, suing on the contract, was not entitled to recover the price. And Slidell, J., and Eustice, C. J., concurred in the decree upon still other grounds.

In *Morrow v. Goudchaux et al.*, 41 La. Ann. 711, 6 South. 563, it was distinctly held, by the entire court, that a sale by a wife of her paraphernal property was good, though part of the purchase price was represented by the obligation of the purchaser to expend the sum for the account of the husband.

In the course of the opinion in the last-cited case, the court, after quoting C. C. 2397, which declares that the wife cannot alienate her immovable, save with the authorization of her husband, or the judge, except where the alienation of dotal property is permitted, and article 2398, which declares that the wife cannot bind herself for, or with, her husband for debts contracted by him, said:

"These articles have given rise to much discussion by commentators and jurists, resulting in quite a contrariety of opinion as to their true import in respect to a wife's alienation of her paraphernal property. The decisions of this court have been, in some cases, pushed to the extremity of announcing that (in) the two articles quoted, constituting, as they do, a separate chapter of the Code, which is entitled, 'Of the Wife's Incapacity to Alienate her Immovables, or Bind herself for her Husband,' the provisions of either may be considered as interpreting the other, and the prohibition contained in one as exercising control, in some sort, over the other. * * * With due deference to the decisions on this subject, we cannot subscribe to that theory. * * * After making a careful examination of the whole jurisprudence, we find no decision which so tersely expresses our views on this question as that in *Courtney v. Davidson*, 6 La. Ann. 455. It is as follows, viz.: [And then follows, in part, the excerpt that we have already made from the opinion of Mr. Justice Preston]."

In *Broussard v. Le Blanc*, 43 La. Ann. 941, 9 South. 908, the ruling so made was, in effect, affirmed, by differentiating it from the case then before the court, and which resembled that which is here alleged in the petition, but is not established by the evidence.

In *Lester v. Sheriff et al.*, 46 La. Ann. 340, 15 South. 4, it was held that, where a mortgage, by a wife, separate in property, to secure the debt of a husband, is disguised as a sale, the rights of an innocent third person, acquiring the note, given in the transaction for the recited price and secured by mortgage, will be protected. The wife, as we have seen, is incapacitated from alienating her immovables without the authorization of her husband, or the judge, and from becoming security for any debt contracted by her husband. C. C. 1790, 2397, 2398. On the other hand, C. C. 2390 declares that:

"Art. 2390. The wife may alienate her paraphernal property with the authorization of her husband, or, in case of refusal or absence of the husband, with the authorization of the judge; but, should it be proved that the husband has received the amount of the paraphernal property thus alienated by his wife, or otherwise disposed of the same for his individual interest, the wife shall have a legal mortgage on all the property of the husband for the reimbursing of the same. * * *"

The law, therefore, contemplates that the proceeds of the sale of the immovable property of the wife may be "received" by the husband (with her consent), or may be "otherwise disposed of" by him for his individual interest, and those conditions are present in this case; that is to say, the husband, with the consent of the wife (so far, certainly, as the purchaser of the property was advised) received the proceeds of the immovable property of the wife and disposed of the same for his individual interest, and, she, on complying with more recent requirements of the law, would have become entitled to a legal mortgage upon all of his property for the security of the same. There is nothing in the law which requires the wife to maintain any secrecy as to the fact that she intends to turn over the proceeds of her

property to her husband, or to allow him to receive such proceeds, to be used for his individual interest, or which requires him to keep it a secret that his most imperative interest is the settlement of a judgment that is about to be executed against him. I am therefore further of opinion that the contract here in question, being a contract of sale, was a competent one for plaintiff to have entered into, and that she is without standing to annul it on the grounds here set up, and, still further, that, even were the sale unauthorized, that the present attack upon it is barred by the prescription of five years, under C. C. 1786, 3521, and 3542, which declare that:

"Art. 1786. The unauthorized contracts made by married women, like the acts of minors, may be made valid after the marriage is dissolved, either by express or implied ratification."

"Art. 3521. Prescription runs against all persons, unless they are included in some exception established by law."

Article 3542, which declares that actions for nullity or rescission of contracts are barred by the prescription of five years. *La fitte et al. v. Delogny et al.*, 33 La. Ann. 659; *Brownson v. Weeks*, 47 La. Ann. 1042, 17 South. 489; *Jones et al. v. Jones et al.*, 51 La. Ann. 643, 25 South. 368; *Munholland v. Fakes*, 111 La. 931, 35 South. 983; *Doucet v. Fenelon*, 120 La. 44, 44 South. 908; *Hamilton v. Hamilton*, 130 La. 302, 57 South. 935.

I find no exception in favor of persons who have been allowed to remain in possession as here disclosed:

"The circumstance of having been in possession by the permission or through the indulgence of another person, gives neither legal possession nor the right of prescribing. Thus, those who possess precariously, that is, by having prayed the master to let them have the possession, do not deprive him thereof, but, possessing by his consent, they possess for him." C. C. 3490. *John T. Moore P. Co. v. Morgan & Co.*, 126 La. 891, et seq., 53 South. 22.

The Code of Practice declares that:

"Art. 20. He who has a right of action to claim what is due him, has a right yet more evident to use the same cause of action as an exception, in order to preserve his rights."

My conclusion, however, upon the further consideration of the matter, is that plaintiff has no such right as is contemplated by the article quoted, and hence that it has no application to the case.

I, therefore, respectfully dissent from the opinion and decree this day handed down.

PROVOSTY, J. (concurring). This case is here on writ of review. My own private opinion is that when cases in which the Constitution has denied a right of appeal to this court are brought up to this court by writ of review, it is not for the purpose of reviewing the facts, as if the complaining litigant had a right of appeal on the facts, but only for the purpose of reviewing the law. The true function of this right of review is to maintain uniform jurisprudence, and not to afford a litigant a hearing before this court

on facts in a case unappealable to this court on its facts. A litigant has had his full day in court on the facts of his case when the tribunals appointed by the Constitution to pass on the facts of his case have done so. I do not mean to say that this court has not jurisdiction to pass on the facts in such a case; but simply that it should be as reluctant to disturb the judgment below on the facts in such a case as it is reluctant to disturb the verdict of a jury on the facts—indeed, very much more reluctant, as the verdict of a jury on the facts is appealable to this court under the Constitution, whereas, under the Constitution, the cases which are brought up to this court by writ of review are not thus appealable.

However, be that as it may: What are the facts? At the time this contract was entered into this property was the home of the plaintiff and her husband. It was their only home and hence they had, and could have, no earthly motive for desiring to sell it; and the defendant, on the other hand, who was a relative of plaintiff's, and a man of means, with a home of his own, could have, and had, no earthly motive for buying it. He does not pretend to have bought it by way of investment or speculation, but simply to have bought it. But while these parties were thus utterly without any motive or desire to buy and sell, they did admittedly desire the one to borrow and the other to lend. The husband stood in need of a loan, and the defendant, as his relative and friend, was willing to make the loan. Defendant does not pretend to say that he had any need of the property, or desired in any way to become the owner of it. All he desired was to lend the money to plaintiff's husband for helping him out of his troubles, but to be secure in doing so. He knew as a business man, or perhaps was advised, that a wife cannot mortgage her property for a debt of her husband; but he knew, or perhaps was advised, that a wife can sell her property, and that it is no concern of the vendor what she does with the money.

Such being the law, the uninitiated suppose that the law which protects a married woman against binding her property for a debt of her husband can be easily circumvented by simply giving to the contract of security the form of a bill of sale; and we know by common experience that this subterfuge is being constantly resorted to. But these forms are mere cobwebs, which the law brushes aside, when facts are developed which show that the parties have resorted to them merely to cover up or disguise a contract by which the wife's property is to be made to stand security for a debt of the husband.

And, in judging whether a contract, on its face a sale, was really intended to be such or mere security for a debt of the husband, no circumstantial fact is more significant

than that of possession. When a person buys, unless by mere speculation or for the sake of investment, it is for the purpose of getting possession and enjoyment. If the vendor continues in possession, the Code declares that this, in the revocatory action, or in the action on declaration de simulation, shall be taken to be a badge of fraud; that is to say, it shall be taken to be evidence that the contract was not intended to be a bona fide sale. The plaintiff testifies that she continued in undisturbed possession of this property, never knowing that defendant pretended to be owner of it, and that at the filing of this suit, 30 years and more after the pretended sale, she was still in undisturbed possession; that during all this time she and her husband paid the taxes on the property. Defendant does not deny this, but says that plaintiff's husband was his lessee, and paid him rent until his death, and that thereafter he (defendant) let plaintiff remain in the quiet enjoyment of the property rent free, because she was a poor widow. Plaintiff testifies that defendant never claimed ownership of the property; that he even disclaimed having any rights upon it, his mortgage rights, as he said, having run out of date; that the first time she ever heard of defendant's having rented the property to her husband was when the defendant's statement to that effect was made on the witness stand on the trial of this case. Her son, a man 40 years old, who during all these 30 years lived either with his mother on this land or in the immediate neighborhood, testified that he never heard of defendant's pretending to own this property; that he never knew or heard of his father's paying any rent for it; that when, just before the filing of this suit, he applied to defendant to remove the cloud from his mother's title by making a deed to her of the property, defendant did not pretend to own the property, but, on the contrary, said that he had had a mortgage upon it, but that it had run out of date. Another witness who, wishing to buy the timber on the land from plaintiff, and having ascertained, by looking up the records, that the record title was in defendant, saw defendant in regard to the matter, testifies that defendant told him that he had had a mortgage upon the property, but that it had run out of date. Against all these probabilities and all this positive testimony there is nothing but the uncorroborated testimony of defendant. The two lower courts do not seem to have had any difficulty in holding against defendant on these facts.

Coming to the law propositions. The one which the learned counsel for defendant argued at greatest length, and upon which apparently he placed his main reliance, is as to whether a wife may, without alleging violence, error, or fraud, be allowed to prove by parol that her written act of sale was in

reality a mere contract of security for a debt of her husband. This proposition I will not discuss, as it is fully covered by the original opinion.

The other legal questions arise from defendant's plea of prescription. The plea is founded upon article 3542 by which "actions for nullity or rescission of contracts" are barred by the lapse of five years.

Plaintiff's action is twofold: First, to have the true nature of the contract established, by having it declared to be a mortgage and not a sale; and, secondly, to have the mortgage annulled. The first of these two actions is an action neither in nullity nor in rescission, and therefore does not fall under the prescription of actions of that kind. The second of these actions is in nullity, and falls under said prescription, and is barred, unless the course of the prescription has been suspended or constantly interrupted by plaintiff's continued possession, in accordance with the maxim, "*Quæ temporaria sunt ad agendum, perpetua sunt ad excludendum.*" By a copious jurisprudence going back to the Martins and coming to our day, the existence of the principle embodied in this maxim has been recognized under our Code, and its existence under our Code is not contested by the brief of defendant's learned counsel, but only its applicability to this case. It is said by learned counsel that it does not apply to this case because the possession of plaintiff was precarious—"by the permission or through the indulgence" of defendant. And learned counsel contend further that this maxim cannot be invoked by a plaintiff, but only by a defendant.

There can be no doubt whatever that if the plaintiff's possession was precarious, in other words, if she was holding possession "by the permission or through the indulgence" of the defendant, she cannot invoke this maxim. But was she so holding? Yes, if the contract in question was a real sale—was intended to transfer the ownership of the property; for then the defendant would have become the owner, and she a mere tenant by lease or by mere sufferance. No, if the said contract was a mere contract of security, or, so-called, mortgage; for then she would have continued to be owner, and her continued ownership would have been as owner, and not as a tenant of defendant either by lease or sufferance.

To hold that plaintiff's possession was precarious, or, in other words, by lease or by sufferance, is to hold that the contract in question was a real sale intended to transfer to defendant the ownership of the property; and to hold this is to put an end to the case, and thereby to remove all occasion for pleading prescription, for if the contract was a real sale and not a mere mortgage, there is an end to the case.

Before this question of prescription can be of any interest in the case, the conclusion

must first be reached that the purported sale was a mere contract of security, or, in other words, that plaintiff continued to be owner. And, if so, she, of course, was not a mere tenant of defendant, either by lease or by sufferance, and her possession was not precarious.

The question of whether plaintiff's possession was as owner or as tenant stands before that of prescription. If she held as tenant, the question of prescription cannot arise; for the suit itself is at an end the moment that conclusion is reached. It is only if the purported sale was a mere, so-called, mortgage, and she held as owner, that the question of prescription can arise. We can reach this question of prescription only after we have found, as a fact, that the said contract was a mere, so-called, mortgage, and that, therefore, plaintiff's continued possession was as owner, and not as tenant, or precarious.

If the question of prescription is to be debated at all in this case, therefore, it is to be on the hypothesis that plaintiff possessed as owner; it is to be as to whether prescription will run against the party in possession as owner. I proceed, then, to discuss it on that hypothesis.

The meaning of the maxim *quæ temporaria*, is that prescription will not run against the party in possession. In the opinion which I originally prepared in this case, from which a rehearing was granted, I contented myself with quoting on this point what this court said in the case of *Delahoussaye v. Dumartait*, 18 La. 91. This appeared to me to be all-sufficient, and I still cannot conceive how anything further could be needed. However, I shall now make some further citations.

In that case this court said:

"This rule * * * is now * * * well understood to exist only in favor of a defendant in the possession or exercise of the property, right, or position attempted to be taken from him. If, for instance, a vendor is left in possession of property after a sale of it which might have been annulled on the score of lesion, he may remain silent as to this defect in the contract, and reserve to himself the right of pleading the nullity of the sale, by way of exception, whenever he shall be sued by the purchaser for the delivery of the property; until then he has no interest to bring a suit; he might consider the contract as a nullity, and believe that the purchaser will never call for its execution; hence the maxim, '*Possidenti non competit actio ad exceptio.*' If, on the contrary, such a vendor had delivered the property, and suffered the purchaser to remain in possession a length of time sufficient for the prescription of the action of rescission, he could not afterwards, by bringing the petitory action, thus compel the purchaser to produce his title, and then by way of exception ask for its nullity or rescission."

In *Lea v. Myers*, 4 Rob. 14, this court said:

"This question is not new in our jurisprudence. * * * In *Delahoussaye v. Dumartait*, 18 La. 92, * * * this court held that 'this rule * * * is now well understood to exist only in favor of a defendant in the possession or exercise of the property, right, or position attempted to be taken from him.'

"It cannot, in our opinion, protect a party who has remained silent and suffered a purchaser to remain in possession a length of time sufficient for the prescription of the action of rescission; and, as Toullier says (volume 7, No. 602), 'if the exception is perpetual, it is when the contract has not been executed.'"

In *Marshall v. Grand Gulf R. R.*, 12 Rob. 202, this court said:

"Until the contract alleged to be fraudulent is sought to be enforced, the party affected has no interest in opposing it. We had occasion to consider this maxim and its proper application, in the case of *Delahoussaye v. Dumartrait*, 16 La. 91. It has been applied in numerous cases."

In *De Lallande v. De Lallande*, 10 La. Ann. 220, where a partner was called upon to account for sums he had received, and he sought to offset them with sums which he had paid out, the maxim was applied.

Toullier, vol. 7, p. 708, says:

"Let us suppose that a married woman has sold her property without the authorization of her husband. If the purchaser has possessed for 10 years since the death of the husband she will have irrevocably lost her right of action in nullity, but if she has remained in possession, if the contract has not been put into execution, she will have the right perpetually to avail herself of the nullity of the act."

Again, at page 718:

"Besides, if the action is temporary while the exception is perpetual, it is when the defendant has remained in possession; in a word, when the contract has not been executed. If, for example, a vendor, after having left the purchaser in the peaceable possession of the thing sold for more than 10 years without having instituted the action in nullity or rescission against him, were to exercise against him the action in revendication (the petitory action) so as to compel him to set up the contract, and should then set up the nullity by way of exception, this exception would be met by the plea of prescription after 10 years, because this unusual mode of proceeding would manifestly have been resorted to for the purpose of circumventing the law."

Troplong, Prescription, vol. 2, No. 827, p. 404, says:

"All are now in accord that the rule in question (*quæ temporalia*) is restricted to the case where the defendant who sets up the exception is in possession of the thing, or in the enjoyment of the liberty, which the contract set up against him would have the effect of depriving him of.

"* * * So long as I remain in the enjoyment of the thing I have sold you by a contract tainted with lesion, I may remain silent, reserving to myself to set up the nullity whenever I shall be attacked by the purchaser demanding delivery.

"As thus restricted, the rule *quæ temporalia*, etc., is an homage to reason. It is but the expression of this constant and palpable truth: That the party in possession cannot be prescribed against; that one who is in the enjoyment of a position or status of any kind has need only of an exception to be maintained in it and not of an action. Hence Azon well observes in his famous adage: '*Posidenti non competit actio sed exceptio*.' Indeed, why should one who is in quiet enjoyment, not being troubled, take the initiative in a contest which would make him lose the advantageous position of a defendant in order to play the part of a plaintiff, a part environed always by perils. We were speaking a while ago of the lesioned ven-

dor; let us recur for a moment to that illustration: When the party who has been deceived to the extent of more than seven-twelfths in the price of the sale sues to annul the contract, it is because he wishes to get back the thing he has sold. The annulling of the sale is but a preliminary to the getting back of the thing. But, what if he has the thing already, by reason of the contract not having been carried out, is it right to compel him to cast himself into all the dangers of a lawsuit in order to obtain a thing which, as a matter of fact, he has already; to procure the decretal of the nullity of a contract which he has every reason to believe is as if having never been entered into, since it is not being sought to be carried out? In fact, who knows whether the purchaser has any idea of ever seeking to avail himself of it? Who knows that his intention has not been to abandon it? But, lo and behold! perhaps a sudden attack will provoke his resentment, and prompt him to engage in a contest. After all, lawsuits have their chances; he who may believe himself most secure in his right may fail; and our vendor who has opened the arena, thinking to relieve his possession of a possible cause of trouble, may well find himself compelled to recognize the legality of the title contested by him, and to abandon his possession; so that he will have himself, brought on the event which will have despoiled him entirely. It is evident that the most vulgar prudence would advise a different course. The rôle of the possessor is to await attack, and never to provoke it."

Merlin, Rep. de Juris. Vo. Prescription, Sec. II, para. XXV, page 815, says:

"Hence, for the same reason, although the vendor has, under article 1776, C. C., only two years within which to sue for rescission of a sale for lesion beyond seven-twelfths, yet if the purchaser leaves him in possession during these two years, and comes only thereafter to claim delivery of the thing sold, no doubt whatever but that the vendor is still in time to set up the defect of the contract, and to ask that the demand of the purchaser be rejected, in default of his supplementing the price."

Speaking of the action in nullity, this same learned writer, under the title of Nullity, para. 8, Sec. 2, p. 665, says:

"If the person entitled to invoke it continues to possess the thing which forms the object of the contract, no lapse of time can bar it."

We are fully informed by these citations as to how and when this maxim comes into play for preventing the running of prescription. It is but the application to the prescription *liberandi causa* of the fundamental principle of the prescription *acquirandi causa*, that prescription does not run against the party in possession.

The learned counsel for defendant cites *Vaughan v. Christine*, 3 La. Ann. 328; *Lafitte v. Delongy*, 33 La. Ann. 659; *Brownson v. Weeks*, 47 La. Ann. 1042, 17 South. 489; *Munholland v. Fakes*, 111 La. 931, 35 South. 983; *Doucet v. Fenelon*, 120 La. 44, 44 South. 908; *Hamilton v. Hamilton*, 130 La. 302, 57 South. 935.

All these cases involved executed contracts, in which the maxim *quæ temporalia* was not invoked, and would not have been applicable if invoked.

Learned counsel argues that the present suit has not been brought by defendant

against plaintiff, but by plaintiff against defendant, and that therefore plaintiff cannot invoke this maxim. This appears to me to be in the nature of a play upon words. The law looks to the substance of things, and attaches importance to form only in those exceptional cases where form is sacramental. Counsel's argument amounts to this: That this principle of the law of prescription would have had application to the case if the suit had been brought by defendant, but that it has no application because the suit has been brought by plaintiff. In other words, that the rights of these parties are to be determined, not in accordance to the legal principles applicable to them, but according to who has brought the suit. This is the same argument by means of which parties not in possession have vainly sought in the past, in many cases, needless to be cited, to avail themselves without right of this maxim *quæ temporalia*. They said they were defendants and were setting up this maxim by way of exception, and therefore were entitled to its benefit. The court very properly told them that the operation of this maxim was to protect the party in possession, and that it made no difference that the party seeking to invoke it was a defendant and was setting it up by way of exception; he could not avail himself of it if he was not in possession. The substance of things in the present case is that the defendant is seeking to enforce in the present suit this act of sale. Such would be the effect of rejecting plaintiff's demand.

In substance, the situation is precisely as if defendant were suing plaintiff to obtain delivery of the property. By resisting the demand of plaintiff, the defendant is, in effect, averring that the contract in question was a real sale, and is asking the court to enforce it as such. Against such a demand, no matter in what form instituted, the plaintiff in this case has the right to say that the contract was null because it was for a debt of her husband, and when prescription is pleaded against her she has the right to say that prescription does not run against the party in possession, according to the maxim, "*Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum*." The practical operation of the doctrine advocated by counsel would amount to this: That while plaintiff might have let the status quo continue indefinitely and still be in time to invoke, by reconvention or exception, the nullity of the pretended sale whenever defendant sued her for delivery of the property, she cannot be allowed to bring a suit to remove this cloud from her title; that she must suffer her property to remain indefinitely under this cloud—out of commerce, as it were—until it shall please defendant to bring a suit to enforce a pretended sale which he knows not to be such and to be unenforceable as such, and thus afford her an opportunity of causing this cloud to be

removed from her title. It can hardly be necessary to say that our law and our system of procedure are not thus impotent.

(136 La. 636)

No. 20210.

Succession of CHOPIN.

(Supreme Court of Louisiana. Jan. 11, 1915.
Rehearing Denied Feb. 23, 1915.)*(Syllabus by the Court.)*

DESCENT AND DISTRIBUTION ¶8—SUCCESSION—GOOD WILL OF BUSINESS—RIGHTS OF MINOR HEIRS—FORFEITURE.

Where the head of a family dies, leaving a wife and minor children and a practically insolvent succession, included in which latter is the good will of a business involving, mainly, manual labor, such as the care of gardens and lawns, and the eldest boy, with the consent of the mother, after attempting to conduct such business as the agent, and for and on behalf of the estate, declines to go further in that capacity, but assumes the business for his own account and is thereby enabled to pay the debts of the succession and to provide shelter and protection for his mother and the other minors in a home of their own, until the minors are able to provide for themselves or are otherwise provided for by marriage, they have no standing, years after attaining majority, to claim an interest in the business so conducted, the good will of which could have been of no value to them, save as assumed by their brother, under the circumstances and for the purpose and with the result stated.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 33-39; Dec. Dig. ¶8.]

Appeal from Civil District Court, Parish of Orleans; George H. Théard, Judge.

Succession of Gustave Chopin. Action by certain minor heirs of Gustave Chopin against Peter A. Chopin. From judgment for defendant, plaintiffs appeal. Affirmed.

Woodville & Woodville, of New Orleans (J. B. Rosser, Jr., of New Orleans, of counsel), for appellants. Frank Wm. Hart, of New Orleans, for appellee Peter A. Chopin.

MONROE, C. J. Plaintiffs, Octavia Mary Chopin, wife of Thomas J. Wetta, Theresa Frances Chopin, wife of Albert Kinlock Falconer, Leon Frederick Chopin, and Jean Baptiste Joseph Chopin, all children and heirs of Gustave Chopin and Frances Rouyer, his wife, both deceased, prosecute this suit against their brother and coheir, Peter A. Chopin, for an accounting and for the recovery of their alleged four-fifths interests in the business conducted by him, in the proceeds of certain real estate, inventoried and sold in the succession of their father, of other real estate acquired by defendant, in his own name, and alienated by him, and in certain other real estate, so acquired, and still standing in his name; the allegations upon which the prayer of the petitioners is predicated being, in effect: That their father, who was engaged in business as a florist and landscape gardener, died in 1892, leaving a

widow, who was wholly illiterate, and five children, of whom defendant was 17 years of age and the eldest, and the others, plaintiffs herein, were 15, 13, 9 and 6, years of age, respectively; that, though the widow took out letters of administration, she intrusted the actual administration of the estate to defendant; that he has since then continued and is now continuing to conduct the business of their father in his own name, without accounting to them with respect to, and without having acquired their interests in, the same; that the father died leaving five lots of ground in square 263, bounded by Camp, Berlin, Milan, and Chestnut streets, and two lots in the square bounded by Willow, Clara, Second, and First streets; that on July 12, 1892, defendant, through their mother, as administratrix, provoked the sale of the Willow street property, for the payment of the debts of the succession, received the proceeds, amounting to \$501, and has never accounted for same; that on August 1, 1896, acting through said administratrix, as his "tool and mouthpiece," he provoked the sale of three of the Camp street lots for the payment of a pretended indebtedness of the succession to him of \$1,972.08; that said alleged debt was "fraudulent, fictitious, and not due, has never been recognized or adjudicated in any form in said proceedings of their father, and no account filed therein"; that said lots were, none the less, adjudicated to defendant at the price of \$1,850, which was set off by a like amount of said alleged debt, the whole proceeding being in pursuance of a fraudulent scheme, conceived by defendant, to appropriate to himself the entire estate of his father and mother, and the result of the carrying out of which has been that petitioners have received nothing from the succession of their parents save their interest in two of the lots in square 263, while defendant has accumulated a considerable estate, consisting partly of the property and business of their father and partly of the earnings and accretions thereto in the hands of defendant, for all of which he should be held to account.

"Petitioners aver that the following constitutes the real estate bought by the said Peter A. Chopin from the money and the proceeds of the property and business of their said father which he continued to conduct after the death of their said father without any right to the ownership thereof and which said business he was conducting for their account and benefit."

And then follow the descriptions of 12 different pieces of real estate, alleged to have been acquired by defendant, and some of them to have been sold again at various dates during the years from 1895 to 1912, inclusive.

Defendant pleaded exceptions of no cause of action, prescription, and estoppel, and answered, in effect, that he conducted the business of his father but a short time after his father's death, for which he made a settlement with the administratrix, and that, since then, he has been carrying on a business of

his own, in which plaintiffs have had no interest.

The questions presented involve mainly issues of fact, upon which the judge a quo, as we infer, found for the defendant, since he rejected plaintiffs' demands, at their cost. Plaintiffs have appealed, and defendant has answered praying for a more definite ruling upon his exception.

We find the facts to be as follows:

Gustave Chopin died February 7, 1892, leaving a widow and the five children who are now before the court, and who were minors, aged, approximately and respectively: Peter, 18; Octavia, 15; Theresa, 13; Leon, 9; and Joseph, 6 years. He left an estate, in community, consisting of movables, appraised at \$261, and immovables, appraised at \$2,000, and debts to the amount of about \$2,000; of which \$1,000, with probably some accrued interest, was represented by mortgage and vendor's lien notes, given in payment of three-fourths of the purchase price of four (out of five) of the lots in square 263, and other amounts were represented by bills for rent, bread, milk, etc., with respect to which the family seem to have fallen behind by reason of the fact that the decedent had suffered a stroke of paralysis some seven months prior to his death. The succession was opened by the widow, who qualified as administratrix. The notary, who appears to have known her well, says, in his testimony:

"Mrs. Chopin was not an ignorant woman. She was an illiterate woman. She had no education. But she was a woman of strong character and good common sense. * * * Oh, yes; Mrs. Chopin was very familiar with everything" (relating to the condition of the estate of her husband).

The defendant was the eldest of the minors and had been working with his father, and, during the illness of the father, had been in charge of the business; and, as he appears to have been intelligent and efficient, his mother, naturally, looked to him as her main support in the trouble which had come upon her, since the next in age were the two girls, of 15 and 13, respectively, while the other two boys were, the one 9, and the other but 6, years old. At the suggestion of the notary, who seems also to have been a friend of the family and to some extent their legal adviser, an advertisement, bearing defendant's signature, was inserted in the newspaper, to the effect that the business of the decedent would be continued for the benefit of the family; and defendant undertook to continue the business in that way. Although, however, the decedent had held himself out as a "florist, horticulturist and landscape gardener," and was doubtless well entitled to do so, the main business in which he was, and had always been, actually engaged, was (to use the language of one of the witnesses) "gardening on the outside, jobbing, contracting and doing new yards and all kinds of things like that"—a business which consisted, prin-

cially, of hard manual labor, such as digging in the ground with a spade or hoe, pushing a lawn mower, handling a wheelbarrow, and the superintendence of the men employed to assist in that kind of work. But even that work required some capital, for the laborers had to be paid, though the collections might be delayed, and decedent left but \$34.63 in bank, and was behind in such payments at the time of his death. The family were obliged to leave the house in which they had been living, because of their inability to satisfy their landlord, who was also their baker, as to his past-due rent and bread bill, and were refused another, after the keys had been given to them and the girls had put it in order, because their credit was bad. It is not surprising, under the circumstances, that defendant should soon have realized that he had assumed a heavier burden than he could, or could reasonably have been expected to, carry. He was to do all the work, under the disadvantage of acting as agent, though a minor, for a practically insolvent succession, and the product of his labor was to be divided in the proportion of nine-tenths to his mother and sisters and brothers and one-tenth to himself.

On the other hand, he found that people were more willing to deal with him personally than as such agent, and he therefore, at the end of about three months, again consulted his mother and the notary, and his mother readily consented that he should go on with the business in his own name and for his own account and that he might make use, for that purpose, of a horse and wagon and of certain gardening implements belonging to the succession. The horse gave out in a short time, and was sold, with the consent of Mrs. Chopin, for \$10, which was turned over to her, and the wagon and implements were not worth more than \$100, at the outside. It appears to have been understood that defendant was to do his best to placate the creditors of the succession, to keep the property from being sold at a sacrifice, and to maintain the family and keep it together; and it may be here stated that he did those things. The debts of the succession were gradually paid, the family was kept together in a home of their own, the girls were there maintained until they were married, and the boys were there maintained, and sent to school, until they arrived at the ages of 15 and 16 years, respectively, when, still living at home, they were employed by defendant and paid such wages as they were able to earn. The amounts paid out by defendant for the clothing and shoes of his sisters and brothers were charged to them and were accounted for by them, when they married or attained majority; that is to say, he released the debt of one sister, as a wedding present, and was paid by the other, because he thought that he had previously given her the equivalent in some other form, and the boys repaid him in money or work. But he was

not reimbursed, nor has he asked to be reimbursed, the amount expended during a number of years for the maintenance of the family, and which he estimates at \$6,000 or \$8,000.

Defendant started in business for himself, probably, in May, 1892 (the exact date not being fixed by the testimony), and took an office that his father had once occupied, in a carpenter shop, at Third and Magazine streets; the premises in square 263 (which we shall call the Camp Street property) being then occupied by a tenant, named Lagrue, to whom it had been rented by the administratrix. Soon afterwards, it became necessary to pay some of the more pressing debts of the succession, and the administratrix petitioned the court to order the sale of the two Willow Street lots, which were appraised at \$200, but for which defendant had found a purchaser who was willing to bid \$500. To the petition was attached a statement showing the following debts, to wit: Expenses of last illness, \$85; funeral expenses, \$121; notes secured by mortgage on Camp Street lots, \$1,000; taxes, \$74; expenses of administration, \$150; note (for money borrowed from an employé) to John T. Dubos, \$90. And the lots were sold for \$501.

To the amount thus realized, there appears to have been some addition from other sources, making a total of \$972.69, with which the immediate necessities of the occasion were tidied over, and the debts that were not paid therefrom were taken care of, and paid, within the succeeding four years, by defendant, together with certain other bills that were incurred during those years. On August 1, 1896, the administratrix filed another petition, alleging "that the estate owes a debt of \$1,972 to P. A. Chopin, being disbursements made by him for account of the estate, as per detailed statement hereto annexed," and praying for an order for the sale of three of the Camp Street lots, and the order was given, and the sale made, accordingly; the adjudicatee being the defendant, and the price being \$1,850. The detailed statement annexed to the petition is signed by the defendant, and was evidently intended to serve, at once, as a statement of account between him and the administratrix and between the administratrix and the succession. It shows the total amount (\$972.69) which had been received for account of the succession, and the various debts and charges in payment of which that amount had been disbursed; the disbursements exceeding the receipts by \$24.88, which had been advanced by defendant. It shows further payments, for which defendant had advanced the money between February 1, 1893, and, say, June 26, 1896, as follows, to wit: Addition and repairs to house, \$375; curbing, \$57.40; sidewalk, \$145.15; 112 loads of filling, \$33.60; 20 loads of filling, \$46; three (mortgage) notes, with interest, \$1,330. In explanation of the item of \$375, it may be said that there

was, on the Camp Street lots, or one of them, a three-room house, which, in view of the difficulty that was experienced in renting a house, it was decided should be enlarged, by the addition of one room, and repaired, and occupied by the family, and the \$375 was spent in the enlarging and repairing. The evidence is, however, conclusive and uncontradicted to the effect that, time and again, whenever one of the plaintiffs attained majority, an informal family meeting was convened, attended by the family friend, the notary, and the account in question was explained and gone over to the satisfaction of all present; and we are of opinion that the conduct of the plaintiffs, in alleging "that the said debt" (referring to the balance of \$1,972.03, shown by the statement in question to be due to defendant) "was fraudulent, fictitious, and not due," and yet failing upon the trial either to withdraw, or to offer a syllable of evidence in support of, that allegation reflects severely upon their good faith in the prosecution of this suit, since it is evident that they must have known, in making it, that the allegation was equally untrue and unjust.

It is shown that, shortly after the death of his father, defendant found considerable profit in treating orange trees for a disease which had appeared among them; and that, somewhat later, co-operating with others, he made money in buying and selling real estate, usually pieces which required the investment of no large amounts of cash. In the meanwhile, he had developed the business of cultivating, at his own establishment, of buying and selling, flowers and plants, and of floral decoration, at entertainments, ceremonies, etc., and, in 1900, he bought lots and opened a place at the corner of Magazine and Eighth streets, where that business increased to such an extent that he concluded to give up, entirely, the business of attending to the gardens and lawns of customers, which, in 1905, he sold to his brother Leon (who had recently married) for \$150; and Leon thereafter sold an interest to the younger brother, Joseph, and the business was conducted by them under the name of "Chopin Bros.," for perhaps two or three years, when it proved a failure, although it is admitted that it was more prosperous when Leon acquired it, in 1905, than when defendant took it over, in 1902, and, though they borrowed \$400 to start with, whereas defendant had but \$18. The \$150 was paid, at some inconvenience (as we infer from the testimony), in installments, which were taken from collections, as paid by different patrons whose lawns or gardens were kept in order, and the \$400 was borrowed from the notary, and yet the two brothers, Leon and Joseph, adhere to the theory that the business thus purchased by them was dealt with as an asset of the estate of their father, which defendant was holding and administering for account of the widow and heirs, and in which they (Leon and Joseph) had an interest as heirs. They

testify that the amounts received by them while working under defendant (from \$25 to \$50 per month) were not paid or received as wages, but as allowances from the estate; that they accepted those amounts on that account, and in order that, upon the final settlement, there might be more left in the estate for division; and that they could have made \$75 or \$85 per month doing the same work elsewhere; and yet, when they took the business themselves, they failed in it within but a short time, and, when they failed, they did not find, or seek, so far as we are informed, the work to which they refer, but accepted positions as motormen, at \$60 per month, or less. There are witnesses, however, who testify that the brothers told them that they were working for Peter, that Peter had a good business, and was well able to get married, etc. The sisters, also, adhere to the theory that all that defendant has been doing in the way of business, since the death of their father, has been as the agent of the widow and heirs; that, though they have known that he was conducting his business in his own name, and according to his own views, he has always admitted that it was being conducted for the benefit of the estate; and that such admissions were made at the family meetings to which we have referred. We find an exception, in that respect, in the testimony of Mrs. Wetta, whom defendant appears to have called to the stand, unexpectedly, as we infer, as upon cross-examination, and who then testified, in part, as follows:

"Q. When did you first conceive the idea that you had an interest in Peter's business? A. After Papa died; we always felt there was an interest in it for us. Q. When did you first make a demand on Peter for a settlement of the business with you? A. When I was 21 years old. Q. What sort of demand did you make on him? A. I went to Peter and said: 'I am 21 years old, and married, and I would like to have the portion of the estate that is coming to me.' And Peter said to me: 'What do you want to do that for? Don't go and take it, now; wait 'til the younger children get older, and we will all come together, and I will make a settlement with you.' * * * Q. When the youngest child became of age—Peter said when the youngest child became of age, he would make a settlement. Did you go to Peter and demand a settlement? A. Yes, sir. Q. When was that? A. When Joe was 21 years old. That is about 8 years ago. That was before my mother's death. Q. Was there any settlement made then? A. No, sir. Q. Why? A. Because there was no settlement made. * * * Q. What attempts did you make to get it, other than to ask Peter for it; what did you do when— A. We went to Peter and asked for our portion of the father's estate. Q. What did he say? A. He always said there was nothing coming to us. Q. That was eight years ago? A. Yes, sir; and, at present, he says the same thing. * * * Q. You say he always denied it—that there was something coming to you? A. There is something coming to us. Mama always told us—Q. I am not asking you that, now. I am asking you what Peter told you. You say Peter always told you that there was nothing coming to you? A. Yes. Q. Who supported the family from the time your father died? A. My brother. Q. What brother? A. Peter."

The notary, who has since departed this life, testified, positively and emphatically, that, at the family meetings to which we have referred, there was never any suggestion that the business conducted by Peter was the business of the estate, and that the explanations that were made in regard to the estate always proved entirely satisfactory; the fact being, as we apprehend, that plaintiffs have confused the question of the settlement of the estate with that of the status of the business conducted by Peter. Mrs. Wetta, for instance, attained her majority in 1898, after the Willow Street and the three Camp Street lots had been sold and the debts of the succession paid, and there was nothing left in the estate save the other Camp Street lots, of which Mrs. Chopin had the usufruct. There was therefore no settlement of the estate to be made at that time with the children, or at any time afterwards until Mrs. Chopin died. In the meanwhile, the defendant had long been conducting a business of his own, the most prosperous part of which was a business that his father had never conducted, save in the most limited and casual way. In 1902 the plaintiffs herein (with the exception of Joseph, who was still a minor) executed an act (called a sale) whereby they conveyed to defendant their respective interests in the rear portions of the Camp Street lots which were still left in the succession, in exchange for a portion of the lots in square 263, which had been sold to him in 1896 (or 1897). In 1905, defendant sold the business of outside gardening to his brother Leon, who paid for it as in the case of any other purchase, and who sold an interest in it to Joseph, as he would have sold any other property. And, in 1910, all the parties before the court joined in a petition praying to be put in possession of the estate of their mother, to which petition there is attached the affidavit of Leon Chopin, to the effect that the decedent left no other property than the lot of ground described in the petition, being the lot made up from the original Camp Street property, as hereinabove appears.

Plaintiffs' counsel argue that defendant could not have acquired, and never did acquire, as his own, the business that his father was conducting. We must, however, first distinguish between the business of outside gardening, upon the one hand, in which Gustave Chopin was engaged, and the business of cultivating in his own garden, and dealing in, plants and cut flowers and the business of floral decoration, in which alone defendant was engaged when this suit was brought, upon the other hand, and in which his father was never engaged to any appreciable extent. As to the business last mentioned, the plaintiffs have not a color of standing. As to the business first mentioned, it is true that, under ordinary circumstances,

one cannot, of his own motion, make himself the owner of that which he has received in the capacity of agent or fiduciary; but the circumstances under which defendant acted were not ordinary, and he cannot be said to have acted of his own motion, or so much even for his own advantage as for the advantage of the plaintiffs now before the court, and of the mother of them all, with whose consent and approval he, at first, attempted to conduct the business in question in the capacity of agent, for, and in behalf of, the estate, and then, with the same consent and approval, undertook to conduct it for his own account, as being the only way in which it could be either saved or conducted to the advantage of any of those who were interested. It is evident that, if defendant and his mother had allowed matters to take the ordinary course, the property of the succession would have been sacrificed at forced sales, for an insufficient amount to pay the debts, and the whole family would have been thrown homeless, upon the charity of the world, unless the two mentioned had found means to provide for them in some other way. It is equally evident, we think, that the good will of the business in which Gustave Chopin was engaged would have sold for nothing, for a number of witnesses, who are familiar with that business, testify that it is worth nothing, because of the difficulty in making effective delivery, and where the sheriff makes such a sale, for a succession, the difficulty amounts to an impossibility. The defendant therefore, in assuming the business in question, deprived the plaintiffs of nothing that could possibly have been of the slightest value to them, save as thus assumed, but which, in that way, served as the means of sheltering and keeping them, as one family in a home of their own, until they were able to provide for themselves, or, in the case of the girls, were sought by good husbands who provided for them. Beyond that, the defendant was not bound to continue in a position in which all the work and but one-tenth of the product fell to his share, and he declined to do so. The good will of the business in which his father had been engaged, then, became derelict, and was open to appropriation by any one who chose, or might be able, to appropriate it; and he, having an interest in it, as heir, was within his rights and within the canons of the law, legal and moral, when he did appropriate it, for the purpose and with the effect of giving his coheirs such benefit from his action as he is shown to have given them. The view thus taken of the matter renders it unnecessary that we should consider the exceptions, but we do not wish to be understood as holding that they are without merit. The judge a quo properly rejected plaintiffs' demands, and his judgment is affirmed.

(136 La. 649)

No. 21022.

STATE v. HEAD.

(Supreme Court of Louisiana. Feb. 8, 1915.)

*(Syllabus by the Court.)*WITNESSES \S 288—REDIRECT EXAMINATION—SCOPE—INTOXICATING LIQUORS.

In a prosecution for retailing intoxicating liquors without a license on a day fixed, where the prosecuting witness has already testified to such sale, and on cross-examination also testifies that he bought intoxicating liquors from the defendant at another time, it is competent for the state, on redirect examination, to inquire as to the time that such purchase was made.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1003; Dec. Dig. \S 288.]

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

J. Y. Head was convicted of retailing intoxicating liquors without a license, and appeals. Affirmed.

Earl B. Kidd, of Winnfield, and Wm. J. Hammon, of Jonesboro, for appellant. R. G. Pleasant, Atty. Gen., and Julius T. Long, Dist. Atty., of Winnfield (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. The defendant appeals from a judgment, on a trial without a jury, finding him guilty of retailing intoxicating liquors without a license on January 24, 1914.

The only bill of exceptions found in the record is taken to the ruling of the court in permitting the district attorney to ask a state witness, on redirect examination, whether the purchase by him of intoxicating liquors from the defendant, different from that fixed in the indictment, and about which he had been questioned on cross-examination by defendant's counsel, and which had not been testified to by him on his examination in chief, had taken place prior to the date mentioned in the bill of particulars or not. In overruling the objection to the question propounded by the district attorney on redirect examination, the court said:

"The testimony as to the facts shown was brought out by counsel for defendant on cross-examination, and the state was permitted to ascertain the time to determine whether or not it was a different sale from that included in the charge. It was shown to have been a time prior to that included in the bill of particulars, and did not enter into the facts forming the basis upon which the accused was convicted. The testimony shows conclusively a sale of whisky without a license to sell on the date and in the manner alleged, independent of the testimony complained of, and without in any manner considering it as a part of the case as charged."

It appears from the statement of the judge that the state had proved the offense charged in the indictment, and that the prosecuting witness, on cross-examination by counsel for the defendant, testified about a sale of intoxicating liquors by defendant at some other time; and it was therefore competent for the state to show the date of such sale, and that

it was prior to the date mentioned in the indictment under which the defendant was being tried. This ruling is not in opposition to the ruling in *State v. Ryan*, 131 La. 1054, 60 South. 681. The state was not here attempting to prove other sales of intoxicating liquors on other dates than that mentioned in the bill of particulars. That evidence had been brought out by the defendant on cross-examination of the prosecuting witness, and he cannot be heard to complain thereof.

Judgment affirmed.

(136 La. 651)

No. 20120.

TOMMIE v. LITTLE RIVER LUMBER CO. (Supreme Court of Louisiana. Feb. 8, 1915.)

*(Syllabus by the Court.)*RAILROADS \S 276—TRESPASSERS—DUTY OF COMPANY—SAFE EQUIPMENT.

A railroad company owes no duty to uninvited strangers to keep its locomotives in such condition that they may be safely jumped upon while in motion.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 878-886; Dec. Dig. \S 276.]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Action by J. B. Tommie against the Little River Lumber Company. From a judgment for defendant, plaintiff appeals. Affirmed.

George Wear, Jr., and J. C. Harper, both of Jena, for appellant. Blackman, Overton & Dawkins, of Alexandria, for appellee.

LAND, J. Plaintiff sued the defendant for \$25,500 damages for the loss of a foot, which was crushed in a cogwheel of a Shay locomotive operated on a tram railroad, alleged to belong to the defendant.

The petition alleges in substance: That plaintiff, on June 8, 1912, was working in the employ of the defendant as a cross-haul loader. That the defendant operated a train on said tramroad for the purpose of carrying employes to and from their work. That plaintiff, owing to the fact that he had a team to care for after the day's hauling was done and before the day's hauling commenced, rarely used said train, although authorized so to do by the officials of the defendant, and occasionally did so with their knowledge and consent. That on June 8, 1912, the plaintiff, having finished his day's work and cared for his team, was standing near the tramroad, when the defendant's log train came up on its way to Manistee, the site of defendant's sawmill. That the engineer in charge of the train, on seeing the plaintiff, slowed down to a very slow rate of speed, as was customary, to enable the plaintiff to board the train. That he reached up and took hold of the grabirons or handholds provided for use in boarding said Shay engine, and attempted to pull himself aboard,

putting one foot on a step or foothold which was to be used in boarding said engine. This foothold had been so much used that it had become worn and smooth and was as slick as glass, which fact was known to the operatives and the officials of said company, but was unknown to petitioner. That, as plaintiff placed his foot on said hold, his foot slipped, owing to the slickness of the steps, and went into the exposed cogwheels of said engine, and was crushed and mangled.

The petition alleged that the defendant was guilty of gross negligence in operating said Shay engine without shields over the cogwheels, which had been removed by the servants of defendant—a fact unknown to the plaintiff, but well known to the officials of the company and the crew operating said train.

For answer the defendant denied all of the allegations of the petition, and further specially denied that the plaintiff was in its employ on the date of the alleged accident or since, and that it owed to the plaintiff any duty whatever, and further denied that the plaintiff on said date was known to, or invited by, the respondent company to take passage upon any of its trains or locomotives, and continued as follows:

"Further answering, respondent shows that, only in the event the court should find any relationship of master and servant existing between plaintiff and respondent on the date of the alleged accident, then, if plaintiff was injured, his injury was the result of his disregard for his own safety, and want of care, and plaintiff contributed to his injury, which contributory negligence your respondent now specially pleads in bar of plaintiff's right of recovery."

The answer further averred that, if the plaintiff was injured through any fault of respondent, the danger was plain, obvious, open, and apparent, and ought to have been known and was in fact known to the plaintiff.

The case was tried before the district judge, who rendered judgment in favor of the defendant company. The plaintiff has appealed.

The evidence, both written and oral, in the record, proves beyond dispute that the plaintiff was employed by, and at the time of the accident was in the service of, Henry A. Morehead, an independent contractor for the getting out and delivery of logs f. o. b. cars on the tramway.

Plaintiff in his testimony stated that no one ever invited or told him to ride on the train, and that no one ever told him he could not. The evidence shows that the management instructed the engineer and fireman not to carry any other persons than those employed on the train. It is true that the engineer violated these orders, as in plaintiff's case, by slowing down his engine so that men could jump on the train. When plaintiff made his jump the engine was running three or four miles per hour. Had he

looked he could have seen the exposed cogwheel and the danger of stepping or slipping upon it. Unfortunately, the plaintiff jumped without looking, and one of his feet was caught and crushed by the cogs.

The engineer testified that the fender over the cogwheel had been broken and removed by him; that the presence of a fender would not prevent a person from falling under the wheel; that the broken fender was straight and was not intended to be used as a step; that plaintiff had jumped on the train on several occasions, either on the left side of the engine, where there were no cogwheels, or on the right side of the footboard behind or in front of the engine. There were regular steps on the left side of the engine, and also on the coal or gondola cars.

Plaintiff, having failed to prove that he was the servant of the defendant, or that he was invited by the defendant to ride on its log train, occupies the position of a stranger to whom the company owed no duty to keep its engine in proper repair.

In a similar case this court correctly held, as stated in the syllabus, that:

"A company is not responsible for injuries received by a person who, holding no contractual relations with it, either as a passenger or an employé, and with no invitation from it, attempts to board one of its moving engines by steps leading up to the engineer's cab, even though the injury should have been due to the defective condition of the steps."

See *Holmes v. Crowell & Spencer Lbr. Co.*, 51 La. Ann. 352, 25 South. 265. In that case the engineer permitted boys to ride on his engine, in violation of instructions. See, generally, 4 R. C. L. 1050, 1051.

Plaintiff having failed to prove negligence in the defendant, it is unnecessary to consider the question of the alleged insufficiency of the plea of contributory negligence.

Judgment affirmed.

(126 La. 655)

No. 20317.

MEUNIER v. THIBODAUX.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by the Court.)

DIVORCE — 27 — SEPARATION — GROUNDS — RIGHT OF ACTION — PETITION.

Where the allegations of a petition in a suit for separation from bed and board are such as, taking them to be true and assuming that they can be sustained by proof, to indicate that the plaintiff would find living with defendant insupportable by reason of defendant's conduct, there should be a trial on the merits, and a judgment sustaining an exception of no cause of action will be reversed.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 27, 62-83; Dec. Dig. — 27.]

Appeal from Twenty-Seventh Judicial District Court, Parish of St. James; Charles T. Wortham, Judge.

Action by Mrs. Clara May Madeline Meunier, wife, against Henry Joseph Thibodaux,

husband. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Gulon, Lambremont & Hebert, of Lutchter, for appellant. Pugh & Himel, of St. James, and John L. Peytavin, of New Orleans, for appellee.

MONROE, C. J. Plaintiff prosecutes this appeal from a judgment sustaining an exception of no cause of action. She alleges, among other things, that she brought a similar suit in 1912, and that it was disposed of by an opinion and decree, from which she makes the following excerpt, to wit:

"Man is prone to err. The defendant has seriously erred. The evidence shows, however, that he is not without real affection for his children and for his wife. He has frequently visited and been kind to his children, after the mother carried them from his home. Nor does the court believe that the plaintiff is wanting in the feelings which become a wife and mother. Forbearance and forgiveness, within certain limits, are the duties which the law and society impose on both husband and wife. In refusing this separation, the court hopes that the wife will speedily return to her husband; that her husband will receive her kindly and tenderly, cease harsh language towards her and bestow on her the gentleness which the weaker sex requires; that the wife will minister to her husband's infirmity; and that both will be happy as their sons and daughters grow up around them. The charge of public defamation is not established, and it is not insisted that it is. The court will make the decree one of nonsuit, so as not to preclude the plaintiff from making use of the same facts in a future suit, should the husband be guilty of abuses or cruel treatment in the future, so as to render their living together insupportable."

And, it is alleged, there was judgment of nonsuit.

The petition contains other allegations, setting out, in great detail, the charges of harshness, abuse, defamation, and cruelty of various kinds, extending over a period of about five years, up to July, 1912, when petitioner instituted her first suit. It is further alleged that, after the rendition of the judgment in that suit, plaintiff came to New Orleans, with her six children, and lived with her mother; that defendant came there to see the children, and, shortly afterwards, made overtures, through plaintiff's brother, for a reconciliation, that plaintiff then met him, at her brother's house, and that he admitted that he had been altogether at fault, implored her forgiveness, and assured her that she should have no cause to complain, in the future, if she would consent to the re-establishment of their relations; that she told him that she could never live with or near his sisters, who had grossly defamed her, and he agreed that her position was correct, and that he would not ask her to return to St. James, but would himself come to New Orleans to live and engage in business, and that thereupon they were reconciled, and he remained in New Orleans with her and the children for about a week, when she accompanied him to St. James, where they

packed their household effects and shipped them to New Orleans, and she returned to that city; that defendant remained in St. James, but visited his family three times within six weeks, but that he failed to go into business, as he had said that he would, and within a few months announced that he had changed his mind and engaged in business in St. James; that he took three of the children to St. James, and, as petitioner heard nothing from them and became uneasy, she went to St. James, and sent word to defendant from a boarding house, requesting him to send the children to see her, to which he replied that she could not see them, save at the home of his sisters, where they were staying; that she then asked that she be permitted to see them at the former matrimonial domicile, to which defendant consented, but refused to let her see them alone, or take them back to New Orleans, and was harsh and rough to them and to her, telling them that they might cry their eyes out but would never return to their mother, and abusing and slandering her in their presence; that upon leaving she exacted a promise that the children should be permitted to write to her, but that, during the following week, she heard nothing from them, and again returned to St. James, and sent word to her husband that she wished to see them, to which he replied, as before, that she could see them only at his sisters'; that she went to the gate of the sisters' residence and called him thereto, and he spoke roughly to her, did not even shake hands, and refused to allow the children, who were locked up in the house, to come out and see her; and that she came away without seeing them. She further alleges that, since the reconciliation, defendant has, by fraud and deceit, taken possession of three of the children, but otherwise has abandoned his family and the matrimonial domicile and has made no provision for their maintenance.

There are still other allegations, from which it appears that defendant's disposition and conduct towards plaintiff are about as before the reconciliation, and are aggravated by the fact that he has repudiated the agreement upon the basis of which the reconciliation was effected. The judge a quo was of opinion that, upon the face of the papers, it was the duty of the plaintiff to return to St. James and live with her husband, and that she need not live with his sisters; but we gather from the petition that the matrimonial domicile has been abandoned, and that, even if it were open, the attitude of the defendant towards plaintiff is such as would render their living together insupportable. This, of course, taking the allegations of the petition to be true and assuming that plaintiff will be able to sustain them by proof.

It is therefore ordered that the judgment appealed from be set aside, the exception of no cause of action overruled, and the case re-

manded, to be proceeded with according to law; defendant to pay the costs of the appeal.

(136 La. 658)

No. 20712.

STATE v. WOOD.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW \S 114—PROSTITUTION \S 1, 4—ELEMENTS OF OFFENSE—EVIDENCE—VENUE.

The offense denounced by Act No. 134 of 1890, \S 1, is complete when a woman of previous chaste character is enticed by false representation "from her father's home or from any other place (in Louisiana), * * * for the purpose of prostitution or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere," and, as affecting the completion and venue of the offense, it is immaterial whether, such woman having been so enticed from her home in this state to a place in another state, further representations are there made to her, followed by her prostitution or unlawful sexual intercourse; but evidence of such happenings, though not essential thereto, is admissible in the prosecution of, as tending to establish, the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 233; Dec. Dig. \S 114; Prostitution, Cent. Dig. \S 1, 2, 4; Dec. Dig. \S 1, 4.]

2. CRIMINAL LAW \S 1156—APPEAL—DENIAL OF NEW TRIAL.

This court is without jurisdiction to reverse the ruling of a trial judge in a criminal case, refusing a new trial, applied for upon the grounds that the jury failed to give the applicant the benefit of the reasonable doubt to which he was entitled (there being no complaint that the judge failed to give the proper instruction), and that the verdict was contrary to law and the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 3067-3071; Dec. Dig. \S 1156.]

3. INDICTMENT AND INFORMATION \S 86—VENUE—SUFFICIENCY OF ALLEGATION.

The venue need not be set out in the body of an indictment; it is sufficient that it appear in the margin.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 230-243; Dec. Dig. \S 86.]

4. COMMERCE \S 8—FEDERAL STATUTE—EFFECT.

The fact that the federal government has declared it an offense to induce women to travel from one state to another for immoral purposes does not affect the authority of the state of Louisiana to declare it an offense against her laws to entice a chaste woman from her home in Louisiana, by false representations, for such purposes. The laws neither conflict with each other nor cover the same subject, and in so far as they are directed against similar evils are easily reconciled.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. \S 5; Dec. Dig. \S 8.]

O'Niell, J., dissenting.

Appeal from Eighteenth Judicial District Court, Parish of Acadia; William Campbell, Judge.

W. E. Wood was convicted of abduction, and appeals. Affirmed.

Philip S. Pugh, L. H. Pugh, and Percy T. Ogden, all of Crowley, for appellant. R. G. Pleasant, Atty. Gen., C. B. De Bellevue, Dist. Atty., of Crowley (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. Defendant, having been convicted of abduction and sentenced to imprisonment at hard labor, presents his case to this court by means of three bills of exception, to wit, a bill to the overruling of his objection to the admission of certain testimony concerning happenings between him and the prosecutrix in the state of Texas, a bill to the overruling of a motion for new trial, and a bill to the overruling of a motion in arrest of judgment.

[1] 1. The indictment charges that defendant—

"did unlawfully, willfully, fraudulently, and by false representations, entice, abduct, induce from her mother's house one [giving the name], a young girl of previous chaste character, for the purpose of unlawful sexual intercourse, at a house or place in the city of Beaumont, state of Texas, and did then and there unlawfully, willfully, and feloniously, and by false representations, have unlawful sexual intercourse with the aforesaid —."

The statute under which the prosecution is conducted reads, in part (quoting from section 1):

"That any person who shall fraudulently, deceitfully or by any false representation, entice, abduct, induce, decoy, hire, engage, employ or take any woman of previous chaste character from her father's house, or from any other place where she may be, for the purpose of prostitution, or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere, * * * shall, on conviction, be punished," etc.

The testimony to which the bill refers was that of the prosecuting witness who had been induced to leave her home, being the home of her mother, in Louisiana, and join the defendant in Beaumont, Tex., concerning promises made to, and sexual intercourse with, her at the place last mentioned. The statement per curiam, attached to the bill, reads, in part:

"The objection was overruled for the reason that the same promises that were made in Beaumont, Texas * * * were also made * * * in * * * Louisiana two or three days previous to those made * * * in Beaumont, the said promises being false, as was shown by the evidence, for the purpose of deceiving the said [prosecutrix] and to get her away from the home of her mother, * * * and to induce her to go to Beaumont, Tex., for immoral sexual intercourse, as shown from the evidence of the said [prosecutrix] and also from letters and telegrams introduced, showing said facts, and, also, that the evidence showed beyond peradventure of any doubt that said [prosecutrix] was a girl of previously chaste character, and only 17 years of age."

The offense denounced by the statute and charged in the indictment was complete if the defendant, by any false representations, enticed the prosecutrix, she being a woman of previously chaste character, "from her

father's house, or from any other place [in Louisiana] * * * for the purpose of prostitution or for any unlawful sexual intercourse, at a house of ill fame, or at any other place of like character, or elsewhere;" and, *as affecting the question of completion and venue*, it was immaterial whether, the prosecutrix having been so enticed from her home in this state to a place in another state, further representations were there made to her, followed by her prostitution, or her unlawful sexual intercourse with the defendant; but evidence of those happenings, though not essential, was admissible as supporting the charge that it was for the purpose thus said to have been accomplished that the prosecutrix was enticed from her home in Louisiana. The objection to such evidence was therefore properly overruled.

[2] 2. The motion for new trial was predicated upon the alleged error which has been thus considered, and upon the further grounds that the jury did not give defendant the benefit of the reasonable doubt to which he was entitled, and that their verdict was contrary to law and the evidence. There is no complaint that the trial judge failed to instruct the jury that defendant was entitled to the benefit of any reasonable doubt that might be left in their minds, after hearing the evidence, and it was for them to determine whether such doubt existed; neither the trial court nor this court having any possible authority or capacity to determine that question for them. If, however, it be said that, upon the evidence adduced, the jury should have entertained such a doubt, and hence that their verdict should have been set aside by the trial court, and should now be set aside by this court, the answer is that, whilst the trial court might have set it aside upon that ground, this court has no such power; and the same law and jurisprudence apply to what is practically the same question, presented in the complaint, that the verdict was contrary to law and the evidence.

In *State v. Peterson*, 2 La. Ann. 922, it was said:

"After conviction a motion was made for new trial, on the ground that the verdict of the jury was contrary to law and the evidence; and we are urged to examine the evidence, which was reduced to writing on the trial and has been brought up with the record, in order to determine whether the judge properly overruled the motion. Our jurisdiction, in criminal cases, is limited to questions of law alone. Const. art. 63 (now article 85). We are not permitted to examine the evidence for the purpose of determining whether the court properly exercised its discretion in refusing a new trial, or whether the verdict of the jury is not supported by the evidence, which was admitted without objection. The question is one of fact, in relation to which we are not permitted to inquire or to determine."

In *State v. Ward*, 14 La. Ann. 673:

"Before expressing any opinion upon the numerous bills of exception which are presented for our consideration, it is proper that notice

should be taken of the extent of our jurisdiction in criminal matters. By constitutional provision it is limited to questions of law; and, in giving effect to this limitation of our appellate jurisdiction, we have, on five different occasions, held that we could take cognizance only of unmixed questions of law, that these questions should be submitted upon bills of exception taken to the ruling of the inferior courts, or upon assignment of errors, unless the defects are patent on the face of the papers, and, finally, that, though certified by the district judge or the clerk, the facts of the case did not fall within our jurisdiction, and we were not justified in giving them our consideration."

In *State v. Sweeney*, 37 La. Ann. 2:

"The district judge could have granted a new trial, if the verdict was contrary to the evidence, for he has authority to consider the verdict and review the facts, to test its correctness. Although he cannot comment upon the facts before the jury prior to verdict, still he has the right, after verdict, to decide whether the facts proved justified or not the verdict, and, accordingly, to refuse or grant a new trial. Where he refuses such motion, this court, in the exercise of its appellate jurisdiction, is powerless to grant any relief from the effect of such ruling, even if the same were erroneous. The constitutional prohibition lies to the exercise of the jurisdiction of this court to find questions of fact which were submitted to and found by the jury. As this court was never designed to pass upon questions of fact, as a jury is called upon to do, in other words, to pass upon the guilt or innocence of the accused, it cannot, under any circumstances, review the verdict of a jury touching such guilt or innocence."

In *State v. Hauser*, 112 La. 334, 36 South. 403, referring to the decision in the case last above quoted, the court said:

"What was said in that case as to the finality of the conclusions reached by the jury upon questions of fact applies also to the conclusions" reached by the jury "in determining its verdict as to the guilt or innocence of the accused. The jury in this state are judges of both the facts and the law. This court is authorized to pass upon questions involving the admissibility or nonadmissibility of evidence before the jury, if they are properly presented to it, but not upon the effect of the evidence when it has once reached the jury. It is authorized to say whether questions of law as submitted to the jury were correct or not, and whether correct questions of law, which the accused had the right to have submitted to the jury, were improperly refused or not; but, when the case once gets to the jury under legal conditions, we are powerless to review the correctness of its conclusions as to the blended questions of law and fact which were submitted to it. We cannot separate the one from the other."

The court refers to quite a number of cases, cited by the state from among its reported decisions, as supporting the doctrine as thus stated, and other cases have since been decided to the same effect.

In *State v. Labry*, 124 La. 753, 50 South. 702, it was said:

"The first complaint made in the motion for new trial was that the verdict was contrary to the law and the evidence. That ground of complaint calls for no particular discussion. *Marr's Criminal Jurisprudence*, p. 843; *State v. Nelson*, 3 La. Ann. 497; *State v. Crawford*, 32 La. Ann. 526; *State v. Hauser*, 112 La. 313, 36 South. 396; *State v. Apfel*, 124 La. 649, 50 South. 613."

In *State v. Green*, 111 La. 89, 35 South. 396, defendant was convicted of embezzling

the money of the "Brooklyn Lodge, Grand United Order of Odd Fellows, a corporation of which he was secretary," and he moved for a new trial on the ground that there had been a fatal variance between the allegation and the proof of the "existence of such corporation"; he having objected to certain of the evidence which had been admitted on that subject. In passing upon the question so presented, this court said, in effect, that if defendant's bill had shown that no evidence whatever, "literally none at all," had been offered on an essential point, the ruling of the court, in sending the case to the jury, might possibly have furnished matter for the attention of this court.

"But [the opinion goes on] since, in point of fact, the witnesses testified to the corporate character of Brooklyn Lodge, defendant could not have meant that no evidence at all, of whatever kind, had been offered to the jury, but he must necessarily have meant that the evidence offered was illegal, or insufficient, or untrue. The latter being the scope of the objection this court cannot review the ruling sending the case to the jury. The jurisdiction of this court, in criminal cases, is restricted to questions of law, and the questions as to the verity or sufficiency of the evidence are purely of fact. * * * With the question raised on the [motion for] a new trial, namely, whether the corporate character of Brooklyn Lodge was in fact proved, this court can have nothing to do. Whether such proof was made or not is a question the jury dealt with. It is a question of fact not within the cognizance of this court."

There appear in the transcript in the case now under consideration certain letters and telegrams (that is to say, copies) purporting to have been sent by defendant to the prosecuting witness, also a copy of a marriage license, issued by the county clerk of Jefferson county, Tex., authorizing the solemnization of the rites of matrimony between defendant and the prosecuting witness. These documents are not made part of any bill of exception, and, so far as appears, were admitted in evidence without objection, so that defendant had the benefit of anything that, in the estimation of the jury, they may have proved. The clerk of the district court was, however, without authority to copy them in the transcript, and their being so copied cannot alter the situation, since this court is without jurisdiction to consider them; and the same would be true, if all the evidence offered in the case appeared in the transcript, instead of only part of that offered on behalf of defendant and none of that offered on behalf of the state.

In *State v. Ward*, 14 La. Ann. 673, *supra*, it was said:

"It has been remarked by Mr. C. J. Merrick, in the case of *State v. Henderson*, 13 La. Ann. 489 (and this ruling meets the unqualified approbation of the court), that it is apparent that, inasmuch as the testimony is never taken down by the clerk in criminal cases, the record cannot be certified, as in civil cases, to contain all the evidence. This was known to the framers of the Constitution when they conferred the appeal, and to the Legislature also when it authorized an appeal in criminal cases, without giving

bond. The articles of the Code of Practice, which gives either party the right to require the clerk to take down the testimony in civil cases and * * * to certify the same to the Supreme Court, are not applicable to appeals in criminal cases."

It is true that, under Act 113 of 1896, p. 162, the trial court may order "the facts" to be taken down, in a criminal case, in connection with bills of exception which are reserved, and the clerk is required to attach a "certified copy thereof" to the bill in connection with which it is taken, but the statute mentioned appears to have no application to the situation here presented.

We conclude, therefore, that defendant's second bill of exception presents no grounds upon which relief can be granted him by this court.

[3] 3. The motion in arrest of judgment was without merit.

The indictment charges, in the language of the statute, or its equivalent, the offense denounced by the statute. The law does not require that the venue shall be set out in the body of the indictment, but holds it sufficient that it appear in the margin, and it so appears. *R. S.* 1062, 1064; *State v. Wilson*, 11 La. Ann. 163; *State v. Askins*, 33 La. Ann. 1253.

[4] The fact that the federal government has declared it an offense to induce women to travel from one state to another for immoral purposes does not affect the authority of the state of Louisiana to declare it an offense against her laws to entice a chaste woman from her home in Louisiana, by false representations, for such purposes. The laws neither conflict with each other nor cover the same subject, and, in so far as they may be directed against similar evils, are easily reconciled. *Bishop's Cr. Law* (8th Ed.) § 136.

The motion was therefore properly overruled.

For the reasons thus given, the judgment appealed from is affirmed.

O'NIELL, J., dissents and hands down reasons.

O'NIELL, J. I respectfully dissent from the view that this court has no authority to give relief when the trial judge improperly refuses a new trial. The facts stated in the bills of exception, and the documents annexed thereto disclose that the defendant persuaded the prosecutrix to leave her home and go to Beaumont, not for an immoral purpose, but that the defendant might marry her. When she arrived there, the Catholic priest refused to perform the ceremony during the Lenten season. The defendant had procured the marriage license and offered to have the ceremony performed by a justice of the peace. The prosecutrix refused to be married by a justice of the peace, but cohabited with the defendant.

To say that these facts did not justify a conviction of abducting the girl for an immoral purpose is not deciding a question of fact; it is stating a legal proposition. The jury committed an error of law; and, the facts being shown by the record and certified to us by the district judge, so that there is no dispute about the facts upon which the verdict was rendered, we have jurisdiction and authority to say that the verdict was contrary to the law. I am of the opinion that, according to the facts of this case, the verdict was contrary to the law and should be set aside.

(135 La. 666)

No. 20727.

J. GROSSMAN'S SONS et al. v. CHACHERE et al.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by Editorial Staff.)

1. FRAUDULENT CONVEYANCES ⇐300—SUFFICIENCY OF EVIDENCE—SIMULATION.

In a suit by judgment creditors to set aside the debtor's sale of land to his mother, evidence held to show that the sale was a real contract and not a mere simulation.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. ⇐300.]

2. FRAUDULENT CONVEYANCES ⇐295—SUFFICIENCY OF EVIDENCE—PREFERENCE—STATUTE.

Evidence held to show that the mother, purchasing from her son, sought to obtain a preference over the son's other creditors, knowing that his financial condition made it necessary, laying the preference open to annulment at the suit of the creditors, under Rev. Civ. Code, art. 1983, expressly declaring that one taking a preference, under circumstances declared by law to be constructive fraud, shall lose the advantage endeavored to be secured thereby.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. ⇐295.]

3. FRAUDULENT CONVEYANCES ⇐301—WEIGHT AND SUFFICIENCY OF EVIDENCE—INSOLVENCY.

In a creditor's suit to set aside the debtor's sale of realty, it is not necessary to establish the purchaser's positive knowledge of such insolvency, but proof of circumstances, tending to produce a strong impression that he was aware of it, will suffice.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 904-907; Dec. Dig. ⇐301.]

4. FRAUDULENT CONVEYANCES ⇐295—SUFFICIENCY OF EVIDENCE—SIMULATION—INSOLVENCY.

In a suit by judgment creditors to set aside the debtor's sale of realty to his mother, and her sale of the same land, together with another tract, to her daughters, evidence held to show that the mother's sale to her daughters was a simulation to put the property beyond the reach of creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 867-875; Dec. Dig. ⇐295.]

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; B. H. Pavy, Judge.

Action by J. Grossman's Sons and others against Nolle Chachere, Mrs. Lucile Chachere, and others. Judgment for defendants, and plaintiffs appeal. Judgment set aside, sale by Mrs. Chachere set aside and annulled, and record thereof canceled, and sale by Nolle Chachere to Mrs. Chachere, annulled in so far as it affects the rights of creditors.

Smith & Carmouche, of Crowley, and D. L. Guilbeau and Leon S. Haas, both of Opelousas, for appellants. Peyton R. Sandoz, of Opelousas, for appellees.

PROVOSTY, J. Plaintiffs are the judgment creditors of the defendant Nolle Chachere and of his mother, Mrs. Lucile Chachere. They bring this suit to set aside a sale by him to her of three tracts of land, and likewise to set aside a sale by her of the same lands and also of another tract to her daughters Mrs. Burieligh and Mrs. Smith, as being simulations designed to screen the property from the pursuit of creditors, and in the alternative, in the event said sales are held not to have been simulations, then to set them aside as in fraud of creditors, and finally, in case neither of said demands can be maintained, then to set aside said sales on the ground that the property was sold at one-fifth less than its value.

The facts are as follows: The defendant Nolle Chachere kept a saloon in the village of Lewisburg, about a mile from Bellevue, where he and his mother, aged 65, owned adjoining tracts of land upon which they lived. His tract contained 75 acres; hers 105. He owned also the store building at Lewisburg in which he kept his saloon. With his mother lived her daughter Mrs. Burieligh and the latter's husband, who cultivated his mother-in-law's said land in corn and cotton. On what terms, whether as tenant or otherwise, the record does not show. Her other daughter, Mrs. Smith, and the latter's husband, lived at Sunset, about six miles from Bellevue. Mr. Smith was in the mercantile business, on a small scale, as we gather. Nolle Chachere had not been very successful in his said business; from time to time he had had to seek financial aid from his mother. In January, 1912, she signed jointly with him four notes of \$250 each in favor of the plaintiff J. Grossman's Sons, and she had lent him her signature on other notes. In May, 1912, she let him have \$1,000, which she had borrowed for that purpose from the St. Landry State Bank by mortgaging her said homestead. On November 25, 1912, one of the plaintiffs in this suit, Lon A. Bernard, brought suit against her son in the district court on several notes aggregating about \$250 in capital, interest, and attorney's fees. He had then ceased making payments to his creditors. On December 3, 1912, another creditor, F. L. Sandoz, brought suit against both him and her in the city court on a note of \$131, signed

by them jointly. The next day, December 4, 1912, by act passed before the lawyer notary employed by him to defend the Bernard suit in the district court, he made the sale in question to his mother. The three tracts of land are described by metes and bounds, and as having buildings and improvements upon them, and as containing, one of them, 13 acres, another, 7 acres, and the third, 55 acres; two of them contiguous to the said homestead of the vendee.

The act recites that the price is \$2,990; and that in payment of it the vendee has paid \$1,400 cash and assumed the payment of six notes of \$265 each, given by the vendor for the purchase of the same property from Joseph Smith. Two years previously, on December 27, 1910, the said vendee, Mrs. Chachere, had sold these three tracts by the same description to Joseph Smith, father of Mr. Smith, the husband of her daughter Mrs. Smith, for \$3,650, whereof \$1,000 cash, and the balance on a credit secured by mortgage on the property. On February 8, 1912, Jos. Smith had sold this same property, by the same description, to Nolle Chachere at the same price of \$3,650, whereof \$1,265 cash, and the balance by assuming the mortgage resting upon the property in favor of his mother. This mortgage is the same which Mrs. Chachere assumed in part payment of the price of the hereinabove mentioned sale by her son to her. At about this time, Nolle Chachere sold the building in which he had kept his saloon at Lewisburg, but whether before or after this sale to his mother, the record does not show. Notwithstanding the recital to the contrary in the act of sale, Mrs. Chachere did not, as a matter of fact, pay \$1,000, or any amount whatever, cash, at the passage of the act of sale; but, as she and her son testify, the \$1,000 said to have been then paid cash was in reality the \$1,000 she had borrowed from the St. Landry Bank and lent him; and the remaining \$400 said to have been paid cash was paid only some time later, if ever at all. On December 10, 1912, the plaintiffs in this suit, J. Grossman's Sons, filed suit in which they obtained the judgment for \$1,000 and interest which they are now seeking to enforce. On January 15, 1913, the defendant Mrs. Chachere borrowed \$1,500 from Edward M. Boagni by mortgaging her 105-acre homestead, and out of this money paid, as she testified, the debt of \$1,000 to the St. Landry Bank, and \$400 to her son. On March 8, 1913, Mrs. Chachere executed an act of sale in favor of her two daughters Mrs. Burleigh and Mrs. Smith, purporting to transfer to them, in consideration of \$5,000, the three tracts of land which her son had transferred to her, as well as her own homestead of 105 acres, thereby divesting herself of all property she had liable to seizure. The act recites that the said \$5,000 was paid \$1,910 cash, \$1,500 by assumption of the mortgage theretofore executed in favor of Edward M. Boagni, and the balance by the execution

of the notes of the two daughters secured by mortgage on the property sold. On the day on which this *cessio omnium bonorum* was made, but only after the sale had been consummated, the citation in the suit of the plaintiffs J. Grossman's Sons, filed months before, was served on Mrs. Chachere, as well as the citation in another suit, both of which citations had been held up by the sheriff, at the request of Nolle Chachere. He assigns on the witness stand, as the reason why he prevailed on the deputy sheriff not to serve these citations on his mother, that he had hopes of being able to pay the debt; but the fact that the service of the citations was withheld so long, and was made just as soon as the sale had been consummated, in the evening of the same day, is too significant for the court not to understand what the true reason was.

[1] Whether the sale to the mother was or was not intended to be a final transfer of the property, we have no doubt at all that it was not intended to be a mere simulation, but a real contract. We believe the mother when she testifies that she "had paid out a great deal for Nolle," had "given him several thousand dollars," had "many times signed his note and paid out all I could," and that she "just simply took this property from him to protect the indebtedness he owed" her "and the money" she "had given him and debts" she "had paid." Perhaps the contract was a mere contract of security, and probably was, since no reason is otherwise assigned why Nolle Chachere should have desired to divest himself of this property which he had but recently acquired, nor the mother to reacquire it after having two years before sold it; and, moreover, there must have been due one year's interest on the notes, unless Nolle Chachere had paid this interest in advance to his mother, the holder of the notes—a thing very unlikely, since he had been borrowing money from her—and yet this interest does not seem to have been taken into computation at all; however, the contract was, we are satisfied, a real contract, though possibly not a sale.

[2, 3] There is no positive evidence that Mrs. Chachere knew of her son's insolvency; but we are satisfied that she did. In cases such as this, "it will not be necessary to establish positive knowledge in the obligee of such insolvency; proof of circumstances, tending to produce a strong impression that he was aware of it, will suffice." *De Blanc v. Martin*, 2 Rob. 38. The very anxiety of the old lady to secure protection for her claim shows that she understood what the situation was.

She undoubtedly sought to obtain a preference over the other creditors of her son, knowing that his financial condition made this necessary; and this lays the contract open to annulment at the suit of the creditors of her son. C. C. 1933.

[4] As to her pretended sale to her daughters, we have had no difficulty whatever in

reaching the conclusion that it was a pure simulation. It was a *cessio omnium honorum*, and, except to put this property beyond the reach of plaintiffs and of the other creditors who were suing her, there was no reason whatever why she should have made the sale. The one assigned by her, that her children could better than she make the property productive for paying the mortgage debt of \$1,500 resting upon it in favor of Mr. Boagni, is worse than none at all, since it is disproved by the circumstances, and the fact of its having been assigned as the sole reason shows the absence of any other. The circumstances are that, after the sale, her son continued to live upon and cultivate one of the tracts of land as he had done before, and she continued to occupy her homestead as she had done before, and her son-in-law continued to live upon and cultivate it as he had done before; and no explanation is offered why she, who had been assisting her son to the amount of several thousand dollars, and had just borrowed this \$1,500, could not have managed to pay this \$1,500 when it would fall due a year hence.

The daughters had no money to buy the property with. One of them, Mrs. Burleigh, testifies that she borrowed her half, \$955, from her husband; and that he had it from having sold his crop and some mules. The other daughter, Mrs. Smith, says she borrowed \$555 from her husband; that the other \$400 was money of her own. To the question, "Where did you get it?" she answered:

"When I married I had a horse and buggy, and I sold it. And I had a few head of cattle I sold, and I sewed and had worked in the store and had this money put up."

She says her husband did not know she had this money until a few days before the sale, when she spoke to him about buying the property, and asked him to let her have the balance. Of course this is possible, but how very improbable.

As already stated, no change whatever took place in the possession of the property. Another very significant circumstance, one which of itself, almost, is sufficient to serve as the straw which is said by this court, in the case of *Johnson v. Mayer*, 30 La. Ann. 1203, to show in cases of this kind the direction of the wind, is that instead of simply paying the \$1,910 cash to their mother on passing the sale, which would have been the obvious thing to do if the purpose of the transaction had been simply what on its face it purports to be, each of the daughters, who had never drawn a check before and never drew one since, and who had not a cent in bank, and probably had never in their lives had any money in any bank, drew her check on the Bank of Sunset for \$955, in favor of their mother, and the latter indorsed the checks, and then Mr. Smith, one of the husbands, took the \$1,910 and the checks and traveled

six miles over country roads to Sunset, deposited the \$1,910 in exactly equal parts to the credit of each of the purchasing ladies, then cashed the checks, and straightway traveled back six miles over country roads to Bellevue and turned the \$1,910 over to Mrs. Chachere. And the old lady says she has since then been keeping that sum of money in her house, and that the house is sometimes left to itself with that money in it and no one near to guard it.

The discrepancy in the price of this sale and that at which the three tracts had been recently sold, is also very significant. The price of the sales to Jos. Smith and by the latter to Nolle Chachere had been \$40.86 per acre. The price of this sale was \$27.77 per acre. The properties had not decreased in value.

In cases of this kind courts have to be guided largely by the attending circumstances. The positive testimony of the parties to the transaction that is attacked as to their good faith, etc., is not considered to be conclusive. If it were otherwise, in nearly all the cases creditors would have little chance of succeeding in uncovering the property of their debtors. When debtors resort to simulated sales for the purpose of putting their property beyond the reach of their creditors, it is not usually with a view to admitting the simulated character of the transactions when questioned in that regard.

It is therefore ordered, adjudged, and decreed that the judgment appealed from is set aside; the sale made on the 8th of March, 1913, by the defendant Mrs. Chachere to her daughters, the defendants Mrs. Burleigh and Mrs. Smith, is set aside and annulled, and the inscription of it on the public records is ordered canceled; and the sale made by the defendant Nolle Chachere to the defendant Mrs. Chachere on December 4, 1912, is annulled in so far as it affects the rights of the plaintiffs in this suit; and that the defendants pay the costs of this suit.

(136 La. 674)

No. 20355.

KENNEDY v. YOUNG, State Bank Examiner.
(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by the Court.)

BANKS AND BANKING — 113 — ACTS OF OFFICERS — BINDING EFFECT.

The officers of a bank will not be heard to deny the entries on the books of the bank, their sworn published statements, and their sworn representations to the state examiner of state banks concerning a deposit to the credit of another insolvent bank, where the state examiner, the depositors and creditors of the insolvent bank, and the public have accepted and acted upon such sworn published statements. Public policy requires that the bank should be bound by the acts of its officers.

[Ed. Note.—For other cases, see *Banks and Banking*, Cent. Dig. §§ 273-276; Dec. Dig. § 113.]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; J. B. Lancaster, Judge.

Action by H. H. Kennedy against W. L. Young, State Bank Examiner, wherein J. S. Brock, Jr., intervened. From judgment for plaintiff and intervenor, defendant appeals. Reversed and rendered.

St. Clair Adams, of New Orleans, for appellant. Ott, Johnson & Ott, of Bogalusa, for appellees.

SOMMERVILLE, J. The Bank of Angle and the Commercial Bank of Bogalusa, being in insolvent circumstances, were closed by order of the state examiner of state banks, and special agents were duly appointed to liquidate them.

The plaintiff, H. H. Kennedy, a depositor in the Bank of Angle to the extent of some \$7,000, presented a petition to the said examiner, objecting to the payment to the special liquidator of the Commercial Bank of the sum of \$11,000, appearing on the books of the Bank of Angle to the credit of the deposit account of said Commercial Bank, for reasons which may be stated as follows:

That said sum is and was held by the Bank of Angle as collateral security for a loan of \$11,860 from said bank to the Commercial Bank; that said loan was negotiated by H. D. Bickham, president of the Commercial Bank, who on January 7, 1913, signed a note for said sum in favor of the Bank of Angle, and the proceeds, the sum of \$11,000, was placed directly to the credit of the Commercial Bank, under a contemporaneous agreement between said Bickham, president, and the president and cashier of the Bank of Angle, that the same was for the benefit of the Commercial Bank, and was to remain on deposit in the Bank of Angle without being subject to check, and as collateral security for said loan. That subsequently, on January 14, 1913, "said loan was shifted by substitution, in lieu of the H. D. Bickham note, one note of the Angie Mercantile Company and one note of W. E. Douglas, for \$5,830 each." That said substitution was agreed upon between Bickham, president of the Commercial Bank, and Douglas, individually, and as president of the Angie Mercantile Company, and as a director of said bank on one part, and W. W. Warner and R. V. McCarthy, president and cashier, respectively, of the Bank of Angle, on the other part; all subject to the same understanding and with reference to the said deposit and note of Bickham. Neither he nor Douglas nor the Angie Mercantile Company derived any benefit from said transaction; "and it was merely a subterfuge which was adopted for the purpose of obtaining money and credit for the benefit of the Commercial Bank of Bogalusa."

"That all the transactions and arrangements were made without the knowledge or consent of the board of directors of the Bank of Angle. That after they had become known to the said board of directors of the Bank of Angle they immediately began to demand the recalling of said transaction. That the president of the Bank of Angle, W. W. Warner, and the cashier, R. V. McCarthy, had no authority to bind the bank in this matter, the said loan being for an amount almost equal to the capital stock of the said Bank of Angle."

That the said Bickham, president, was acting in behalf of the said Commercial Bank, and that the said bank is estopped from claiming said credit of \$11,000, "for the reason that the entire proceeds of said loan went for the benefit of

the said Commercial Bank of Bogalusa, and the directors of the said Commercial Bank of Bogalusa knew or could have known that such was the case, and they further knew or could have known that at no time since said loan was made would it have been possible for the said Bank of Angle to have paid said ostensible deposit."

That the said Bickham endeavored to secure a release of a portion of said ostensible deposit for the use of the Commercial Bank, and for that purpose communicated with the president and cashier of the Bank of Angle, who emphatically refused to release any of said deposit.

The petition closes as follows:

"Petitioner submits further that the purported or ostensible claim of the Commercial Bank of Bogalusa against the said Bank of Angle for \$11,000, as herein set out, has not been rejected, and he therefore prays that you submit this objection to the payment of same to the honorable Twenty-Sixth judicial district court of Louisiana for Washington parish, in accordance with the provisions of section 5 of Act No. 300 of the General Assembly of Louisiana, for adjudication thereon."

On receiving this petition the state examiner of state banks presented his petition to the judge of said court, who ordered the same to be filed, and service made on the special agents in charge of said banks.

J. S. Brock, Jr., special agent in charge of the Bank of Angle in liquidation, intervened, and joined the plaintiff in opposing the allowance of the claim of the Commercial Bank to said deposit, and prayed that the same be rejected.

Daniel T. Cushing, special agent in charge of the Commercial Bank of Bogalusa, filed an answer which may be stated as follows:

1. Respondent admits that the books of the Bank of Angle show a credit of \$11,000 in favor of the Commercial Bank, but denies that that sum is held by said Bank of Angle as collateral security as alleged in the petition, and further denies that the Commercial Bank borrowed said sum, or any part thereof, from the Bank of Angle.

Respondent further averred that, on the contrary, said Bank of Angle is and was indebted unto the Commercial Bank of Bogalusa in the full sum of \$11,000, for the reasons:

That in December, 1912, the state examiner of state banks, on examination, found that the capital of the Commercial Bank had been impaired to the extent of \$10,684, and thereupon so notified the state auditor of public accounts, who notified the officers of the bank that, unless said impairment was made good or restored within the time required by law, the bank would be closed in accordance with section 17, Act No. 179 of 1902, which act was amended by Act No. 152 of 1910.

That a meeting of the board of directors of the Commercial Bank was held on January 3, 1913, at which Houston D. Bickham, president, and owner of a majority of the stock of said bank, stated that he would agree individually to raise, donate, and make good to the Commercial Bank the sum of \$11,000 to cover said impairment of the capital stock.

That said Bickham, pursuant to said agreement, on January 7, 1913, negotiated a loan

at the Bank of Angle for \$11,000 on his personal promissory note, secured by 110 shares of the capital stock of said Commercial Bank belonging to him. That by direction of Bickham the said sum was placed to the credit of the deposit account of the Commercial Bank on the books of the Angle Bank, and was also credited on the books of the Commercial Bank for the purpose of making good the impairment of its capital stock.

That the Commercial Bank notified the state bank examiner that the impairment of the capital stock had been made good in cash as required by that official, and that said deposit of \$11,000 has ever since been carried on the books of the Commercial Bank as one of its live assets.

That thereafter the said bank continued in business until May 23, 1913, when it was closed by the said state bank examiner.

Respondent denied the alleged parol agreement between Bickham, president, and the Bank of Angle, as set forth in the petition, and averred that the officers of the Angle Bank well knew that the money was borrowed for the purpose of making good the impairment of the capital stock of the Commercial Bank, and that said bank could not borrow money on its own capital stock, and that said Bickham in said transaction was acting in his individual and personal capacity.

That the Bank of Angle, its officers and agents, have always carried said deposit on their books as belonging to the Commercial Bank, and as one of the liabilities of said Bank of Angle.

That said deposit was included in the liabilities of said bank, in a sworn statement furnished by its president to the state examiner of state banks on March 1, 1913, which a few days later was published in a newspaper in the parish of Washington, as directed by the statute.

Respondent pleaded that the facts stated estopped the Bank of Angle and its officers to deny said deposit, and to assert that there was any secret oral agreement that said deposit should be held as collateral security to secure the payment of the note of Bickham, as alleged in the petition.

Respondent denied that the Commercial Bank was a party to the substitution of the notes on January 24, 1913, as alleged in the petition, or had any interest therein, or was privy to any of the alleged parol agreements or understandings set forth in the petition.

Respondent further averred that, if H. D. Bickham and Warner, president, and McCarthy, cashier, of the Bank of Angle, made any such agreement as set forth in article 1 of the petition, the same was against good morals, and a willful fraud practiced upon the banking department of the state of Louisiana, and that the said Bank of Angle and its officers and agents are bound by their own acts and declarations, and are estopped to urge their own turpitude.

Respondent further averred that the president and cashier of the Bank of Angle did have power and authority under its charter and by-laws to bind said bank in said transaction, as to which the Commercial Bank was an innocent third person.

Respondent prayed that the plaintiff's demand be rejected, and for judgment recognizing the Commercial Bank as the owner of said deposit of \$11,000, and, as such, entitled to demand and receive payment thereof.

Respondent made a like answer to the petition of intervention.

The case was tried, and judgment was rendered in favor of the plaintiff and the intervenor as prayed for. The defendant has appealed.

It was admitted that H. H. Kennedy was a depositor of the Bank of Angle, as alleged in the petition.

On January 7, 1913, Bickham executed his individual note for \$11,660 to the order of the Bank of Angle, secured by shares of stock of the Commercial Bank, which were owned by him. The Bank of Angle discounted the note, and the net proceeds (\$11,000) were credited to the account of the Commercial Bank of Bogalusa, and \$660 was credited to the interest account of the Bank of Angle.

McCarthy's testimony on the subject-matter of the alleged parol agreement with H. D. Bickham is, in effect, as follows:

He was cashier of the Bank of Angle on January 7, 1913, and after that date the Commercial Bank never had, on the books of the Bank of Angle, a credit of less than \$11,000. The agreement between Mr. Bickham and Dr. Warner, president, was:

"That the proceeds of the note were to be placed to the credit of the Commercial Bank of Bogalusa, and they were not to be checked against, or that they would not draw below \$11,000."

That the proceeds of the note were pledged to the Bank of Angle. In May, 1913, said bank refused to permit Bickham, as president of the Commercial Bank, to draw on said deposit.

The witness supposed that he was dealing with Bickham as an officer of the Commercial Bank.

The note of Bickham was taken up by two notes, one signed by the Angle Mercantile Company, per W. E. Douglas, president, and the other by W. E. Douglas, who was also a director of the Angle Bank. Notes aggregating \$11,660 were received by said bank, and charged to bills receivable. The Bickham note was marked paid, canceled, and returned to him. The debt was novated. The capital stock of the Bank of Angle was only \$15,000, and the above transaction showed a loan of \$11,000 to one person.

On cross-examination McCarthy said: The note of Bickham was discounted, and \$660 was earned as interest by the Bank of Angle. The Bickham note for \$11,660 was secured by 110 shares of the stock of the Commercial Bank standing in Bickham's

name. This collateral was indorsed on the back of the note, but nothing was indorsed thereon showing that the money was to be held by the Bank of Angle. There was no written agreement between Bickham and the officers of the Bank of Angle. The cashier knew nothing of Bickham's authority in the premises, except from the transaction and agreement. The loan was made as Bickham negotiated it, and the agreement was that the \$11,000 was to be held by the Bank of Angle as collateral to secure the Bickham note. The cashier considered the transaction as a loan. Bickham said that he wanted the loan to use as a reserve, and that he would leave the money at the Bank of Angle as a reserve.

The sworn statement of the condition of the bank on February 25, 1913, signed by the president and cashier, was taken from the books of the Angle Bank, and was a true statement of its affairs as they stood on the books at that time. The item of liabilities in said statement was made up in part of the item of \$11,000 due the Commercial Bank, which appeared on the books as an individual deposit subject to check.

The substitution of the notes was made at Bickham's suggestion, because one loan of \$11,000 looked too large.

The cashier understood that the loan was for the benefit of the Commercial Bank, which appeared in the transaction only as the donee of the proceeds of the Bickham note.

The two substituted notes were secured by the same 110 shares of stock pledged to secure the Bickham note.

The cashier acted in good faith in this transaction, and the Angle Bank refused to make the loan until the agreement was made to allow the money to remain in said bank as security.

Dr. W. W. Warner, former president of the Bank of Angle, as a witness, corroborated the testimony of R. V. McCarthy, the former cashier, as to the transaction of January 7, 1913, with Mr. Bickham, president of the Commercial Bank. Dr. Warner stated that the transaction was had with Mr. Bickham as the representative of the Commercial Bank, and as having entire control of its affairs; that Mr. Douglas refused to sign the two substituted notes until he knew that the money was to remain in the Bank of Angle.

Dr. Warner further testified that the transaction was not fictitious, but real, and that Mr. Bickham wanted the credit "to show up as a reserve for the Commercial Bank; that the transaction was only an accommodation to said bank, and the entries on the books of the Bank of Angle did not represent real money; that said bank made no profit on the transaction, and has never received one cent from the Commercial Bank for the credit of \$11,000.

Mr. Rives, assistant state bank examiner,

testified that the greater part of the \$11,000 went directly to the credit of interest and discount on the books of the Commercial Bank, and they do not show that said credit was the result of any check that could have been given. Mr. Rives further testified that the payment of said sum of \$11,000 would have taken all the cash and reserve of the Bank of Angle.

Mr. Houston D. Bickham did not testify, and it was admitted by counsel in argument at the bar that Mr. Bickham is confined in the state penitentiary for certain violations of the banking laws, which have nothing to do with the instant case.

L. L. Richardson, former cashier of the Commercial Bank of Bogalusa, testified in behalf of the defendant, in substance, as follows:

"The Commercial Bank had to its credit with the Bank of Angle on January 7, 1913, more than \$11,000, and the account was subject to check. Mr. McCarthy told him so. Mr. Bickham went to the Bank of Angle and got \$11,000 to make good the impairment of the capital stock of the Commercial Bank, and brought back a deposit slip for that amount signed by McCarthy, cashier, reading as follows: 'Commercial Bank as a depositor with the Bank of Angle on note No. 1223 for eleven thousand dollars.' This checking account never got below \$11,000. The money represented by the deposit slip was credited as follows: 'Undivided profits of ten thousand six hundred and eighty-four dollars and eighty-three cents,' and \$316 to the personal account of Houston D. Bickham. The Commercial Bank did not borrow any money to make good the impairment of its capital stock. The item of resources of said bank on February 25, 1913, sworn to by witness and Bickham, and published, did not include an item of \$11,000 borrowed from the Bank of Angle."

On cross-examination the same witness testified that the \$11,000 was the personal money of Mr. Bickham, out of which he donated \$10,684 to the Commercial Bank of Bogalusa; that he knew that Mr. Bickham borrowed the money, because he left the bank to go to the Bank of Angle for that purpose, but that he did not know what agreement there was between Mr. Bickham and said bank; and that Mr. Bickham said he had borrowed the money himself. The witness further testified that his bank got no interest on the loan from the Bank of Angle, but paid interest on the loan after January 1st, because "we carried it as a reserve."

Mr. McCarthy, in rebuttal, testified that he never told Mr. Richardson that the deposit of \$11,000 was subject to check, but, on the contrary, informed him of the details of the agreement of January 7, 1913.

Mr. W. L. Young's testimony shows that he, as state bank examiner, notified the Commercial Bank to make good the impairment of its capital, and told Bickham, the president, that his bank could not borrow money for that purpose, and that any sum of money advanced by officers or stockholders of said bank to make good said impairment would be considered a donation.

It appears from the minutes of the board of directors of the Commercial Bank that Bickham, as an individual, undertook to raise the sum of \$11,000 to make good the impairment of the capital stock of said bank. The evidence shows that he discounted his own note, secured by his own shares of stock, and that he had the proceeds put to the credit of the Commercial Bank in the Bank of Angle.

The Bank of Angle issued a deposit slip for the \$11,000 in the name of the Commercial Bank, which was delivered to and accepted by the Commercial Bank.

This was, in effect, a donation made by Bickham to the Commercial Bank, of which he was president, in accordance with the requirement of the state examiner of state banks, in order that the capital stock of that bank should be restored, so that it might continue to do business.

A similar condition of affairs existed in the case of the People's Bank of New Orleans, which is reported in 133 La. 745, 63 South. 310, in the case entitled *Wright v. Gurley*, where it was held that the deposits of checks of stockholders to make good the capital stock were donations to the bank, and could not be recovered by the stockholders making the deposits.

If there was a secret oral agreement between Bickham and the officers of the Bank of Angle, as testified to by the latter, and as already set forth herein, the Commercial Bank was not a party thereto, and it is not bound thereby. It was an innocent third person to such agreement, and it is not estopped to claim the donation made by Bickham to it.

The Bank of Angle, through its officers, sent to the state examiner of state banks a sworn statement, and under the heading of "Liabilities" was \$11,000 among the "Individual deposits subject to check." That statement was duly published in a newspaper of Franklinton. The books of the bank showed, and the cashier swore to the assistant bank examiner, that this deposit belonged to the Commercial Bank of Bogalusa. The latter bank made a similar statement, and its cashier swore on the trial of the cause that said amount was subject to check by his bank.

These entries on the books of the banks and these sworn statements must prevail over a secret oral agreement which may have been made between the president of one bank with the officers of another bank which had for its object the concealing of the truth, and the deception of the public and the state officials charged with the examination of the said banks with a view of ascertaining their solvency. It would be against public policy and good conscience to hold otherwise.

The Bank of Angle was a quasi public institution, conducting business under limitations and restrictions contained in statutes of the state, and it was subject to examination by, and supervision of, state officers. Its reg-

ularly published statements were sworn to by its officers, and these officers will not be permitted to afterwards contradict these statements, and be heard to testify to the falsity of the records made by them.

If such a course of conduct were sanctioned, it would be impossible for the state officers, the public, and the court to ascertain the true condition of any bank. *R. S. 877; Wright v. Gurley*, 133 La. 745, 63 South. 310; *Landwirth v. Shaphran*, 47 La. Ann. 336, 16 South. 839; *Pauley v. O'Brien* (C. C.) 69 Fed. 460.

The policy of the law will not allow the officers of the Bank of Angle to gainsay or deny that which they have said and done in their written documents, book entries, and sworn statements to officers of the state and to the public. *Briggs v. Stafford*, 14 La. 381; *Mathews v. Boland*, 5 Rob. 200; *Garthwaite v. Seip*, 23 La. Ann. 218; *Freeman v. Savage*, 2 La. Ann. 269; *Morse v. United States*, 174 Fed. 539, 98 C. C. A. 321, 20 Ann. Cas. 938.

The legal title to the \$11,000 was vested in the Commercial Bank at the time that Bickham, the president, proposed to make good the impairment of the capital stock of the bank by a donation, which was agreed to by resolution of the board of directors, and when he (Bickham) deposited that sum in the Bank of Angle to the credit of the Commercial Bank, and a deposit slip for the amount was issued by the former to the latter bank, and was accepted.

The resolution of the board of directors referred to, in accepting the donation from Bickham, provided "that this amount be paid in as required by law." The bank examiner required that it be paid in cash. And this resolution shows that the Commercial Bank was a stranger to the oral agreement sworn to by the officers of the Bank of Angle which they said existed between them and Bickham.

If the depositors and stockholders of the Bank of Angle sustain loss, it is by reason of the fault and wrongdoings of those to whom they intrusted the management of their business; and they must look to the makers of the notes whose notes were substituted for that of Bickham, when he borrowed the \$11,000 and had it placed to the credit of the Commercial Bank, on the books of the Bank of Angle.

It is ordered, adjudged, and decreed that the judgment appealed from be reversed, and that there be judgment in favor of D. T. Cushing, special agent, liquidating the Commercial Bank of Bogalusa, La., and against petitioner, H. H. Kennedy, and intervenor, J. S. Brock, Jr., special agent, liquidating the Bank of Angle, rejecting their demands.

It is further ordered, adjudged, and decreed that the Commercial Bank of Bogalusa, in liquidation, is the owner, and as such entitled to the deposit, of \$11,000, appearing on the books of the Bank of Angle, and that said

Commercial Bank is entitled to demand and receive same from the Bank of Angle in due course of the liquidation of that bank, with costs in both courts.

(136 La. 686)

No. 20089.

DELAMBRE v. KYES.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by the Court.)

LIBEL AND SLANDER ⚡101—**DAMAGES—PRESUMPTION.**

The law presumes malice upon the one hand, and injury upon the other, where slanderous words are used, and damages will be awarded in a substantial amount, but not for an amount too great for the defendant to bear.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 150, 273, 275-280; Dec. Dig. ⚡101.]

O'Niell, J., dissenting.

Appeal from Twenty-Fourth Judicial District Court, Parish of East Feliciana; Jos. L. Golsan, Judge.

Action by Constance Delambre against Mrs. Maggie Wedge Kyes. From a judgment for plaintiff for less than claimed, she appeals. Amended and affirmed.

Justin C. Daspit, of Baton Rouge, for appellant. Kilbourne & Walker, of Clinton, for appellee.

SOMMERVILLE, J. Plaintiff appeals from a verdict and judgment in her favor in the sum of \$25 against the defendant for damages for slanderous charges made by the defendant against her in the presence of others. She alleges that defendant called her a low-down thief. Defendant filed a general denial; and she has not appealed from the judgment, or answered the appeal of the plaintiff in this court.

The evidence supports the allegations contained in the petition. The record contains no evidence in mitigation, and plaintiff asks that the judgment be increased to \$2,500, as originally prayed for.

Plaintiff having appealed to the court against the slander and abuse proven on the trial of the cause, and having made out her case, is entitled to substantial redress. The judgment for \$25 is too small.

Plaintiff may have failed, in the sense of the common-law rule, to show any special damage growing from the slanderous charges of defendant; yet as we say in *Miller v. Holstein*, 16 La. 389, she has shown that she enjoys a good character in the community in which she lives, and it is difficult to come to the conclusion that there was no damage shown.

"If there be any intellectual enjoyment higher than that of possessing a good name, or gratification greater than the respect of our neighbors, they must be looked for in matters out of the reach of the libeler. Such a charge as is stated in the petition is in itself presumption

of damage. In this view, the law has left the damages to the jury, subject to the revision of this court."

In the case of *Fatjo v. Seidel*, 109 La. 699, 33 South. 737, we say:

"When plaintiff appealed to the courts against slander and abuse, his case being made out, he was entitled to substantial redress." *Simpson v. Robinson*, 104 La. 180, 28 South. 908.

There remains for consideration the amount of the increase to be allowed in the judgment. It is impossible to fix upon any particular sum of money which would, altogether, make good the injury which has been inflicted by the defendant upon the plaintiff. A favorable judgment in the case is a vindication of the plaintiff, and a rebuke to the defendant; and we shall not add a penalty in money greater, perhaps, than the defendant can bear. She is a school teacher, depending upon her salary for a support; and the payment of a large amount of money would be a very great burden upon her.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by increasing the amount thereof from \$25 to \$250; and, as thus amended, it is affirmed, with costs in both courts.

O'NIELL, J., dissents, being of the opinion that the judgment should be affirmed.

(136 La. 688)

No. 20043.

MASSEY et ux. v. W. R. PICKERING LUMBER CO.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by the Court.)

COMPROMISE AND SETTLEMENT ⚡6—**PERSONAL INJURY CLAIM—VALIDITY OF COMPROMISE.**

A compromise of a claim for damages for personal injuries made in good faith cannot be attacked on account of any error in law or for inadequacy of the price.

[Ed. Note.—For other cases, see Compromise and Settlement, Cent. Dig. §§ 35-50; Dec. Dig. ⚡6.]

Appeal from Twelfth Judicial District Court, Parish of Vernon; James R. Monk, Judge ad hoc.

Action by Petty Poole Massey and wife against the W. R. Pickering Lumber Company. From judgment for defendant, plaintiffs appeal. Affirmed.

S. I. Foster, of Shreveport, for appellants. Stubbs, Russell, Theus & Wolff, of Monroe, for appellee.

LAND, J. This is the second suit instituted by the plaintiffs for damages for the death of their son, who was killed while working in one of the mills of defendant.

The first suit was dismissed on a plea of compromise settlement, as in case of non-suit. The plaintiffs in said suit did not assail said settlement on the ground of fraud,

error, or mistake, and did not offer to return the money received by them. The object of the nonsuit was to enable the plaintiffs to sue to rescind the compromise.

In the present action the plaintiffs assail the act of compromise on the ground that plaintiff P. P. Massey was induced by the fraudulent representations of defendants' agents to believe that the release signed by him was a receipt for insurance money due on a policy or contract held by his son; and that he could not read the document, which was not read to him by any one, nor its contents made known to him.

Defendant pleaded the judgment in the first suit as res judicata and also filed an exception of no cause of action. Defendant also pleaded the compromise as an estoppel. The exception was overruled, and after trial judgment was rendered in favor of the defendants, rejecting the demands of the plaintiffs, who have appealed.

The plaintiff P. P. Massey signed in the presence of F. K. Jenny and F. R. Williams an instrument reading as follows:

"Release.

"For the sole consideration of the sum of two hundred and no/100 dollars, this 14th day of September, 1910, received from W. R. Pickering Lumber Company, I do hereby acknowledge full satisfaction and discharge of all claims, both for liability of employer and for all half wages or insurance accrued or to accrue, in respect of all injurious results direct or indirect, arising or to arise from an accident sustained by Leo Massey on or about the 6th day of September, 1910, while in the employment of the above. It is expressly understood and agreed that the consideration expressed above is the sole consideration of this release and the consideration stated herein is contractual, and not a mere recital; and all agreements and understandings between the parties are embodied and expressed therein."

The compromise settlement was made by P. P. Massey, with F. R. Williams and F. K. Jenny at one sitting. Williams was superintendent of the company, and Jenny was an insurance adjuster. The latter testified that the insurance due the son amounted to \$117, and that the balance of the \$200 was for the release of all other claims. Massey testified that during the conference he said that he did not want "pay for his son." Jenny's version is that Massey said that he knew he could get damages, but he did not believe that kind of money did a man any good; that he did not want blood money. Williams testified that the conversation was between Jenny and Massey, but that he heard the latter say that he did not like that kind of money; that it did not do anybody any good. It is evident from the testimony of the three witnesses that compensation for the death of the son was referred to during the conference, and that Massey was averse to receiving "pay for his son," as he expressed it. Such being his feelings on the subject, it is not strange that he was willing to forego his

claim for damages for a nominal compensation. Massey received \$83 in excess of the insurance due his son, and could not have been ignorant of that fact. The foregoing facts repel the allegation that Massey was fraudulently induced to believe that the compromise included only the claim for insurance. The testimony of both Williams and Jenny was to the effect that the document was read in a distinct and audible voice in the presence of Massey, and Jenny also testified that Massey read the document before signing. Plaintiff's plea that he did not read the instrument, and signed it, thinking it merely an insurance receipt, is on all fours with a similar plea which was brushed aside by the court in *Antoine v. Smith*, 40 La. Ann. 568, 4 South. 321.

"Transactions [or compromises] have, between the interested parties, a force equal to the authority of things adjudged. They cannot be attacked on account of any error in law or any lesion." Civil Code, art. 3078.

It is Hornbook law that a compromise made in good faith will not be set aside for inadequacy of the price. 8 Cyc. 504-512.

Plaintiffs' claim for damages, being a joint acquisition during the marriage, fell into the community. Civil Code, art. 2402. The husband as head and master of the community had the undoubted right to make the compromise in question. Civil Code, art. 2404.

Judgment affirmed.

No. 20913.

(136 La. 691)

VICKSBURG, A. & S. RY. CO. v. LOUISIANA & A. R. CO.

(Supreme Court of Louisiana. Feb. 8, 1915.)

(Syllabus by Editorial Staff.)

1. APPEAL AND ERROR ⇐47—JURISDICTION—AMOUNT—CLAIM FOR DAMAGES.

A suit to expropriate servitude of passage for its railroad across that of defendant, where the land affected was worth less than \$100, but in which defendant seriously and in good faith claimed \$10,000 damages for future losses in collisions, loss of time in stopping trains, and loss from having to reduce the weight of trains, owing to the steepness of the grade, is one for more than \$2,000, so as to bring the defendant's appeal within the jurisdiction of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 202-225; Dec. Dig. ⇐47.]

2. EMINENT DOMAIN ⇐10—DELEGATION OF POWER—"RAILROAD"—"COMMON CARRIER"—"PLANT UTILITY."

Const. art. 271, provides that any railroad corporation may cross any other railroad, and shall receive and transport its passengers and freight. Article 272 declares railroad companies to be "common carriers," and article 230, exempts certain railroads from taxation for ten years, on certain conditions. The statute, as amended by Act No. 227 of 1902, provides that, whenever any corporation organized under the laws of the state to construct a railroad cannot agree with the owner of land, it may expropriate it. Plaintiff, a corporation, was organiz-

ed under the laws of the state to operate a railroad extending from the pit of a gravel company, a distance of eight miles, to a connection with another railroad, chiefly to carry gravel, and not to carry passengers, and three-fourths of its organizers and stockholders holding the majority of its capital stock, were stockholders in the gravel company. *Held*, that plaintiff was an independent concern, and a railroad entitled to expropriate a crossing; that it could not be both a "common carrier" and a mere "plant utility," for what is meant by a railroad being a mere plant utility is that it is not a common carrier; that the fact of its close relation to an industrial plant did not detract from its character as a "railroad," within its definition as a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power to run upon, a road to transport passengers or freight, or both; and that the constitutional provisions were not intended to define the meaning of the expropriation statute.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 35-48; Dec. Dig. ¶ 10.]

For other definitions, see Words and Phrases, First and Second Series, Common Carrier; Railroad.]

3. STATUTES ¶ 188—CONSTRUCTION—TAKING WORDS IN USUAL MEANING.

The words of a statute are to be taken according to their popular meaning, in the absence of anything to the contrary in the statute itself.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 267, 276; Dec. Dig. ¶ 183.]

4. EMINENT DOMAIN ¶ 128—EXPROPRIATION—RAILROAD CROSSING ANOTHER ROAD.

On a railroad's expropriation of a servitude of passage across another railroad, future damages from the crossing, as the result of collisions, loss of time in stopping trains in conformity with the rules of the Railroad Commission, and reduction in the weight of trains owing to the steepness of the grade at the crossing and the difficulty in starting from a stop, were not recoverable.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 349-351; Dec. Dig. ¶ 128.]

Appeal from Thirteenth Judicial District Court, Parish of Rapides; W. F. Blackman, Judge.

Suit by the Vicksburg, Alexandria & Southern Railway Company against the Louisiana & Arkansas Railroad Company. Judgment for plaintiff, and defendant appeals. Motion to dismiss denied, and judgment affirmed.

Henry Moore and Henry Moore, Jr., both of Texarkana, Ark., and H. H. White and R. F. White, both of Alexandria, for appellant. Blackman, Overton & Dawkins, of Alexandria, for appellee.

On Motion to Dismiss.

PROVOSTY, J. [1] The plaintiff company seeks in this suit to expropriate a servitude of passage for its railroad across the railroad of the defendant company. The appeal is by defendant, and motion is made to dismiss it on the ground that the amount involved falls below the lower limit of the jurisdiction of this court. That limit is \$2,000, and the loca-

tion of the desired crossing is in the open country where land is worth about \$10 an acre, so that the land itself to be affected by the servitude is admittedly worth less than \$100; but defendant claims \$10,000 damages which it alleges it will suffer in the future from this crossing as the result of collisions, and from loss of time in stopping trains in conformity with the rules of the Railroad Commission, and from having to reduce the weight of trains owing to the steepness of the grade at this crossing and the consequent difficulty of starting again after a stop.

These elements of damage, says plaintiff, cannot be taken into consideration in computing the amount involved in the suit, because they cannot serve as the basis for a demand in a suit of this kind; that this court so decided in *Kansas City, S. & G. Ry. Co. v. La. W. R. Co.*, 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512, 7 Ann. Cas. 831.

That decision, and any others, more or less in point, by this court and other courts, in suits between other parties, cannot preclude defendant from bringing forward this demand. The argument reduces itself, therefore, to this: That because the demand may prove to be unfounded it is not involved in the suit, and cannot serve as a basis for jurisdiction. But how could its groundlessness be ascertained without jurisdiction being entertained?

We will not say that a demand may not be so utterly and manifestly baseless as to be unservicable for purposes of jurisdiction; nor even that a legal proposition may not be so perfectly plain, or have become so fully settled by repeated decisions, that the making it the basis of a demand might not be looked upon as a mere subterfuge for conferring jurisdiction, and be treated as such. But this cannot yet be said of the legal proposition underlying the said demand for damages in this suit. Said demand is being urged seriously, and not as a mere pretense.

The motion to dismiss is overruled.

On the Merits.

[2, 3] Defendant denies that plaintiff is a railroad corporation within the meaning of the statute authorizing railroad corporations to invoke the power of eminent domain for expropriating property. In support of that denial defendant avers that plaintiff's railroad is not to be a genuine railroad, but a mere plant utility of the Tioga Gravel Company, and that the plaintiff corporation was organized merely as a subterfuge for expropriating for the benefit of said gravel company across the railroad of defendant a right of way which said gravel company would not otherwise have been entitled to for its tramroad, and that, if this is not the case, still plaintiff is not a railroad corporation within the meaning of said statute, because by express provision of plaintiff's charter plain-

tiff is not to carry both freight and passengers, but freight only.

Plaintiff is organized under the laws of this state. Its railroad is to have a roadbed, cross-ties, steel rails, freight cars, and locomotives, and is to be operated like any ordinary railroad in the service of the public, carrying freight only, however. It is to extend from the gravel pit of the Tioga Gravel Company, at Tioga, La., to Pineville, La.—a distance of eight miles—there to connect with the Iron Mountain Railroad. True, the idea of organizing the plaintiff company was suggested by the fact that there would be a large quantity of gravel to be carried for the Tioga Gravel Company—30 to 50 car loads daily; and true, also, 6 of the 8 organizers and stockholders of the plaintiff company, owning \$98,800 of its capital stock of \$100,000, are stockholders in the gravel company; but 8 of the 15 stockholders of the gravel company, owning \$120,800 of its capital stock of \$200,000, are not stockholders of the plaintiff company; and the testimony is to the effect that, as an enterprise entirely independent of the gravel company, though not, of course, of its patronage, the railroad promises to be a paying proposition.

The two companies, being separately incorporated, with different stockholders, are distinct and separate both in law and in fact. Indeed, we find in the brief of the defendant what is practically an admission of the autonomous character of the plaintiff company, to wit: "Defendant admits that the plaintiff is a common carrier." Plaintiff cannot be both a common carrier and a mere plant utility, for what is meant by a railroad being a mere plant utility is that it is not a common carrier.

A close relation between an industrial plant and a tap railroad, such as is exhibited between the plaintiff company and the gravel company in this case, does not detract from the character of the railroad as a genuine railroad. That question has been so exhaustively treated by the Supreme Court of the United States in the Tap Line Cases that anything we might undertake to say here in that connection would be mere idle repetition. *U. S. v. La. & Pac. Ry. Co.*, 234 U. S. 1, 34 Sup. Ct. 741, 58 L. Ed. 1185.

We conclude, then, that the plaintiff is an independent concern and a railroad corporation; and we pass to the inquiry whether the fact of its carrying freight only, and not passengers also, deprives it of its character of a railroad corporation within the meaning of the statute authorizing railroad corporations to expropriate. The last amendatory act on this subject is, we think, Act No. 227, p. 457, of 1902. It reads:

"Whenever the state or any political corporation of the same, created for the purpose of exercising any portion of the governmental powers of the same, or the board of administrators or directors of any charity hospital or any board of school directors thereof, or any corpo-

ration constituted under the laws of this state for the construction of railroads, plank roads, turnpike roads, or canals for navigation, or for the construction and operation of waterworks or sewerage to supply the public with water and sewerage, or for the purpose of transmitting intelligence by magnetic telegraph," cannot agree with the owner of land, it shall have the right to expropriate.

This statute does not require that the corporation shall carry both freight and passengers, but simply that it shall have been organized for the construction of a railroad; and, since the rule is that the words of a statute are to be taken according to their popular meaning, in the absence of any indication to the contrary in the statute itself, we have to go to the dictionaries for the definition of the term "railroad," and we transcribe from them, as follows:

"A railroad is a road specially laid out and graded, having parallel rails of iron or steel for the wheels of carriages or cars, drawn by steam or other motive power to run upon." *Rapalge & L. L. Dict.*

"A railroad is a road graded and having rails of iron or other material for the wheels of railroad cars to run upon." *Bouvier, L. Dict.*

"A railroad is a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads in vehicles." *Webster's Dict.*

"A road upon which are laid one or more lines of rails to guide and facilitate the movement of vehicles designed to transport passengers or freight or both." *Century Dict.*

According to this, plaintiff's railroad is most unquestionably a railroad within the meaning of the said statute.

The only case in our reports bearing directly upon the question of what is a railroad is *Shreveport Traction Co. v. Kansas City Ry. Co.*, 119 La. 759, 44 South. 457. In that case the question was whether a street railway is a railroad. Defendant cites the case as having held the negative of that question, and plaintiff cites it as having held the affirmative. Plaintiff is unquestionably right. While the court sought to fortify its decision by adducing the fact that the particular street railroad in question was authorized by its charter to carry freight, that circumstance was not the determinative factor in the case, as is made perfectly evident by the decision on rehearing, where the court said:

"As to the right of crossing the tracks of other railroads, . . . there is no difference in principle between a street railroad and a commercial railroad."

In opposition to this, defendant cites *Massachusetts Loan Co. v. Hamilton*, 88 Fed. 588, 32 C. C. A. 46, and *Thompson-Houston Electric Co. v. Simond*, 20 Or. 60, 25 Pac. 147, 10 L. R. A. 251, 23 Am. St. Rep. 86, a Texas decision; but of course, our own decision controls, and, moreover, such a thing might well be as that a street railway should not be a railroad within the meaning of said statute, and yet a concern like that of plaintiff be a railroad, for several of the reasons usually assigned why a street railway should

not be deemed to be, properly speaking, a railroad are totally inapplicable to plaintiff's railroad, which by no possibility can be deemed to be anything other than a railroad, as that term is generally understood.

As showing that a railroad carrying only freight is not a railroad within popular acceptance, defendant cites the note in 29 Am. & Eng. Railroad Cases, 53; but we find nothing in that note countenancing that contention, except, possibly, the reference to two cases as having held that a railroad may be compelled to carry passengers, neither of which cases, on investigation, is found to have involved the question of carrying passengers, but only whether the railroad company there in question could discontinue some particular service due under its franchise.

Defendant cites, also, *Amos Kent Lumber Co. v. Tax Assessor*, 114 La. 866, 38 South. 587, and *La. & Ark. Ry. Co. v. State Board of Appraisers*, 135 La. 69, 64 South. 985. In the former of these cases we find absolutely nothing that has any bearing upon our question. In the other case a log road was claiming to be a railroad, and to be, as such, entitled to the constitutional exemption from taxation, and the court did say, by way of expressing the idea that the said road was a mere plant utility, and not a public carrier, that "it surely did not carry passengers." But the question of whether a railroad ceases to be such in popular contemplation the moment it ceases to carry passengers and confines itself to freight was not being considered, and that expression was not intended to be used in connection with it.

Plaintiff, on the other hand, cites *Kansas City, S. & G. Ry. Co. v. La. W. R. Co.*, 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512, 7 Ann. Cas. 831, where the right to expropriate a right of way for a spur track destined to transport freight only was recognized by this court. The following are in point:

In *Railroad Co. v. Cobb*, 66 Or. 587, 135 Pac. 181, it was held that a statute authorizing any railroad to condemn land includes a company organized to construct a short line carrying only freight.

"The right of eminent domain is available by legislative grant to a railroad corporation which has constructed a railroad for the carriage of freight to and from" certain "lime kilns * * * and goods to and from stores" of a certain "place." *Farnsworth v. Lime Rock Co.*, 83 Me. 440, 22 Atl. 373.

Property may be condemned "by a mining company for the construction of a railroad to be used for the transportation of coal from its mines," since such a use is "of a public nature." *New Central Coal Co. v. G. C. Coal & Iron Co.*, 37 Md. 537.

"The mere fact that a railroad company limits the use of a switch track to the carriage of property does not make the use of the track private." *Brown v. Chicago G. W. Ry. Co.*, 137 Mo. 529, 38 S. W. 1099.

Defendant contends, however, that in Louisiana, no matter what might be the case elsewhere, a corporation, in order to be a railroad corporation, must carry both freight and passengers, because the Constitution of the state so provides; and in support of that contention cites the following articles of the Constitution:

"Art. 271. Any railroad corporation or association organized for the purpose shall have the right to construct and operate a railroad between any points within this state, and connect at the state line with railroads of other states. Every railroad company shall have the right with its road to intersect, connect with or cross any other railroad, and shall receive and transport each other's passengers, tonnage and cars loaded or empty, without delay or discrimination.

"Art. 272. Railways heretofore constructed, or that may hereafter be constructed in this state, are hereby declared public highways, and railroad companies common carriers."

"Art. 230. There shall also be exempt from taxation for a period of ten years from the date of its completion any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1st, 1904; provided, that when aid has heretofore been voted by any parish, ward, or municipality to any railroad not yet constructed, such railroad shall not be entitled to the exemption from taxation herein established, unless it waives and relinquishes such aid or consents to a resubmission of the question of granting such aid to a vote of the property taxpayers of the parish, ward, or municipality, which has voted the same, if one-third of such property taxpayers petition for the same within six months after the adoption of this Constitution."

The provision of this article 271 to the effect that connecting railroads shall receive and transport each other's passengers undoubtedly carries with it to some extent the implication that, within the intentment of the article, a railroad is a concern that carries passengers. And such a thing might well be as that a railroad which does not carry passengers should be excluded from the benefit of the tax exemption provided for by article 230, as not being such a railroad as is contemplated by the Constitution (a point upon which we, naturally, express no opinion); but those articles were manifestly not intended to define what shall constitute a railroad corporation within the meaning of the statutes authorizing corporations of that kind to expropriate property, or to prescribe essential characteristics for the railroads of those corporations; and it is perfectly safe to say that, if these articles had had the effect of repealing, or modifying in any way, those statutes, such result would have been wholly unintentional on the part of the framers of those articles, and be merely one of those freaks of legislation that occasionally crop out to the surprise as much of the persons responsible for them as of the public at large.

We might go even further, and say that, if plaintiff were dependent upon those articles for its right to demand this crossing, it might perhaps have to qualify under article

271 by carrying passengers; but the source of plaintiff's right to this crossing is not this article 271, but is the said statutes which, conferring unqualifiedly the right to expropriate for a right of way, confer necessarily the right to expropriate this crossing if necessary for a passage. Indeed, "no express legislative authority is required in such cases." *Shreveport Traction Co. v. Kansas City Ry. Co.*, 119 La. 777, 44 South. 457, on rehearing.

Let it be noted that, if these articles were inconsistent with the theretofore existing legislation by which the right to expropriate property was conferred upon railroads not carrying passengers, they would be in like manner inconsistent with, and therefore preclude, any future legislation conferring such right; so that the situation would be that, while the Legislature was at liberty to extend this right to expropriate to all concerns in which the public might have an interest, such as canals, plank roads, and turnpikes, it would be absolutely prohibited from conferring it upon such a public utility as a freight carrying railroad. A construction bringing about such an anomalous situation is not to be thought of, unless absolutely unavoidable; and it is easily avoided by reading article 271 as meaning simply that those railroads which do carry passengers will be bound to receive and transport passengers, and not as having a meaning contrary to the general understanding of mankind as to what constitutes a railroad.

Kansas City, S. & G. Ry. Co. v. La. W. R. Co., 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512, 7 Ann. Cas. 831, where a crossing was expropriated for a spur track that was to be used exclusively for freight, has already been referred to. In that case the question here at issue was not raised, but the fact itself of its not having occurred either to the court or to counsel is very significant in view of care with which the case was considered both by counsel and by the court.

[4] We conclude that plaintiff is entitled to the crossing; and we pass on to the question of damages. These are the future damages referred to hereinabove in connection with the motion to dismiss. When defendant came to offer evidence upon them, the evidence was objected to, on the ground that, such damages not being recoverable, all evidence with regard to them was irrelevant and inadmissible.

In the case of *Kansas City, S. & G. Ry. Co. v. La. W. R. Co.*, 116 La. 178, 40 South. 627, 5 L. R. A. (N. S.) 512, 7 Ann. Cas. 831, already referred to, this court held that damages of that kind were not recoverable in a suit of this kind. We see no reason for departing from that decision. The point is not argued in defendant's brief.

Judgment affirmed.

No. 20709.

STATE v. SCHOFIELD et al.

In re SCHOFIELD.

(Supreme Court of Louisiana. Jan. 11, 1915.)

(Syllabus by Editorial Staff.)

1. LICENSES §1—NATURE—LICENSE OR TAX.

In determining whether a license imposed by statute is levied by an exercise of the taxing power or by exercise of police power, if levied by the taxing power, it is plainly for revenue, while, if levied by police power, it should not go beyond providing for the expenses of the regulation of the business in question, together with incidental consequences likely to subject the public to cost in consequence of the business licensed.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 1; Dec. Dig. § 1.]

2. LICENSES §1—NATURE—EXERCISE OF POLICE OR TAXING POWER.

Act No. 40 of 1912, levying a license tax on itinerant or traveling agents selling stocks and bonds of any corporation, regulating the business and requiring bonds, and that the agent file a sworn statement as to residence, value of bonds, etc., and providing for prosecutions for fraudulent sales, makes no provision for use of the proceeds or as to whether it is a state or parish license, nor shows any possible item of expense that will be entailed by the state as a consequence of the adoption of the statute. *Held*, that such license was an exercise of the taxing power, and not of the police power.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 1; Dec. Dig. § 1.]

3. LICENSES §1—NATURE—EXERCISE OF POLICE OR TAXING POWER—STATUTE—CONSTRUCTION—TITLE.

The statement in the title of Act No. 40 of 1912, that it was an act levying a license tax was not necessarily conclusive of its being or not being levied by an exercise of the taxing power, as license taxes can be validly levied by police power subject to the condition that they be for regulation merely, and not for revenue.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. § 1; Dec. Dig. § 1.]

4. STATUTES §121—TITLES—EXPRESSION OF OBJECT.

The title of Act No. 40 of 1912—"An act levying a license tax on itinerant or traveling agents selling stock and bonds; regulating the sale of such stock and bonds by itinerant or traveling agents or vendors and requiring them to secure a certificate of permission before receiving a license; providing the cost and manner of securing such certificate of permission and license; and providing that bonds and security be given that such stock or bonds are as represented; and providing a penalty for the violation of this act"—is not broader than the act in violation of Const. art. 31, requiring the object of acts to be stated in their titles; the act itself merely regulating the business of such sales and requiring a license tax therefor and a bond, and imposing penalties.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121.]

5. STATUTES §107—SUBJECT OF STATUTES—DOUBLE OBJECT—LICENSE AND REGULATION.

Act No. 40 of 1912, levying a license tax on itinerant or traveling agents selling corporate stocks and bonds, is not devoted to two objects, licensing and regulating, in violation of Const.

art. 31; the license being merely an incident in the scheme of regulation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. ¶107.]

6. LICENSES ¶7 — CONSTITUTIONALITY — GRADUATION OF TAX.

The requirement in Act No. 40 of 1912, licensing itinerant or traveling agents selling corporate stocks and bonds, that such agent take out a separate license for each company or stock or bond he represents and for each parish he does business in, is a graduation of the license tax within the requirement of Const. art. 229.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 7-15, 19; Dec. Dig. ¶7.]

7. CONSTITUTIONAL LAW ¶287—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—LICENSE TAX.

Act No. 40 of 1912, requiring itinerant or traveling agents selling corporate stocks to procure from the secretary of state at a cost of \$1 a certificate of permission entitling him to procure from the sheriff of the parish in which he proposes to engage in such sale, a license fixed at \$5 per year, and requiring such agent to give bond in a sum not less than \$15,000, is not, by reason of the amount of the tax or the requirement as to bond, so burdensome as to deprive such agents of their liberty and property in violation of the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 831, 905; Dec. Dig. ¶287.]

8. CONSTITUTIONAL LAW ¶48 — CONSTRUCTION OF STATUTES—PRESUMPTION AS TO VALIDITY.

The action of the Legislature is always presumed to be right until the contrary has been clearly shown.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48.]

9. CONSTITUTIONAL LAW ¶208—CLASS LEGISLATION—TAXING ITINERANT AGENTS.

Act No. 40 of 1912, taxing itinerant vendors of corporate stocks and bonds, is not obnoxious to the provision of the federal Constitution against class legislation, but sets apart a separate class similarly situated.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. ¶208.]

10. CONSTITUTIONAL LAW ¶208—DISCRIMINATION—TAXING ITINERANT VENDORS.

Act No. 40 of 1912, imposing a license tax on itinerant vendors of corporate stocks and bonds, is not class legislation, as unlawfully discriminating between the purchasers from two classes of agents by affording the protection of a bond to purchasers from such itinerant agents, and not the same protection to purchasers from agents with fixed places of business; that protection being merely the result of a proper classification of agents.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. ¶208.]

11. COMMERCE ¶66—TAXATION—LICENSE.

A license imposed on the agent of a foreign corporation selling articles of commerce which at the time of the sale are in another state operates in restraint of interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 111; Dec. Dig. ¶66.]

12. CONSTITUTIONAL LAW ¶48 — VALIDITY OF STATUTES—CONSTRUCTION IN FAVOR.

A statute will not be interpreted so as to render it or any of its parts unconstitutional

if, without doing violence to its language, a saving interpretation be possible.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. ¶48.]

13. STATUTES ¶64 — PARTIAL VALIDITY — LICENSE TAX—INTERSTATE COMMERCE.

If Act No. 40 of 1912, levying a tax on the itinerant vendors of corporate stocks and bonds, attempts to tax interstate commerce as to bonds of foreign corporations which have not yet come into the state, or become mingled with the mass of the property here, invalidity to that extent would not render it invalid in so far as applicable to all other stocks and bonds.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. ¶64.]

14. COMMERCE ¶64—INTERSTATE COMMERCE—TAXATION—LICENSE TAXES.

The right of a state to exact a license for doing business is subject to the qualification that the license must not be so levied as to interfere with interstate commerce, and that it does so operate if it taxes the persons engaged in selling articles of commerce not yet brought into the state and mingled with the mass of property within the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 104-106; Dec. Dig. ¶64.]

15. CRIMINAL LAW ¶1169—BEST EVIDENCE—CERTIFICATES OF STOCK—HARMLESS ERROR.

Any error in proving a sale of stock by an itinerant vendor without a license contrary to Act No. 40 of 1912, otherwise than by the certificate of stock, on the theory that it was the best evidence, was rendered harmless by a subsequent introduction of all the documents executed by the parties at the time of the sale, and by the accused testifying to the whole transaction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3038, 3130, 3137-3143; Dec. Dig. ¶1169.]

16. CRIMINAL LAW ¶400 — DOCUMENTARY EVIDENCE—SALE OF STOCK—CERTIFICATE OF STOCK.

In a prosecution for sale of stock by an itinerant agent without a license contrary to Act No. 40 of 1912, an objection that the sale could be shown only in the manner required by Act No. 180 of 1910, § 1, was not sustainable, as that statute does not undertake to prescribe an exclusive mode of evidencing a sale, but merely regulates transfers on the books and furnishes a rule for deciding between contesting claimants.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 879-886, 1208-1210; Dec. Dig. ¶400.]

17. CRIMINAL LAW ¶1036—RESERVATION OF GROUNDS OF REVIEW.

Where in a prosecution for violation of Act No. 40 of 1912, requiring itinerant vendors of corporate stocks and bonds to procure a license, the evidence showed that the transaction involved was a subscription to stock, the objection that such subscription was not a sale within the meaning of the statute would not be considered on appeal in the absence of an objection to the evidence, as the court having by finding accused guilty found that he sold the stock the only objection that could be made to raise such question would go to the sufficiency of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. ¶1036.]

Applications by H. B. Schofield and others for writs of certiorari and prohibition against

the Judge of the District Court of the Parish of Lincoln. Writs recalled.

J. S. Atkinson, of Shreveport, Price & Price, of Ruston, and G. W. Hardy and Albert Benoit, both of Shreveport, for applicants. R. G. Pleasant, Atty. Gen., and Howard B. Warren, Dist. Atty., of Ruston (G. A. Gondran, of New Orleans, of counsel), for the State. John B. Holstead, District Judge, pro se.

PROVOSTY, J. The indictment against the accused contains two counts—one, under section 1 of Act No. 40, p. 47, of 1912, charging that:

"They being itinerant and traveling agents engaged in the sale of stock of the North Louisiana Electric Railway Company, a corporation organized under the laws of the state of Louisiana, did sell five shares of stock" of said corporation.

The other count is under section 4 of said statute, and charges that, in order to induce the purchase of said stock, they made false representations. They were tried without a jury, and were convicted and sentenced each to a fine of \$50, and their case is before this court on writs of certiorari and prohibition to the trial judge.

By motion to quash, they assailed the validity of said statute on a number of grounds. The said act reads as follows:

"An act levying a license tax on itinerant or traveling agents selling stock and bonds; regulating the sale of such stock and bonds by itinerant or traveling agents or vendors and requiring them to secure a certificate of permission before receiving a license; providing the cost and manner of securing such certificate of permission and license; and providing that bonds and security be given that such stock or bonds are as represented; and providing a penalty for the violation of this act.

"Section 1. Be it enacted by the General Assembly of the state of Louisiana, that every itinerant or traveling agent engaged in the sale of stocks or bonds of any corporation, whether organized in this state or any state or territory, shall before being permitted to make any such sales, procure from the secretary of state, at a cost of one dollar a written certificate of permission, which shall entitle him to procure from the sheriff of the parish, in which he proposes to engage in such sale, a license to do so, which license is hereby fixed at the sum of five dollars per annum, and any such agent who engages in such sales, before securing such certificate of permission and before payment of such license in each parish in which he operates, shall be deemed guilty of a misdemeanor and punished as hereinafter provided.

"Sec. 2. Be it further enacted, etc., that each and every itinerant or traveling agent so engaged in the sale of such stock or bonds before securing such certificate of permission as aforesaid, shall file with the secretary of state a sworn statement giving his name, residence and the name and kind of bonds or stock which he proposes to sell, with the par value thereof, as well as a full statement of the domicile and offices of the corporation whose bonds or stock he proposes to sell, and shall therein declare the market value of such bonds or stock with a brief statement of the property owned by such corporation with its location and any such itinerant or traveling agent who shall make any false statement in said affidavit shall be deemed guilty of perjury and prosecuted as such.

"Sec. 3. Be it further enacted, etc., that each of such itinerant or traveling agents shall before securing such certificate of permission, on procuring of any license or making any sales of stock and bonds as hereinbefore referred to give bond in any sum not less than fifteen thousand dollars filed by the secretary of state, and payable to him which bond shall be furnished by a surety company and approved by the secretary of state and the same shall be conditioned that he will make no false statement, or misrepresentation of facts in making such sales of said stock or bonds, the same to continue in full force for a period of two years from date, and any purchaser of stock or bonds from such agent shall have a right of action on this bond to recover any damages caused by any false statement or misrepresentation made by such agent in the sale of such stock or bonds to be recovered before any court of competent jurisdiction in the parish where the sale is made.

"Sec. 4. Be it further enacted, etc., that any such itinerant or traveling agent engaged in the sale of such stock or bonds who shall make any false statement, false representations, or false promise in order to induce any person to buy such bonds or stock and a purchase is made relying thereon, shall be deemed guilty of misdemeanor and on conviction shall be punished as hereinafter provided.

"Sec. 5. Be it further enacted, etc., that each certificate of permission and license shall designate the name of the company whose bonds or stock are being sold under it, as well as the name of the person to whom it is issued and for each separate company or stocks and bonds represented, a separate bond shall be filed and separate certificate of permission and license obtained, and any agent who shall use or attempt to use any certificate of permission or license for the sale of stock and bonds not designated therein and not issued to him shall be deemed guilty of a misdemeanor and shall be punished as hereinafter provided.

"Sec. 6. Be it further enacted, etc., that any itinerant or traveling agent as aforesaid, violating the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not more than \$500.00 or imprisoned not more than six months or both at the discretion of the court."

[1] A question which is more or less involved in several of the grounds of nullity urged against this statute, and which might as well be disposed of now and for all, is whether the license imposed by this statute is levied by an exercise of the taxation power or of the police power.

When a license is required to be obtained for the privilege of carrying on some particular business without any payment being required for obtaining it, the governmental power that is being exercised in the premises cannot possibly be that of taxation, but is necessarily that of police, for the necessary function of the taxation power is to procure revenue. When a payment is required for obtaining the license, the power that is being exercised may be either that of taxation or that of police. If only an amount sufficient to cover the cost of issuing the license is demanded, the power that is being exercised is still plainly that of police. But, if the amount demanded exceeds the cost of issuing the license, the problem becomes more complicated; especially if, as in the present case, this excess is very large, and the cost of obtaining the license is otherwise provided for.

In nearly all of the very numerous cases where the courts have had to consider this distinction between a license levied under taxation power and one levied under the police power, the question has come up in connection with the ordinance of some municipality that possessed the power to regulate, but not that to tax, the particular business upon which the license was imposed. Hence we generally find the law in that regard stated in the text-books from the standpoint of a municipality, not from that of the Legislature. The question cannot possibly arise in an instance where the acting governmental authority possesses both the power of taxation and that of police, for the license is then valid, even if its purpose be to procure revenue to defray the general expenses of the government. This accounts for its having so seldom arisen in connection with a license imposed by a Legislature; for Legislatures, as a rule, possess both of the said powers in plenitude.

That law on this point is nowhere more fully and lucidly stated than by Judge Cooly in his work on Taxation (page 589), where he says:

"A fee for the license may still be exacted, but it must be such a fee only as will legitimately assist in the regulation; and it should not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business which it covers. If the state intends to give broader authority, it is a reasonable inference that it will do so in unequivocal terms. But the limitation of the license fee to the necessary expenses will still leave a considerable field for the exercise of discretion where the amount of the fee is to be determined. The fee, of course, must be prescribed in advance, and when it cannot be determined with any accuracy what the cost of regulation is to be. It must therefore be based upon the estimates with more or less probability that the result will fail to come anything near a verification of the calculations. Moreover, in fixing upon the fee, it is proper and reasonable to take into account, not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed. In some cases the incidental consequences are much the most important, and, indeed, are what are principally had in view when the fee is decided upon. The regulation of the business of huckster, for instance, could seldom be troublesome or expensive, but that of the manufacture and sale of intoxicating drinks could not be measured by anything like the same standard. The business is one that affects the public interest in many ways, and leads to many disorders. It has a powerful tendency to increase pauperism and crime. It renders a large force of peace officers essential, and it adds to the expenses of the courts, and of nearly all branches of civil administration. It cannot be questioned, therefore, if it is to be licensed by the public authorities, that it is legitimate and proper to take into the account all the probable consequences, or that the payment to be exacted should be sufficient to cover all the incidental expenses to which the public are likely to be put by means of the business being carried on. And all reasonable intendments must favor the fairness and justice of a fee thus fixed; it will not be held excessive unless it is manifestly something more than a fee or regulation."

The cases on this point are very fully and accurately classified in the note in 2 Ann. Cas. 314, where the doctrine of those bearing directly upon the distinction between a license levied under the taxation power and one levied under the police power is summarized thus:

"Under the power to regulate, or to regulate and license, the city may exact the payment of a fee to cover the cost of the license and of the supervision of the business regulated.

"The requirement of such a fee will not be held invalid on the ground that the city incidentally derives revenue therefrom, unless the fee is clearly excessive for the purpose of regulation.

"A license fee may be imposed either for regulation or for revenue, where the city has the power to license, regulate, and tax."

See, also, under the heading "Limit of Amount of License," in 30 L. R. A. 415, a very elaborate and very satisfactory monograph, where apparently the effort has been made to give in analytical order the substance of all the decisions upon the subject of licenses as taxation, and as merely regulation.

The general conclusion from the decisions on this subject is given by Judge Dillon, in his work on Municipal Corporations (section 768 [609]), as follows:

"The taxing power is to be distinguished from the police power. * * * The power to license and regulate particular branches of business or matters is usually a police power; but, when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes."

Among our own decisions we find cases where market fees, and fees imposed upon private butcher stands, and upon market wagons, have been held to be taxes, because not imposed for mere regulation, but for revenue (*Mestayer v. Corrige*, 38 La. Ann. 711; *Delcambre v. Clere*, 34 La. Ann. 1050; *State v. Blaser*, 36 La. Ann. 365); while, on the other hand, inspection fees have been upheld as merely regulative (*City v. Hop Lee*, 104 La. 601, 29 South. 214; *Board of Health v. Standard Oil Co.*, 107 La. 713, 31 South. 1015).

Accepting the foregoing statements of what the law is on this point as being authoritative, we have to consider whether the license we are dealing with in this case is (in the words of Judge Dillon) "plainly imposed for the sole or main purpose of revenue," or, in other words, whether it goes beyond providing for the expense of the direct regulation of the business in question, together with that of (to use the expression of Judge Cooly) "all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed."

[2] In entering upon the examination of that question, the first thing that strikes us is that the statute does not inform us what use the proceeds of said license are to be put to; in fact, does not inform us whether the said license is to be a state license or a parish license; whether, when collected, it

is to go into the parish treasury or the state treasury. Inasmuch, however, as parish licenses are levied by the parish, and state licenses by the state, and this license is levied by the state, no other conclusion is open to us than that it is a state license, whose proceeds must go into the state treasury.

The next thing that strikes us in our investigation of whether this license is levied in view of, or because of, the expenses to which the public may be subjected in consequence of the adoption of the scheme of regulation embodied in this statute, or just simply as ordinary state revenue, is that we cannot conceive of any possible item of expense that will be entailed upon the state as a consequence of the adoption of said statute. The state is not to be put to one cent of extra expense either in the way of policing said business, or of exercising special supervision over it, or otherwise.

The only possible extra public expenses the adoption of this regulation could possibly entail are those that would be incident to any criminal prosecutions that might be made necessary by violations of the statute. But we do not think Judge Cooley could possibly have had reference to an expense such as this when speaking of expenses to which the public might be subjected in consequence of a particular business being licensed. If such an expense as this could be taken into consideration in determining whether any particular measure was confined to regulation or included revenue, it is easily perceived how substantial revenue-bearing clauses could, under pretext of covering expenses of possible future prosecutions, be added to every ordinance adopted under the naked power to regulate; and three-fourths at least of the cases wherein the question of whether the particular license involved in the case was, or was not, a mere regulative measure, would be consigned at one sweep to the rubbish heap of obsolete jurisprudence. The sanction of a regulative ordinance is usually the denouncement of a penalty. If a license fee to cover the probable cost of probable or possible prosecutions for violations of the ordinance could be incorporated in the regulation as part thereof, the consequence would be that a very substantial amount of revenue could be derived in every case under authority given to simply regulate. A pretty thorough examination of the decisions has revealed to us no case where the probable cost of possible future prosecutions for the violation of a regulative ordinance has been allowed to be taken into computation in fixing the amount of the license fee proper to be exacted for permission to carry on any particular business. The nearest approach we have found to it is the case of *St. Paul v. Colter*, 12 Minn. 41 (Gil. 16), 90 Am. Dec. 278, where it was held that it was competent for a city, in fixing the sum required for a license, to look to the probability that the city might be put to

expense in litigation and to other expenses arising out of the business licensed.

But, in reality, that point is of hardly any interest in the present case, since the proceeds of the license involved in this case would go to the state, and not to the parish, and hence would not, and could not, be put to the use of defraying the expense of prosecutions. The expenses of all prosecutions are borne by the parishes, and not by the state. The only part thereof borne by the state is the salary of the judges of the district and Supreme Courts and of the district attorney. This judicial expense on the part of the state could not possibly be added to, even in the slightest degree, by the adoption of this statute.

[3] In that connection it is notable that the title of the act starts out with the announcement that the act is "An act levying a license tax." The fact, however, that this license is there called a tax is not necessarily conclusive of its being, or not, levied by an exercise of the taxation power; for license taxes can be validly levied by an exercise of the police power, subject only to the condition that they be for regulation merely, and not for revenue. Judge Cooley has devoted a chapter of his work on taxation to "Taxes Under the Power of Police." The nature of any measure has to be determined from its operation, and not from the name given to it. The Legislature could not validate as a mere regulation measure a license which in reality was a tax, by simply expressly declaring that it was a mere regulation measure, although its declaration that a certain measure was intended as a tax would perhaps go very far towards being conclusive.

We have to conclude therefore that this license is levied by an exercise of the taxation power; and this brings us to the consideration of the several grounds upon which the accused assails the validity of this statute.

Some of them relate to form, and some to substance.

First, as to those relating to form:

[4] The body of the act is said to be broader than its title, in violation of article 31 of the Constitution, requiring the object of acts to be stated in their titles.

What part of the body of this act is thus supposed to be broader than the title is not stated anywhere; not in the pleadings, and not in the argument; and we, for our part, have not been able to discover it.

[5] The act is said to contain two objects, in violation of the same article 31 of the Constitution, requiring acts to have but one object. The two objects are said to be: First, the levying of a tax, namely, the \$5 license; and, second, the regulating of the business upon which the statute bears.

From the mere reading of the statute it is evident that its sole object is to regulate the said business, and that the levying of the

said license is merely an incident in the scheme of regulation—a mere means of regulation. Indeed, the learned counsel for relators virtually argue in that sense, since they argue that the conditions imposed by said act upon the said business are so burdensome as to be practically prohibitory. A law practically prohibiting the carrying on of a business can hardly have for its object to derive a revenue from the business being carried on. The taxation power is not infrequently used for purposes of regulation.

[6] Next, it is objected that the license imposed by said act is not graduated, as is required by article 229 of the Constitution of taxation licenses.

We think this license is graduated. The graduation consists in the agent being required to take out a separate license for each company or stock or bond he represents and for each parish he does business in. This is a graduation. An agent who represents but one company or stock or bond, and does business in but one parish, pays but one license; whereas an agent who represents two or more companies or stocks or bonds, or does business in two or more parishes, pays as much more in the way of license as this more extended business calls for under the act. While the Constitution requires licenses to be graduated, it leaves the Legislature entirely free as to the mode of graduation. *State v. Liverpool, London & Globe Ins. Co.*, 40 La. Ann. 463, 4 South. 504.

So much for the objections as to form. Now as to those relating to substance:

[7, 8] One is that the conditions imposed by the act are so burdensome as to be practically prohibitory, with the result that the itinerant venders are deprived of their liberty and property in violation of the federal Constitution.

The evident object of the act is to protect the public against the danger of fraud and deception with which the business of selling stocks and bonds by itinerant agents of corporations is supposed to be fraught. Whether this danger is so patent and serious as that it would have justified the Legislature in prohibiting the business altogether, under its police power, is a question we need not go into, as we do not find that this act will have that effect. The argument of learned counsel for showing that it will is that the profit of the agent on the sale of a \$50 stock or bond would amount, at most, to \$5; whereas the license would cost that much, and the giving of the bond would cost \$150 to \$300. But no agent would go into the business on the expectation of making a profit of only \$5, or even \$150 or \$300. No evidence has been offered to show that said statute will operate prohibitively. The Legislature has evidently thought it would not, and has acted upon that assumption; and the action of the Legislature is always presumed to be right until the contrary has been clearly shown. In re

Spencer, 149 Cal. 396, 86 Pac. 896, 117 Am. St. Rep. 137, 9 Ann. Cas. 1105; 8 Cyc. 801. The license is certainly not excessive; and the exaction of a bond from itinerant vendors is not uncommon. 15 A. & E. E. of L. p. 300; Freund, Police Power, § 40, p. 36.

[9] Another objection is that said statute unlawfully discriminates between itinerant sellers and sellers with fixed places of business, and is therefore class legislation, obnoxious to the provisions of the federal Constitution.

The itinerant vender has always been distinguished in legislation from the vender with fixed place of business, and put in a separate class. He has always been singled out for special supervision and regulation. 15 A. & E. E. 295, 300; 8 Cyc. 875, 1115; 21 Cyc. 365; *Bacous v. Louisiana*, 232 U. S. 334, 34 Sup. Ct. 439, 58 L. Ed. 627. The federal Constitution does not forbid the setting apart in a separate class of all persons similarly situated. *State v. Schlemmer*, 42 La. Ann. 1167, 8 South. 307, 10 L. R. A. 135; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923.

[10] And what we have here said applies equally to the next objection, that said statute unlawfully discriminates between the purchasers from these two classes of agents, by affording the protection of a bond to purchasers from itinerant agents, and not extending the same protection to purchasers from agents with fixed places of business. This classification of the purchasers is merely a result, or incident, of the classification of the agents. If, therefore, the one classification is justified, so is the other, which is based upon precisely the same consideration. Indeed, if a bond is to be exacted at all against the possible frauds of these itinerants, the victims of the frauds would seem obviously to be the proper parties to be given recourse upon it.

Another alleged ground of nullity is that, in so far as this statute imposes this license and these onerous conditions upon the agents of foreign corporations, it operates as a restraint upon interstate commerce, and is null; and that, being null as to these agents, it is also null as to the agents of domestic corporations, as there would otherwise be discrimination against the latter class of agents by imposing upon them burdensome conditions from which their competitors in business, the agents of foreign corporations, would be left free.

The idea here is that stocks and bonds are subjects of interstate commerce, and that the said statute does not distinguish between such foreign stocks and bonds as have already been brought into the state and form part of the common mass of the property of the state, and such as have not yet been brought into the state, and would have to be transported into this state for delivery if sold here; that it has reference equally to both of these

classes of stocks and bonds; and that in the case of the latter class it operates as a restraint upon interstate commerce.

Stocks are things of value, and form the subjects of barter and sale, and would have to be transported for delivery. They come, therefore, within the reasoning of the case of *Champion v. Ames* (Lottery Case), 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492, where the Supreme Court of the United States held that lottery tickets are subjects of commerce.

And the same thing may be said of bonds, which are now considered to have a situs of their own, independent of that of their owner. *New Orleans v. Stempel*, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. Ed. 174; *Metropolitan L. Ins. Co. v. New Orleans*, 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853.

[11] And it is well settled that a license imposed upon the agent of a foreign corporation selling articles of commerce which at the time of the sale are in another state operates in restraint of interstate commerce, and in violation of the interstate commerce clause of the Constitution of the United States. *Tax Collector v. Pettigrew*, 44 La. Ann. 356, 10 South. 853, and United States Supreme Court decisions there cited; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649, and cases there cited; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297, and cases there cited.

[12] A statute, however, will not be so interpreted as to render it, or any of its parts, unconstitutional, if, without doing violence to its language, a saving interpretation be possible. See *Western Union Tel. Co. v. State*, 82 Ark. 309, 101 S. W. 748, 12 Ann. Cas. 82, where the authorities on this point are extensively cited and many illustrations given. See, also, 36 Cyc. 1103, 1112; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998. Under this doctrine the stocks and bonds of foreign corporations to which this statute has reference would have to be held to be those only which are already incorporated into the mass of the property of the state. There are no express words to the contrary in the statute.

This statute perhaps might also, constitutionally, include mere subscriptions to foreign stock; for, until stock is actually subscribed for, it has no actual existence (10 Cyc. 265), and hence is not an article of commerce; and the subscribing to it, while in common parlance called a selling of it, is in reality nothing more than a contract of subscription, and, as such, under the reasoning of the court in the case of *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, is not interstate commerce.

And, in like manner and for the same reason, the transaction by which a corporation would sell its theretofore unissued bonds would not constitute interstate commerce, as it would not be in reality a sale or a trans-

action of commerce, but merely a contract of loan.

[13] Even, however, if it were held that this statute has reference to foreign stocks and bonds not yet incorporated into the mass of the property of the state, and is to that extent null, this would not have the effect of nullifying it as a whole. It would continue to be valid in so far as applicable to all other stocks and bonds.

"The weight of authority is to the effect that, where a state statute is primarily intended to regulate domestic commerce, it will be sustained so far as it relates to such commerce, although it contains clauses invalid as attempting to regulate interstate commerce." 36 Cyc. 983; *Standard Oil Co. v. State*, 117 Tenn. 618, 100 S. W. 705, 10 L. R. A. (N. S.) 1015; *Allen v. Texas R. R. Co.*, 100 Tex. 525, 101 S. W. 792; *State v. Peet*, 80 Vt. 449, 68 Atl. 661, 14 L. R. A. (N. S.) 677, 130 Am. St. Rep. 998.

The decision of the Supreme Court of the United States in the case of *Emert v. State of Missouri*, 156 U. S. 296, 15 Sup. Ct. 367, 39 L. Ed. 430, is cited by the Attorney General as authority for the contention that this statute is valid even as to stocks and bonds not yet at the time of the sale incorporated into the mass of property within the state. But the court in that case said:

"There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. * * * So far as appears, the only goods in which he was dealing had become part of the mass of property within the state."

The court distinguished the case from that of *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694, where the goods had not been already brought into the state and mingled with the rest of the property within the state, but where the sale of them was to be negotiated with a view to bringing them thereafter into the state.

In the other case cited by the Attorney General, *Bacchus v. State of Louisiana*, 232 U. S. 334, 34 Sup. Ct. 439, 58 L. Ed. 627, the question of interference with interstate commerce was not raised, but only that of undue discrimination.

[14] As to the proposition that the state may exact a license for the privilege of doing business in the state, it is subject to the qualification that the license must not be so levied as to operate as an interference with, or restraint upon, interstate commerce, and that it does so operate if it taxes the person engaged in selling articles of commerce not yet brought into the state and mingled with the mass of property within the state. *Tax Collector v. Pettigrew*, supra.

If the agent were selling the goods merely as an incident to his own business, a different case would be presented. For example, a stockbroker, though he deal exclusively in foreign stocks (*Nathan v. La.*, 8 How. 73, 12 L. Ed. 992), and a commission merchant who sells cattle consigned to him for sale, though the cattle come from another state (*Hopkins v. U. S.*, 171 U. S. 578, 19 Sup. Ct. 40, 43 L.

Ed. 290), are not engaged in interstate commerce. In such a case the tax is upon the business of the agent as contradistinguished from that of the principal.

We conclude that the statute is valid, and pass to the other points raised in the case.

[15] The prosecution having tendered oral evidence to prove the facts and circumstances and conditions of the alleged sale of stocks upon which the prosecution is based, the accused objected to the evidence on the ground that "the alleged sale of stock could only be shown in the manner required by section 1 of Act No. 180, p. 285, of 1910," and on the further ground that the certificate of the stock would be the best evidence.

We will not examine the latter ground of objection; as the ruling upon it, even if erroneous and originally prejudicial, was rendered harmless by the subsequent introduction in evidence of all the documents executed by the parties at the time of the alleged sale, and also by the accused voluntarily making upon the witness stand a full statement of the whole transaction.

[16] As for the ground of objection based upon Act No. 180 of 1910, that statute does not undertake to prescribe an exclusive mode of evidencing as between the parties a sale of stocks; its object is merely to regulate the mode of transfer upon the books of the corporation, and to furnish a rule for deciding between claimants contesting over the ownership of the stock.

[17] The documents executed between the accused and the person they dealt with are brought up as part of a bill of exceptions. They show that the transaction consisted of a subscription to stock, and was not, properly speaking, a sale of stock; and the accused now contend, as they contended below, that such a transaction as this does not come within the purview of said statute, which denounces only the selling of stock.

We have intimated hereinabove that a subscription to stock comes within the intentment of said statute, as coming within the popular meaning of the term "selling stocks"; but it is not necessary that we should, and we do not, pass upon that question, as it does not come before this court in such shape as to give this court jurisdiction of it. The only way, so far as we can see, the point could have been brought up in proper shape for this court to consider it would have been by objecting to all evidence of a subscription to stock as irrelevant, or not corresponding with the indictment, which alleged a sale of stock, and by reserving a bill to the overruling of the objection, and incorporating all the facts in this bill. As the case stands in this court, the judge, by finding the accused guilty, has found that they sold the stock. This finding the court is without jurisdiction to review, as it involves a question of fact, and the jurisdiction of this court is limited to questions of law alone. The question is

whether the evidence adduced on the trial was sufficient to sustain the allegations of the indictment.

The fact that all the evidence is brought up as part of a bill of exceptions, and that there is no dispute over it, does not alter the legal situation. Thus:

In the case of *State v. Maloney*, 115 La. 498, 39 South. 539, all the evidence was brought up in that manner, and there was no dispute over the facts. The case was tried below upon a statement of facts agreed upon and reduced to writing. The question was whether the act thus admittedly committed by the accused constituted the crime charged in the indictment—precisely the contention made in the present case. The crime was the keeping of a poolroom. The court held that its jurisdiction, confined as it was to questions of law alone, did not extend to passing upon the sufficiency of said evidence to support the charge made in the indictment.

So reluctant has the court been to consider the evidence by which the judgment in a criminal case has been supported, and so cautious has it been not to transcend its jurisdiction in the premises, that in the case of *State v. Rabb*, 115 La. 734, 39 South. 971, it went so far as to refuse to take cognizance even of the facts stated in a bill of particulars, though the contention was that, admitting them all to be true, no crime was shown.

In *State v. Green*, 111 La. 89, 35 South. 396, the court said that, if no evidence whatever—literally none—has been offered upon a point essential for making out the crime charged, or, in other words, for establishing one of the constituent elements of the crime, and objection is made to allowing the case to go to the jury, and a bill is reserved, the question involved might be held to be one purely of law; namely, whether in the absence of all evidence on an essential point, the court should send the case to the jury. The doctrine of that case militates in no way against that of the two foregoing cases, or against that of the following:

In *State v. Hauser*, 112 La. 813, 36 South. 396, the question was whether the facts of the case, as contained in a statement of the admitted facts brought up in a bill of exceptions, constituted the crime charged in the indictment; and the court held that these facts could not be inquired into.

In *State v. Harris*, 107 La. 325, 31 South. 782, the court held that the statement made by the trial judge to the effect that the crime had been committed in another parish could not be considered by this court as it was a question of fact upon which the jury had had to pass. The court had no doubt of the truth or correctness of the judge's statement, but found itself without jurisdiction to inquire into the facts contained in the statement.

So in *State v. Miller*, 107 La. 797, 32 South. 191, the facts were agreed upon, and the question was as to whether they constituted

the crime charged in the indictment; and the court held it had no jurisdiction of that inquiry.

Instances of the same kind might be multiplied, but the foregoing ought to suffice to show that, however plausible may be the proposition that, where there is no dispute over the facts, only a question of law is involved, this court has heretofore taken a different view, and consistently adhered to it.

Our conclusion is that there is no error in the judgment below; hence the writ of certiorari herein is recalled, at the cost of the relators.

O'NIELL, J., concurs in the decree.

(69 Fla. 60)

VIRGINIA-CAROLINA CHEMICAL CO. v. SHADINGER et al.

(Supreme Court of Florida. Feb. 8, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR \S 336—NECESSARY PARTIES—DISMISSAL.

Where judgment is obtained against only two of four joint makers of a note, the other two appearing, but no default was taken for failure to plead, a writ of error taken by the plaintiff will be dismissed, where the purpose of the writ of error is to open up the judgment to later take action, so as to include an adjudication against the two, as to whom the plaintiff in error has shown no right to a judgment, and such two are not parties to the judgment or to the writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1868-1876; Dec. Dig. \S 336.]

Error to Circuit Court, Dade County; T. Emmet Wolfe, Judge.

Action by the Virginia-Carolina Chemical Company against F. A. Shadinger and another. Judgment for defendants, and plaintiff brings error. Writ of error dismissed.

Hudson & Cason, of Miami, for plaintiff in error.

PER CURIAM. An action was brought by the Virginia-Carolina Chemical Company against W. H. Burnham, C. H. Slifer, F. A. Shadinger, and J. N. Osteen, on a joint note made by them. W. H. Burnham and C. H. Slifer appeared. A default was entered against F. A. Shadinger and J. N. Osteen, who were served with process. It does not appear that Burnham and Slifer filed any pleading, or that a default was entered against them. On an ex parte hearing a verdict was returned against all four of the defendants. Judgment was entered only against F. A. Shadinger and J. N. Osteen. The plaintiff took writ of error. The writ of error was dismissed, but was afterwards reinstated by the court.

The plaintiff in error does not show by the transcript that the trial court had authority to enter judgment against Burnham and Slifer; they having appeared, but no default being entered against them for failure

to plead. The plaintiff in error is not entitled to a review here of the judgment merely for the purpose of opening up the judgment to later take action, so as to include an adjudication against Burnham and Slifer in the judgment, since the plaintiff does not show a right to a judgment against Burnham and Slifer, even if such a review would be permitted here, when Burnham and Slifer are not parties to the judgment obtained or to the writ of error brought to review the judgment.

The writ of error is dismissed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

(69 Fla. 77)

ROBINSON et al. v. TISCHLER et al.

(Supreme Court of Florida. Feb. 8, 1915.)

(Syllabus by the Court.)

1. CREDITORS' SUIT \S 8—PROPERTY SUBJECT—EQUITABLE INTEREST.

While an execution at law cannot be levied upon equitable property of the debtor, yet such equitable property may in equity be subjected to the debtor's judgment debts.

[Ed. Note.—For other cases, see Creditors' Suit, Cent. Dig. §§ 12-41; Dec. Dig. \S 8.]

2. BANKRUPTCY \S 421—DISCHARGE—EFFECT.

A discharge of a debtor in bankruptcy is from personal liability.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 772-774, 776, 777, 779-781, 783-786, 788-790; Dec. Dig. \S 421.]

3. BANKRUPTCY \S 196—DISCHARGE—EFFECT—EQUITABLE LIENS.

Bankruptcy proceedings do not discharge or abrogate vested equitable liens of judgment creditors, acquired more than four months before bankruptcy proceedings, upon property which the debtor had and fraudulently kept from his creditors in the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. \S 196.]

4. BANKRUPTCY \S 216—EFFECT ON RIGHTS OF CREDITORS—EQUITABLE LIENS.

The bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1913, §§ 9585-9656]) is not designed to aid in a fraud, or to prevent equitable relief to creditors against fraudulent acts of a debtor; and where the creditors, seeking such equitable relief by reason of previously acquired equitable liens, do not purposely ignore or violate the terms or the spirit of the bankruptcy law, and no unlawful preference among creditors is sought by those asking such equitable relief, it may be afforded in appropriate proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 328-333; Dec. Dig. \S 216.]

5. BANKRUPTCY \S 209—TRUSTEES—CREDITORS—RIGHTS.

The right given a trustee in bankruptcy under the 1910 amendment of the bankruptcy law is not exclusive of the creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 818; Dec. Dig. \S 209.]

6. BANKRUPTCY \S 211—EQUITABLE LIENS—RIGHTS OF CREDITORS.

A court of equity may decree an equitable lien upon property of a bankrupt, even though

the fund should be administered by the bankruptcy court.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 321, 323; Dec. Dig. §=211.]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Bill by Freda K. Robinson and her husband against Philip Tischler and others. From an order sustaining a demurrer to the bill, complainants appeal. Reversed.

J. M. Carson and G. J. Patterson, both of Jacksonville, for appellants. Bisbee & Bedell, of Jacksonville, for appellees.

WHITFIELD, J. This appeal is from an order sustaining a demurrer to a bill of complaint.

The bill brought by appellants against the appellees in effect alleges:

That on October 17, 1904, the appellants obtained a decree in chancery against Philip Tischler for \$18,262.18, the said decree having the force and effect of a judgment; that in July, 1908, the complainants, appellants here, received \$4,257.03 on said decree; that there remained due complainants \$17,988.12, which, by order of the court, was required to be paid, and such order had the force of a deficiency decree for \$17,988.12, now in full force and effect; that on May 5, 1909, Philip Tischler filed a voluntary petition in bankruptcy; that his schedule of liabilities included this balance of \$17,988.12, and that, "in the assets of said Philip Tischler, it was made to appear that he had none of value at all, except wearing apparel of the value of sixty (\$60) dollars"; that on May 10, 1909, Philip Tischler was adjudged a bankrupt; that on June 2, 1909, the referee in bankruptcy filed his report showing that the bankrupt had no property, except wearing apparel to the amount of \$60, which was exempt under the laws of Florida; that on June 17, 1909, Tischler filed his application for final discharge, and on July 2, 1909, was granted a discharge by the United States District Court; that Philip Tischler now and since December 2, 1904, has been the real owner of certain described real estate; that the property was on December 2, 1904, conveyed to the defendant Flora A. Max, a niece of the defendant Philip Tischler, by the Metropolitan Company, a corporation, which conveyance was made under an agreement theretofore made by and between Tischler and the Metropolitan Company, of date February 11, 1893; that said conveyance was made for the benefit of said Philip Tischler, and although the said property was conveyed to said defendant Flora Tischler Max and remained in her name from said 2d day of December, 1904, until March 30, 1911, that the defendant Philip Tischler was the real owner in interest in said lands during the entire time mentioned; that said land was taken in the name of the said Flora Tischler Max and held by her by the procurement of the said Philip Tischler, defendant, for the purpose of defrauding creditors of the said Philip Tischler and preventing the collection of the claims and debts due by the said Philip Tischler to various and sundry creditors; that the consideration for the conveyance of the real estate hereinabove described to the defendant Flora Tischler Max by the Metropolitan Company was paid by the defendant Philip Tischler, and that the defendant Philip Tischler entered into the enjoyment of the rents and profits derived from said real estate, and has continued to enjoy said rents and profits, although said property was held in the name of Flora Tischler Max; that, prior to this, the

said defendant Philip Tischler had a verbal agreement with Thalheimer Bros., a partnership, doing business in New York City, New York state, which said partnership had held and foreclosed a mortgage against the said Philip Tischler in an action brought in this court in chancery, against the said Philip Tischler, on lot 8, block 32, of the city of Jacksonville, Fla., by which verbal agreement it was agreed by and between the said Thalheimer Bros. and the said Philip Tischler that the title to said lot should be held by the said Thalheimer Bros., but that, upon the sale of said property by the said Thalheimer Bros., the said Thalheimer Bros. should retain such sums as might be or were necessary to repay them (the said Thalheimer Bros.) for money loaned the said Philip Tischler, together with interest thereon, and costs of court in connection with the foreclosure of the said mortgage, together with reasonable costs and expenses to which the said Thalheimer Bros. had been put in the matter of foreclosing said mortgage, and should pay any and all sums in excess which might be secured by the sale of said property to said Philip Tischler, and "your orators allege that said verbal agreement between the said Thalheimer Bros. and the said Philip Tischler, as a matter of law, amounted to a recognition by the said Thalheimer Bros. as an equity of redemption which the said Philip Tischler had in said property, and was in the nature of a collusion between the said Philip Tischler and the said Thalheimer Bros. for the purpose of defrauding the other creditors of the said defendant Philip Tischler, and preventing them from realizing and collecting the amounts due them on their respective judgments; that the said Thalheimer Bros. have since the discharge of the said Philip Tischler from bankruptcy, paid to him a large sum of money, to wit, the sum of forty thousand (\$40,000) dollars, and that said forty thousand (\$40,000) dollars was in the form of an equity of redemption; that on the 30th day of March, 1911, the said Flora Tischler Max, defendant, wife of Nathan Max, conveyed to the said Philip Tischler, defendant, the property before that time held in her name, as is more fully set out hereinabove, in section eight; that said conveyance was without any consideration whatever; that said conveyance was not made until after the two years allowed the creditors of the said Philip Tischler for the reopening of his discharge in bankruptcy hereinabove set out, or for the prosecution of him for having made false statements in his schedule filed in connection with his petition for voluntary bankruptcy, had elapsed, and there was and is no remedy left your orators in the United States courts under the bankruptcy proceedings and statutes for the recovery of this property or for the collection of their claim against this property which was fraudulently concealed in said proceedings, but that said statute has run against your orators and other creditors, and they are precluded from reopening said proceedings; that complainants did not learn of the facts hereinabove stated and alleged as to the fraudulent character of the conveyance of the real estate to Flora Tischler Max and the fraudulent holding of the same by her nor of the fraudulent collusion between the defendant Philip Tischler and Thalheimer Bros. until after the limitations imposed by the United States bankruptcy acts had run against them, but that, when your orators were informed of said facts, a petition was filed by them in said United States court, alleging the same, and praying for the appointment of a trustee for the bankrupt, the defendant Philip Tischler, and that said trustee was appointed; that thereupon an action in ejectment to recover possession of said real estate and moneys was begun by the said trustee in bankruptcy against the defendant Philip Tisch-

ler, and that the same is now pending in this court; that said Philip Tischler is now, and has been since March 30, 1911, in possession of the premises conveyed to him by the said Flora Tischler Max, as aforesaid, with title in his own name, and that the execution issued out of this court, as aforesaid, cannot be levied on said property by reason of the discharge in bankruptcy hereinabove referred to, but that your orators' claim, having been reduced to a decree having the full force and effect of a judgment, and execution having been duly issued thereon, and having been returned as above set out, and said return having been set aside by the Supreme Court, your orators are without any remedy at law, either in the bankruptcy court or in the courts of law of this state, whereby they reach the property herein named and described, that has been fraudulently concealed, both from the courts of this state and from the courts of the United States, wherefore your orators pray that they may be heard in equity, that the court will decree the appointment of a receiver who shall reduce to possession the property herein described in this bill, both the real estate described herein and the forty thousand (\$40,000) dollars paid to Philip Tischler, defendant, in whatever form this money may now be, and that said lands hereinabove described and the money paid to the defendant Philip Tischler, by the said Thalheimer Bros., in whatever form it may be, be held in trust for your orators and for the other judgment creditors of the said Philip Tischler, and subjected to the payment of the claim of your orators and the claims of such other creditors as may properly present their claims to him, and also that your orators may have such other and further relief in the premises as the case may require and to your honor seem meet."

The grounds of the demurrer of Philip Tischler to the bill of complaint are as follows:

"First. That the plaintiffs have not in and by their said bill made or stated such a case as entitled them or either of them, in a court of equity, to any relief as to the matters contained in said bill, or any of such matters.

"Second. That this court has no jurisdiction to grant any relief to the plaintiffs, and that the jurisdiction, if any, is in the District Court of the United States.

"Third. That the bill shows on its face that the defendant Philip Tischler has been discharged from the payment of the demands of the plaintiffs by a decree of the District Court of the United States for the Southern District of Florida, in Bankruptcy.

"Fourth. That the plaintiffs' bill on its face shows that the plaintiffs are barred from having any relief by the statute of limitations.

"Fifth. That the bill on its face shows that the plaintiffs are barred from having any relief by their own laches, and the bill does not show that the plaintiffs exercised due diligence to an earlier discovery of the fraud alleged in the bill."

The demurrer of Flora Tischler Max and her husband, Nathan Max, is:

"That the plaintiffs have not in and by their said bill made or stated such a case as entitled them or either of them, in a court of equity, to any relief against these defendants."

Both demurrers were sustained, and the complainants appealed.

The demurrer admits the material and well-pleaded allegations of the bill of complaint; and, if equity is alleged for any relief consistent with the prayer, the demurrer to the whole bill should not be sustained.

[1] While the money decree against Philip

Tischler obtained by the Robinsons in December, 1904, and the deficiency decree obtained in 1908, could not have been enforced by execution issued at law to be levied upon the equitable property of the debtor, yet if Tischler had in fraud of his creditors caused the legal title to lands to be placed in another leaving the beneficial interest in himself, judgment creditors, having an equitable right to a lien on the debtor's interest in the land, could in equity subject the interest of Tischler in such property to the satisfaction of the decrees having the force of judgments, where no rights of innocent purchasers for value and without notice of the fraud intervened. See *Macfarlane v. Dorsey*, 49 Fla. 341, 38 South. 512. The allegations of the bill of complaint admitted by the demurrer show a placing of the legal title to the property in the defendant Mrs. Max in 1904, in fraud of the rights of creditors of Tischler, who had the beneficial interest, and who, after the bankruptcy proceedings in 1909, took the legal title from his niece. If the right to an equitable lien on the property existed before the bankruptcy proceedings, and such right has not been enforced or lost, and the debtor's interest in the property has not been in any way subjected to his debts, and the property is not held by an innocent purchaser for value, the equitable lien may, on the allegations here admitted, be declared now by the state court of competent jurisdiction, even if the assets, when available, should be administered in the bankruptcy court. See *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

There appears to be an equity alleged in favor of the complainants; and if others are entitled to participate therein, or if the administration of the assets should be by the bankruptcy court, the state chancery court may declare the lien, even if it should go no further.

[2, 3] A discharge of the debtor in bankruptcy is from personal liability. The bankruptcy proceedings did not discharge or abrogate the vested liens of judgment creditors acquired more than four months before bankruptcy proceedings on property which the debtor had and fraudulently kept from his creditors in the bankruptcy proceeding. See *John Leslie Paper Co. v. Wheeler*, 23 N. D. 477, 137 N. W. 412, 42 L. R. A. (N. S.) 292; *Bridge v. Kedon*, 163 Cal. 493, 126 Pac. 149, 43 L. R. A. (N. S.) 404; *Evans v. Staalle*, 88 Minn. 253, 92 N. W. 951; *Gregory Co. v. Cale*, 115 Minn. 508, 133 N. W. 75, 37 L. R. A. (N. S.) 156. This is true even though the creditors could not enforce a specific lien by execution at law, since he had long prior to the bankruptcy proceedings, and now had, a right to an equitable lien on the property.

[4] The bankruptcy law is not designed to aid in a fraud or to prevent equitable relief to creditors against fraudulent acts of a debtor; and where the creditors, seeking

such equitable relief by reason of previously acquired equitable liens, do not purposely ignore or violate the terms or the spirit of the bankruptcy law, and no unlawful preference among creditors is sought by those asking such equitable relief, it may be afforded in appropriate proceedings.

[5] Laches do not appear from the allegations of the bill of complaint, and apparently there is no statutory bar that should be applied to defeat the asserted right to an equitable lien. Even if the trustee in bankruptcy, appointed at the instance of the complainants, is a proper party to ask the relief here sought, under the 1910 amendment of the bankruptcy law, the creditor is not an improper party under the circumstances, and the right given the trustee is not exclusive.

[6] As the state court of equity may at least decree that the property be subjected to the proper demands of lienholding creditors, even though the funds should be administered by the bankruptcy court, the bill of complaint is not without equity, and a general demurrer to the entire bill should not be sustained.

Reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(39 Fla. 53)

COTTON STATES BELTING & SUPPLY CO.
v. FLORIDA RY. CO.

(Supreme Court of Florida. Jan. 27, 1915.)

(Syllabus by the Court.)

1. CORPORATIONS \S 464 — POWERS — EXECUTION OF NOTES.

A corporation in this state has authority to execute promissory notes or other customary evidences of indebtedness as may be deemed necessary in the legitimate transactions of the business which the corporation is authorized to transact.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1820, 1821, 1828; Dec. Dig. \S 464.]

2. CORPORATIONS \S 414—ACTS OF OFFICERS—BINDING EFFECT—EXECUTION OF NOTE.

A promissory note executed in the name of a corporation by its president, for its benefit, and one which the corporation has power to authorize the president to execute or to ratify after it has been made, or, if executed by the president in the ordinary course of business, and within the scope of the authority the president is accustomed to exercise, or apparently has exercised with the consent of the corporation, is the corporation's obligation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1640-1646; Dec. Dig. \S 414.]

3. NEW TRIAL \S 70—RIGHT TO GRANT—VERDICT—EVIDENCE.

A verdict of a jury should not be disturbed and a new trial granted where it appears that such verdict is required by the admissions contained in the pleadings and the evidence submitted.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. \S 70.]

Error to Circuit Court, Taylor County; M. F. Horne, Judge.

Action by the Cotton States Belting & Supply Company, a corporation, against the Florida Railway Company. Verdict for plaintiff, and from an order granting a new trial, plaintiff brings error. Reversed, with directions.

W. T. Hendry, of Perry, for plaintiff in error. W. B. Davis, of Perry, for defendant in error.

ELLIS, J. The Cotton States Belting & Supply Company brought suit at law in the circuit court for Taylor county against the Florida Railway Company.

The declaration declares upon two promissory notes alleged to have been made and executed by the defendant payable to the plaintiff; one note dated May 5, 1913, payable 90 days after date; and one dated September 3, 1913, payable 60 days after date. As to the first note, the declaration alleges that "on the 5th day of May, 1913, the said Florida Railway Company being then and there indebted to the plaintiff, made and executed its certain promissory note of said date"; and, as to the second note, that "on the 3d day of September, 1913, the defendant, being then and there indebted to the plaintiff made and executed its promissory note of said date."

The declaration also contained common counts for goods bargained and sold; for work done and materials furnished; and for account stated.

Copies of the notes were attached to the declaration; also a bill of particulars under the common counts.

The defendant by its attorney filed two pleas: To the first count it pleaded that the notes mentioned and described in the said first count of the declaration are not its notes; and to the common counts it interposed the plea of never was indebted as alleged.

The case was tried upon the issues joined, on the 7th day of October, 1914, at a term of the circuit court for Taylor county. No evidence was submitted by the plaintiff under the common counts of the declaration. There was a verdict for the plaintiff.

The defendant moved the court for a new trial upon the following grounds: First, the verdict is against the evidence and the weight of the evidence; second, there was no sufficient evidence that the notes sued upon were and are the notes of the defendant; third, the verdict is against the law of the case; fourth, there is no sufficient evidence to support the verdict; and, fifth, the evidence in the case is not sufficient to overcome the plea of non est factum.

The court granted the motion for a new trial and the plaintiff took a writ of error. At the trial the plaintiff called as a wit-

ness Frank Drew, who testified that he was president of the Florida Railway Company; that he was president of that corporation on the 3d day of September, 1913, and on the 5th day of May, 1913. Thereupon the two notes sued upon were handed to the witness, and he said: "This is my signature to both of them." The notes were then offered in evidence and admitted over the objection of the defendant. One of the notes is dated Live Oak, Fla., September 3, 1913, is payable 60 days after date to the order of Cotton States Belting & Supply Company at the Citizens' Bank of Live Oak, Fla., bears interest at 8 per cent. per annum from date, provides for payment of reasonable attorney's fees, if given after maturity to an attorney for collection, provides that the makers and indorsers of the note waive demand, notice, and protest, and consents that the time of payment may be extended without notice, and is signed as follows: "Florida Railway Co., by Frank Drew, President." The other note is dated Live Oak, Fla., May 5, 1913, payable 90 days after date to the order of Cotton States Belting & Supply Company, bears interest at 7 per cent. per annum from date, and contains the same provisions for attorney's fees, waiver of demand, notice, and protest and extension of payment as the note first referred to, and is signed as follows: "Florida Railway Co., by Frank Drew, Pres."

Lloyd Bishop Clark, called as a witness for the plaintiff, testified that he was engaged in railroad business—agency work for the Florida Railway Company; lives in Perry, Fla.; had been in the service of the company six years; he is local railway station agent; his duties were to receive and deliver freight, sell tickets, and solicit freight and issue bills of lading; he had been in the service of the company two years in Perry, two years in Live Oak, and nearly two years at Mayo; that Frank Drew is president of the Florida Railway, is general manager of the railway at present, was president on September 3, 1913, and May 5, 1913, and believed he was also general manager, though witness was not sure Frank Drew was general manager on May 5, 1913, but was sure he was general manager on September 3, 1913. W. L. Weaver, a witness for the plaintiff, testified that he was cashier of the First National Bank of Perry, Fla., and knows Frank Drew, the president of the Florida Railway Company. In answer to a question as to whether he had had occasion to handle notes executed by Frank Drew in the name and on behalf of the Florida Railway Company, the witness answered: "Yes, sir." The question was propounded over the objection of the defendant, but the objection was overruled. The witness was asked:

"Were these notes executed by Frank Drew in the name of and on behalf of the Florida Railway Company? A. Yes, sir. Q. Have any of these notes ever been paid at your bank by the Florida Railway Company? A. Yes, sir;

some of these notes have been paid. I might add, however, that these notes were personal indorsements in addition to the signature of Mr. Drew as president. They had the personal indorsement of Mr. Drew. This was during the past two or three years. These notes were paid by the Florida Railway. I don't recall how many notes. Several there have been, one or two renewed, and one or two paid. In the last two or three years one or two of said notes have been paid by the Florida Railway."

The plaintiff called J. H. Parker as a witness, who was not examined as to the merits of the case, and L. W. Blanton testified as to what sum would be a reasonable attorney's fee in the cause.

The above constitutes the evidence for the plaintiff, and the defendant offered none.

Did not the pleadings, together with the evidence submitted, require the jury to find for the plaintiff? If they did, then it follows that the order of the court granting the defendant's motion for a new trial was error.

The plea of the defendant to the first count of the declaration was, in effect, a denial of the existence of the two notes sued upon; that is to say, a denial that they were executed by the corporation, or by any one for and on its behalf under proper authority. The allegations of the declaration that the defendant is a corporation organized and existing under the laws of the state of Florida, and on the 5th day of May, 1913, and on the 3d day of September, 1913, was indebted to the plaintiff, are not denied. They are therefore admitted. Supreme Lodge K. P. v. Lipscomb, 50 Fla. 406, 39 South. 637.

[1] In this state the execution of a promissory note by a corporation in the legitimate transactions of the business authorized is within the corporate powers. The right to borrow money at such rates of interest and upon such terms as its board of directors shall authorize or agree upon carries with it the power to give negotiable notes or to issue such other written customary evidences of its indebtedness as may be deemed necessary or expedient by the corporation. Reese, *Ultra Vires*, par. 100; 1 Daniel on Negotiable Instruments (4th Ed.) par. 381; 1 Morawetz, *Private Corporations*, par. 350; 3 Cook on Corporations, pars. 760, 761.

[2] The indebtedness admitted by the pleadings to have existed against the defendant in favor of the plaintiff is presumed to be such indebtedness as the corporation was authorized under its charter and the laws of the state to contract. The evidence showed unmistakably that the two notes were executed by Frank Drew as president of the defendant corporation; that is, that the name of the corporation was signed to the two notes by him as president. His language that "this is my signature to both of them" could bear no other interpretation reasonably and fairly. It thus appeared that the notes were executed in the name of the corporation, by him, as president, for a debt due by the corporation to the defendant of such character

as the corporation was authorized to incur. It was shown by the evidence that Mr. Drew was the president of the defendant corporation on the dates when the two notes were executed, and on the date when the second note was executed he was also the general manager of that corporation; that within the last two or three years Mr. Drew, as president of the corporation, had executed several notes for and on its behalf; that this exercise of authority by him as president was recognized by the corporation, who paid one or two of them and renewed others. It is true that such notes bore the personal indorsement of Mr. Drew, but that fact did not affect the primary liability of the corporation.

We think that it was unnecessary under these circumstances for the plaintiff to go further and prove express authority in the president from the board of directors to execute the notes for the corporation.

In the case of *McGehee Lumber Co. v. Tomlinson*, 66 Fla. 536, 63 South. 919, where it was contended that the burden was upon the plaintiff to show that McGehee, as president, and Scruggs, as secretary, of the defendant corporation, were clothed with authority to employ and contract with him for the sale of its lands, this court held that such was not the law. The court referred to the case of *Skinner Manufacturing Co. v. Douville*, 54 Fla. 251, 44 South. 1014, where it was held that the "president of a private corporation may be presumed to have authority to employ agents to negotiate the sale of property," and said that it was still in full accord with the holdings of that case, which were, in effect, that "prima facie" the president of a private corporation has authority to employ an agent to effect a sale of its lands, and that, if the corporation in a suit against it by such agent to recover his commissions for effecting such sale under said employment desires to show that its president had no authority to employ him for that purpose, it was defensive matter within its peculiar knowledge that it must prove if it desires advantage therefrom.

Again, in the case of *Beekman v. Sonntag Investment Co.*, 67 Fla. 293, 64 South. 948, this court held that the acts of an agent, performed within the scope of his real or apparent authority, are binding upon his principal.

The president of a corporation is usually the chief administrative officer of the corporate body, and is generally so regarded by the public. The details of the corporate business are usually carried on and attended to by him and his representatives; the usual or ordinary administrative and fiscal affairs of the corporation are transacted through him. The scope of his agency is wide in all matters arising in the ordinary course of the corporation's business. In this position of trust and confidence the corpora-

tion places him, and invites the public to transact business with it through him.

If the contract he makes in the name of the corporation is for the benefit of the corporation, and one which the corporation has power to authorize him to make, or to ratify after it has been made, or one arising in the ordinary course of business, and within the scope of the authority he is accustomed to exercise, and apparently does exercise, or has exercised, with the consent of the corporation, we think the corporation is bound by it, in the absence of any showing that it was neither authorized nor ratified. See *Little Sawmill Val. Turnpike or Plank Road Co. v. Federal St. & P. V. Pass. Ry. Co.*, 194 Pa. 144, 45 Atl. 66, 75 Am. St. Rep. 690; *White v. Elgin Creamery Co.*, 108 Iowa, 522, 79 N. W. 283; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372; *Chicago Pneumatic Tool Co. v. Munsell*, 107 Ill. App. 344; *National State Bank of Terre Haute v. Vigo County Nat. Bank*, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *George E. Lloyd & Co. v. Matthews*, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376.

[3] The verdict of the jury for the plaintiff was required by the pleadings and the evidence; therefore the order of the court granting a new trial was error. The order is reversed, with instructions to enter judgment for the plaintiff on the verdict, unless a motion in arrest of judgment or for judgment non obstante veredicto shall be made and prevail. Section 1695, Gen. Stats. 1906; *Bishop v. Taylor*, 41 Fla. 77, 25 South. 287; *Philadelphia Underwriters' Ins. Co. of North America v. Bigelow*, 48 Fla. 105, 37 South. 210; *Winn v. Coggins*, 53 Fla. 327, 42 South. 897; *Feinberg v. Stearns*, 56 Fla. 279, 47 South. 797, 131 Am. St. Rep. 119; *Georgia Southern & F. R. Co. v. Hamilton*, 63 Fla. 150, 58 South. 838; *Nathan v. Thomas*, 63 Fla. 235, 58 South. 247, Ann. Cas. 1914A, 387.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(69 Fla. 75)

SMITH, RICHARDSON & CONROY v. COWAN et al.

(Supreme Court of Florida. Feb. 3, 1915.)

(Syllabus by the Court.)

SALES—§315—LIEN—SUIT TO ENFORCE—DISMISSAL—EVIDENCE.

Where a bill is filed by a corporation to enforce a lien for an indebtedness alleged to be due to it for goods sold through an agency house alleged to be owned, maintained, and controlled by the corporation, and the proof shows that the alleged agency house was owned by individuals not shown to be even interested in the corporation, the bill is properly dismissed.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 885-889; Dec. Dig. §315.]

Appeal from Circuit Court, St. Johns County; Geo. Couper Gibbs, Judge.

Bill by Smith, Richardson & Conroy, a corporation, against Eugenia H. Cowan and husband. From a decree dismissing the bill, complainant appeals. Affirmed.

F. W. Butler, of Jacksonville, for appellant. E. N. Calhoun, of St. Augustine, for appellees.

COCKRELL, J. This appeal is from a decree dismissing a bill of complaint, praying equitable relief against a married woman's separate property, a certain hotel, for supplies furnished her while operating the hotel.

The account so sought to be enforced appears to be due to "St. Augustine Cold Storage Co., St. Augustine, Fla.," and to obviate this apparent variance the bill alleges that the complainant corporation "owned, maintained, and controlled a certain mercantile establishment in the city of St. Augustine, Florida, in the said St. Johns county, operated under the name and style of St. Augustine Cold Storage Company." The answer categorically denied this allegation. The complainant, to meet this issue, had as its witness the manager of this concern, and elicited from him that C. W. Richardson, F. P. Conroy, and W. S. Barnett constituted the St. Augustine Cold Storage Company. He was again asked if "Smith, Richardson & Conroy did not own it," and he replied:

"Richardson, Conroy & Barnett. If Mr. Smith had any interest in it, I did not know it. The goods were shipped from Smith, Richardson & Conroy, and billed from them. The bookkeeper (in St. Augustine) made the report to Smith, Richardson & Conroy. He always sent in a trial balance once a month."

We think this testimony failed to establish the issue; to the contrary, it shows that these individuals, who may or may not have been interested in the complainant corporation, owned or constituted the St. Augustine Cold Storage Company, from whom these goods were bought, and upon this showing these individuals, and not the corporation here suing, are the creditors.

We cannot, therefore, say the circuit court erred in dismissing the bill.

Decree affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

(69 Fla. 49)

BURBRIDGE et al. v. GUNTER et al.

(Supreme Court of Florida. Jan. 27, 1915.)

(Syllabus by the Court.)

MORTGAGES 292—FORECLOSURE—PERSONAL DECREE.

Where the original mortgagor is not made a party in a suit to enforce a mortgage lien, and there is no allegation that the original mortgagor had title to the property, and the assumption of the mortgage debt by the purchaser from

the mortgagor is not alleged, a personal decree against such purchaser for the debt is not warranted.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 762-771, 790; Dec. Dig. 292.]

Appeal from Circuit Court, Duval County; R. M. Call, Judge.

Suit by Ida M. Gunter and others against William Burbridge and others. From decree for complainants, defendants appeal. Reversed.

Artell & Rinehart, W. M. Bostwick, Jr., and D. H. Doig, all of Jacksonville, for appellants. Frank L. Dancy, of Jacksonville, for appellees.

WHITFIELD, J. This appeal is from decrees adjudging the equities to be with the complainants, and barring the equities of the defendants, and decreeing a sale and distribution in a suit to enforce an alleged mortgage lien.

It appears that in 1902 W. H. H. Styles conveyed the land to his wife, as the statute (section 2457, Gen. Stats.) authorized him to do; that in 1905 the wife died, leaving the husband and children; that in 1909, pursuant to a judicial sale for nonpayment of city taxes, the land was sold and conveyed to W. H. H. Styles; that in 1911 W. H. H. Styles took a mortgage lien on the property from J. A. Bianco; that subsequently in 1911 Bianco conveyed the land to Wm. Burbridge, who, it is alleged, took "subject to the mortgage"; that in 1912 Styles assigned the mortgage from Bianco to the appellee Ida M. Gunter; that on July 2, 1913, Wm. Burbridge conveyed the land to W. H. H. Styles, as trustee for himself and as guardian for his children; that on July 2, 1913, W. H. H. Styles, as trustee for himself and as guardian for his children, executed a mortgage on the property to Farber Burbridge; that in August, 1913, the appellee brought suit to enforce the lien assigned to her by Styles, making Wm. Burbridge and wife, Farber Burbridge, and W. H. H. Styles, and his present wife, and W. H. H. Styles, as guardian for his minor children, and also the minor children, parties defendant.

The appellees have no greater right to a lien than the original mortgagee W. H. H. Styles had. If the conveyance in 1902 by Styles to his wife carried to her the beneficial interest as well as the legal title, and such beneficial title has not passed from Mrs. Styles or her heirs, the lien claimed by the appellee does not exclude the minor heirs of Mrs. Styles, even if the husband has disposed of his interest. If W. H. H. Styles was a cotenant with his minor children as heirs of the wife and mother, the judicial sale to W. H. H. Styles for the amount of unpaid taxes does not of itself exclude the other cotenants, the minor children, from participating in any right or title acquired by the father, subject

to contributions to meet the tax payments. The defendant minor heirs of Mrs. Styles are entitled to have the record show clearly that their interest in the land has duly passed from them before they are barred, and this the record does not show.

The bill of complaint does not make Bianco, the original mortgagor, a party, and does not allege that Bianco, the original mortgagor, had title to the property. There is an allegation that in the deed of conveyance from Bianco to Burbridge "was a clause to the effect that said conveyance was made subject to the mortgage." The copy of the conveyance from Bianco to Burbridge, made an exhibit, "to be taken as a part of the bill of complaint," contains a clause that it is "understood and agreed that the grantee assumes the payment of the indebtedness," but such assumption of the debt by Burbridge is not alleged. Under the allegations of the bill, a personal decree against William Burbridge and his wife for the debt is not warranted, even though, on proper allegations and proofs, the lien upon the land might be enforced adversely to Burbridge and his wife.

Reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 27)

TAMPA ELECTRIC CO. v. CHARLES.
(Supreme Court of Florida. Jan. 19, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR \S 231—TRIAL \S 82—OBJECTIONS TO EVIDENCE—SUFFICIENCY.

"A party who objects to evidence or the competency of witnesses should state *specifically* the grounds of his objections, in order to apprise the court and his adversary of the precise objection he intends to make. General objections to evidence proposed, without stating the precise ground of objections, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances, when a general objection thereto is sufficient."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1299, 1352; Dec. Dig. \S 231; Trial, Cent. Dig. \S 194-210; Dec. Dig. \S 82.]

2. APPEAL AND ERROR \S 1078—PRESENTATION FOR REVIEW—ADMISSION OF EVIDENCE.

In actions at law the party objecting to the introduction of evidence must not only state specifically the grounds of his objection thereto, seasonably except to the ruling of the court thereon, and base his assignment of error upon the objections as made in the court below and upon the ruling thereon, but must argue the assignment as made, in this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4256-4261; Dec. Dig. \S 1078.]

3. TRIAL \S 83—RECEPTION OF EVIDENCE—OBJECTION—SUFFICIENCY.

"Where the only grounds of objection interposed to proffered evidence were that the same was immaterial, irrelevant, and not pertinent

to any issue made in the pleading, such grounds of objection are properly overruled, unless the evidence so objected to is palpably prejudicial, improper, and inadmissible for any purpose."

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 193-210; Dec. Dig. \S 83.]

4. APPEAL AND ERROR \S 232, 1078—SCOPE OF REVIEW—OBJECTION BELOW—ADMISSION OF EVIDENCE.

An appellate court will consider only such grounds of objection to the admissibility of evidence as were made in the court below, the plaintiff in error being confined to the specific grounds of objection made by him in the trial court, and only such of the grounds so made below as are argued will be considered by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 1351, 1368, 1426, 1430, 1431, 4256-4261; Dec. Dig. \S 232, 1078.]

5. WITNESSES \S 287—REDIRECT EXAMINATION—SCOPE.

Testimony is admissible on the redirect examination of a witness which tends to qualify, limit, or explain the testimony elicited on the cross-examination of such witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 930, 1000-1002; Dec. Dig. \S 287.]

Error to Circuit Court, Hillsborough County; F. M. Robles, Judge.

Action by Lavinia Charles against the Tampa Electric Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

P. O. Knight and C. F. Thompson, both of Tampa, for plaintiff in error. Zewadski & Nysewander, of Tampa, for defendant in error.

SHACKLEFORD, J. The Tampa Electric Company, a corporation, brings here for review a judgment recovered against it by Lavinia Charles as damages for personal injuries, alleged to have been caused by the negligence of the defendant corporation.

Eleven errors are assigned, but only the last four are urged before us; the plaintiff in error stating in its brief that it relies upon these assignments for reversal of the judgment. All of such assignments are based upon the admission of testimony of the plaintiff over the objections of the defendant, and may conveniently be treated together. The plaintiff in her direct examination, in response to the question propounded to her by her counsel, "What do you do, Lavinia?" had replied "I pay licenses and running a rooming house." Upon motion of the defendant this answer was stricken out because the same was "immaterial, irrelevant, and incompetent." The plaintiff's counsel then propounded to her the question, "Whereabouts?" to which the witness answered, without objection, "833 Zack street." The plaintiff further testified, without objection, that prior to the injury her business was "washing and ironing, boarding two men, and washing for two men," and that subsequent to the injury she had not been able to carry on such business. On

cross-examination the defendant interrogated the plaintiff at some length as to her business of keeping a rooming house, washing, etc., and as to the income she derived therefrom. Among other things, it was elicited that, prior to the accident the plaintiff was occupying a house containing four rooms, two of which she rented to roomers, and that she cooked for two men and also took in washing and ironing, while subsequent to the accident she had moved into another house containing 10 rooms and had seven roomers, but no boarders, and took in no washing. On her redirect examination, the plaintiff testified as follows:

"Q. Lavinia, you say that you are keeping a rooming house now? A. Yes, sir. Q. What rent do you pay for this house each month? A. Five dollars a week; \$20. Q. Are you able to keep and carry on this house yourself? A. No, sir. Q. How much do you pay some one to take care of the house for you? A. Three dollars and a half a week.

"And thereupon counsel for the defendant then and there objected to the foregoing questions and the answers thereto with reference to the rent paid for the house, and also to the questions and answers in reference to the amount paid by the plaintiff for taking care of the house, and moved the court, then and there, to strike the said testimony from the record, and from the consideration of the jury on the following grounds, to wit: First, because there is no allegation in the declaration of the plaintiff upon which to base such testimony, and the same is therefore immaterial, irrelevant, and incompetent testimony in the case.

"But the said judge did then and there overrule the said objection of the defendant, and did then and there deny the said motion and refused to strike the said testimony from the record and the consideration of the jury.

"And to which ruling and judgment of the court the defendant by counsel did then and there except.

"Q. You say you pay \$20 a month for your house now? A. Yes, sir. Q. And you pay to have your house attended to \$3.50 per week? A. Yes, sir. Q. That is \$14 a month, is it? A. Yes, sir. Q. What other expenses have you? A. Laundry bill.

"And the said plaintiff, further to maintain the issues herein joined on behalf of the plaintiff, then and there propounded to the said witness the following question, to wit: Q. Laundry bill for that house?

"And the said witness did then and there make answer to the said question as follows, to wit: A. Yes, sir.

But to the said question so propounded to the said witness and to the answer as given there counsel for the defendant did then and there object on the following ground, to wit: First, because the said question calls for and the said answer is immaterial, irrelevant, and incompetent testimony.

"And the said judge did then and there sustain the said objection, and struck the said question and answer from the record and the consideration of the jury, and to which ruling and judgment of the court the said plaintiff did then and there object and except. Q. Lavinia, are you able to do any work in your house now? A. No, sir. Q. Were you prior to this accident? A. Sir? Q. Were you able to do any work prior to this accident? A. No, sir. Q. Before the accident were you able to do your work? A. Yes, sir; before the accident I done all my work then."

[1] Upon the admission of this testimony the four assignments insisted upon are predi-

cated. We are of the opinion that they have not been sustained. In *Hoodless v. Jernigan*, 46 Fla. 213, 35 South. 656, we held as follows:

"A party who objects to evidence or the competency of witnesses should state *specifically* the grounds of his objections, in order to apprise the court and his adversary of the precise objection he intends to make. General objections to evidence proposed, without stating the precise ground of objections, are vague and nugatory, and are without weight before an appellate court, unless the evidence objected to is palpably prejudicial, improper, and inadmissible for any purpose or under any circumstances, when the general objection thereto is sufficient."

[2-4] This court cannot consider any objections to the admissibility of evidence, except such objections as were made in the court below; the plaintiff in error being confined to the specific objections made in the trial court.

In actions at law the party objecting to the introduction of evidence must not only state specifically the grounds of his objections thereto, seasonably except to the ruling of the court thereon, and base his assignment of error upon the objections as made in the court below and upon the ruling thereon, but must argue the assignment as made, in this court.

We have followed this holding in a number of subsequent cases. See *Brown v. Bowie*, 58 Fla. 199, 50 South. 637, wherein we held as follows:

"Where the only grounds of objection interposed to proffered evidence were that the 'same was immaterial, irrelevant, and not pertinent to any issue made in the pleading,' such grounds of objection are properly overruled, unless the evidence so objected to is palpably prejudicial, improper, and inadmissible for any purpose."

[5] In view of what the defendant elicited from the witness on the cross-examination, we cannot declare that the testimony brought out on the redirect examination of the witness was "immaterial, irrelevant, and incompetent testimony"; therefore no error has been made to appear in the rulings of the trial court upon which these assignments are based. Conceding the correctness of the contention that the allegations in the declaration would not warrant the recovery of money paid out by the plaintiff for house rent or for a servant as elements of damage, that of itself would not sustain these assignments. The testimony brought out on the redirect examination of the plaintiff undoubtedly tends to qualify, limit, and explain the testimony elicited by the defendant on the cross-examination of the witness and was admissible for that purpose. See *Starke v. State*, 49 Fla. 41, 37 South. 850. We do not think that there is any merit in the further contention of the plaintiff in error that the plaintiff was not entitled to recover any damages for the reason that the declaration alleges that the injuries sustained by the defendant in error were of a permanent nature and the proofs adduced fail to show or establish such permanency. No

extended discussion of this point is necessary. It follows that the judgment must be affirmed.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 97)

LYLE v. STATE ex rel. CALDWELL et al.
(Supreme Court of Florida. Feb. 8, 1915.)

(Syllabus by the Court.)

1. SCHOOLS AND SCHOOL DISTRICTS \S 97—
VALIDATION OF BONDS—PROCEEDINGS—VAL-
IDITY.

The fact that no record of the establishment of a school subdistrict is in the office of the county superintendent of public instruction is not material, in proceedings to validate bonds issued by the school subdistrict or special tax school district under the law, when the establishment in fact of such school district and its definite boundaries appear.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 224-232; Dec. Dig. \S 97.]

2. SCHOOLS AND SCHOOL DISTRICTS \S 97—IS-
SUANCE OF BONDS—AUTHORITY—CONSTRU-
TION OF STATUTE.

Under chapter 6542, Acts of 1913 (Comp. Laws 1914, \S 416b-416ggg), the authority therein given is properly conferred upon the "county board of public instruction" as recognized by the Constitution.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 224-232; Dec. Dig. \S 97.]

3. SCHOOLS AND SCHOOL DISTRICTS \S 97—
VALIDATION OF BONDS—PROCEDURE.

Under the provisions of chapter 6542, Acts of 1913, the bonds to be issued thereunder by a special tax school district may be validated in the manner provided for in chapter 6237, Laws of Florida 1911 (Comp. Laws 1914, \S 2027a-2027f).

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. \S 224-232; Dec. Dig. \S 97.]

Appeal from Circuit Court, Suwannee County; M. F. Horne, Judge.

Proceedings by the State, on the relation of Stafford Caldwell and others, wherein W. H. Lyle intervened. From the decree, intervenor appeals. Affirmed.

H. E. Carter, of Live Oak, for appellant.
Stafford Caldwell, of Live Oak, for appellees.

WHITEFIELD, J. Sections 10 and 11 of article 12 of the Constitution are as follows:

"Sec. 10. The Legislature may provide for the division of any county or counties into convenient school districts; and for the election biennially of three school trustees, who shall hold their office for two years, and who shall have the supervision of all the schools within the district; and for the levying and collection of a district school tax, for the exclusive use of public free schools within the district, whenever a majority of the qualified electors thereof that pay a tax on real, or personal property shall vote in favor of such levy: Provided, that any tax authorized by this section shall not exceed three mills on the dollar in any one year on the taxable property of the district.

"Sec. 11. Any incorporated town or city may constitute a school district. The fund raised by section ten may be expended in the district where levied for building or repairing school houses, for the purchase of school libraries and text-books, for salaries of teachers, or for other educational purposes, so that the distribution among all the schools of the district be equitable."

The statutes provide for the creation of school districts within the several counties. See section 244, Rev. Stats. of 1892, and section 399 et seq., Gen. Stats. of 1906.

The following was agreed to by the Legislature in 1911 and adopted by the electors in 1912 as section 17 of article 12 of the state Constitution:

"Sec. 17. The Legislature may provide for special tax school districts, to issue bonds for the exclusive use of public free schools within any such special tax school district. Whenever a majority of the qualified electors thereof, who are freeholders, shall vote in favor of the issuance of such bonds, a tax not to exceed five mills on the dollar, in any one year, on the taxable property within the district voting for the issue of bonds shall be levied in accordance with law providing for the levying of taxes, to become a fund for the payment of the interest and redemption of such bonds." Acts 1911, page 934.

Chapter 6542, Acts of 1913, authorizes special tax school districts to issue bonds for the exclusive use of public free schools within such special tax school districts upon taking prescribed action, and the same chapter provides that:

"When any special tax school district shall have authorized and issued bonds in the manner provided for under the terms of this act, such bonds shall be subject to validation in the manner provided for in chapter 6237, Laws of Florida, approved June 3, 1911, and any amendatory acts thereto."

Chapter 6237, Acts of 1911, prescribes a procedure in the circuit courts for validating bonds issued by counties and municipalities, giving to any citizen of Florida, resident in such county or municipality issuing bonds, the right to become a party to the validating proceedings, and if dissatisfied with the decree of the court validating the bonds to take an appeal as in chancery cases.

In proceedings where the appellant, a citizen of Florida and a resident taxpayer of the district, was made a party as intervenor, bonds in the amount of \$70,000 issued by special tax school district No. 1 of Suwannee county, Fla., were validated, and on appeal taken by the intervenor it is contended that the court erred in validating the bonds because: (1) There is no record in the office of the superintendent of public instruction of Suwannee county that said special tax school district No. 1 of Suwannee county, Fla., was ever created and established according to law; (2) the bond election was under chapter 6542, Acts of 1913, called by the "county board of public instruction," whereas section 341 of the General Statutes provides for a "board of public instruction

for" each county; (3) chapter 6237, Acts of 1911, provides for the validation only of bonds issued by "counties and municipalities," which does not include school districts.

[1] The pleadings and the agreed statement of facts and the decree in the cause show that special tax school district No. 1, Suwannee county, Fla., comprising sections 13, 14, 15, 22, 23, 24, 25, 26, and 27, township 2 south, range 13 east, all in Suwannee county, Fla., was regularly established and created in the year 1894 as a school subdistrict under the law, and has continued to exist since said date as a school district, and is a legally existing special tax school district under the laws of Florida. Under these circumstances the fact that no record of the establishment of the school district is in the office of the county superintendent of public instruction is not material here. If the record has been lost or destroyed, it may be re-established under the provisions of the statute on that subject.

[2] As the Constitution, in section 9 of article 12, expressly contemplates the creation and existence of a "county board of public instruction" in each county, the terms of section 341 of the General Statutes, constituting "the board of public instruction for the county of —, state of Florida" a body corporate, do not affect the powers of such board as referred to in chapter 6542, Acts of 1913, by the proper constitutional designation of "county board of public instruction."

[3] Section 18 of chapter 6542, under which the bonds were issued by the special tax school district, expressly provides that "such bonds shall be subject to validation in the manner provided for in chapter 6237, Laws of Florida"; therefore it is quite immaterial whether the terms of the latter chapter cover special tax school district bonds.

Decree affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(59 Fla. 98)

GEORGIA SOUTHERN & F. RY. CO. v. RUFF.

(Supreme Court of Florida. Feb. 3, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR — 1026 — HARMLESS ERROR—NONPREJUDICIAL RULINGS.

Where the trial court has refused to grant a new trial in a case, the appellate court will not reverse the judgment or grant a new trial for errors in rulings upon the admission or rejection of evidence, or for errors in giving or refusing charges, or for errors in any other matter of procedure or practice, unless it shall appear to the court from a consideration of the entire cause that such errors injuriously affect substantial rights of the complaining party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029, 4030; Dec. Dig. — 1026.]

2. APPEAL AND ERROR — 1001 — VERDICT — EVIDENCE.

A judgment will not be reversed or a new trial granted by the appellate court on the ground that the verdict is not sustained by the evidence, where the trial court has refused a new trial on that ground, unless it appears that upon the whole evidence the verdict is clearly wrong, or not in accord with the law and the evidence, or that the jury were not governed by the evidence in making their finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. — 1001.]

3. NEW TRIAL — 154 — MOTION — RIGHT TO WITHDRAW.

The trial court has authority to permit plaintiff to withdraw a motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 312, 313; Dec. Dig. — 154.]

Error to Circuit Court, Columbia County; M. F. Horne, Judge.

Action by Theola Ruff against the Georgia Southern & Florida Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. Futch, of Starke, for plaintiff in error. A. H. King, of Jacksonville, and Cone & Chapman, of Lake City, for defendant in error.

WHITFIELD, J. On a former writ of error herein an order was affirmed granting a new trial on a verdict for the plaintiff for \$25,000 damages in an action for personal injuries brought against the railroad company. Ruff v. Georgia Southern & Florida Ry. Co., 67 Fla. 224, 64 South. 782.

At the subsequent trial verdict and judgment were rendered for the plaintiff in \$10,000, and the defendant took writ of error. It is now contended on specific assignments of error that the trial court erred in rulings admitting and rejecting testimony, in giving and refusing charges, in denying the defendant's motion for a new trial, and "in refusing to order a new trial upon the motion of the plaintiff for a new trial, when in open court the defendant agreed, consented, and requested the court to grant the said motion, and to order a new trial."

[1, 2] Where the trial court has refused to grant a new trial in a case, the appellate court will not reverse the judgment or grant a new trial for errors in rulings upon the admission or rejection of evidence, or for errors in giving or refusing charges, or for errors in any other matter of procedure or practice, unless it shall appear to the court from a consideration of the entire cause that such errors injuriously affect substantial rights of the complaining party. Nor will a judgment be reversed or a new trial granted on the ground that the verdict is not sustained by the evidence, where the trial court has refused a new trial on that ground, unless it appears that upon the whole evidence the verdict is clearly wrong or not in accord with the law and the evidence, or that

the jury were not governed by the evidence in making their finding. With this principle in view, a full consideration of all the assignments of error made on matters of procedure discloses the futility of a detailed discussion of asserted errors. There is ample evidence of a defective track, which, if believed by the jury, would legally sustain a finding of liability on the part of the defendant railroad company for compensatory damages growing out of injury to the plaintiff, a passenger on one of its trains, caused by alleged "negligence and carelessness of the defendant in the running of said train," whereby the train was "derailed and wrecked." There was consequently no harm, if error, in sustaining an objection to a question to elicit an opinion as to whether there was any reason why the heavy engine of the train should not have been run over the track. Likewise, as there is evidence legally sufficient to support the amount of damages awarded, errors, if any, in admitting or excluding particular items of evidence relating to or affecting the amount of the recoverable damages are not harmful to the plaintiff in error, since, on the whole evidence, the verdict is not clearly wrong. There is evidence of a permanent injury to the plaintiff as a proximate result of the defendant's negligence; therefore, as stated in the former opinion, the life expectancy of the plaintiff was a pertinent fact in issue. Mortuary tables in common use showing computed life expectancies of persons at stated ages may be shown in evidence, and the physical condition and general health of the particular person to which the table is applicable may also be shown; the probative force of all to be determined primarily by the jury. There was apparently no abuse of discretion in admitting testimony as to mortuary tables; there being much evidence as to the plaintiff's general physical condition to be considered by the jury, in accordance with charges relating thereto.

The declaration alleges negligence of the defendant "in the running of" its train, and no harm could have resulted from a recitation in a charge to the jury that the plaintiff alleges negligence of the defendant "in the running and operation of" the train.

In the former opinion it was held that evidence "as to the plaintiff's loss of earning capacity as a school teacher as a proximate result of the injury was admissible," and charges having proper reference to such evidence cannot avail, as being error.

There was evidence admitted without objection that medicine was given to the plaintiff by the defendant's surgeon soon after the injury, and that the medicine made her nervous. An entire paragraph of a charge stating a number of matters to be considered in determining the amount of damages, if the plaintiff is to recover, was excepted to in the motion for a new trial; and it is contended that the portion of the paragraph excepted to instructing the jury that they might take into consideration "the effect of any drug, opiate, or papine given her" was harmful error, since such an element of injury was not put in issue by the pleadings, and the reference to the drugs was calculated to prejudice the jury against the defendant. The objectionable reference in the charge to the effect of drugs used was one of a number of items contained in a single paragraph, which paragraph was excepted to as an entirety, and only in the motion for a new trial. It was not called to the attention of the trial court when the charge was given, and no correcting charge was requested. As the evidence is legally sufficient to sustain the amount of the verdict without reference to the effect of the medicine on the plaintiff below, no harm reasonable could have resulted to the defendant from the portion of the charge complained of.

[3] After verdict the plaintiff moved for a new trial on the ground that the award is inadequate. The defendant consented to the granting of a new trial. The judge stated that, if both parties asked for a new trial, he would grant it. Thereupon plaintiff asked leave to withdraw her motion for new trial on six grounds. This application was granted over defendant's objection. A motion for new trial was then made by the defendant, which was denied. The court had authority to permit the plaintiff to withdraw her motion for a new trial, and no abuse of discretion or of authority in doing so is shown. A new trial was not, in fact, granted, but it was expressly denied by a subsequent order duly made.

It does not appear upon the whole evidence that the verdict does not accord therewith, and, no material and harmful error of law or of procedure appearing, the judgment based on a second verdict for the plaintiff is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(190 Ala. 243)

JONES v. R. L. POLK & CO. et al. (No. 955.)

(Supreme Court of Alabama. Jan. 14, 1915.
Rehearing Denied Feb. 4, 1915.)**1. LIBEL AND SLANDER — 6 — IMPUTATION
THAT WHITE WOMAN IS COLORED.**

Whether to publish of a white woman that she is colored is libelous depends on circumstances, for the publication imputes no crime or misconduct, nor mental, moral, or physical fault, for which one may be justly held accountable to public opinion.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 3-16; Dec. Dig. 6.]

**2. LIBEL AND SLANDER — 104 — ACTIONS FOR
LIBEL — MALICE — EVIDENCE TO REBUT.**

A publisher of a city directory may, when sued for libel because stating in the directory that a white woman is colored, show that the statement was made by mistake of the printer hired to print the directory, and that on the discovery of the error it was corrected, and thereby rebut the presumption of malice arising from the publication of matter in its nature calculated to defame and injure another, though not necessarily libelous.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. 104.]

**3. LIBEL AND SLANDER — 123 — ACTIONS FOR
LIBEL — MALICE — EVIDENCE — QUESTION
FOR JURY.**

Where, in an action for libel based on the publication in a city directory that a white woman was colored, the publisher of the directory showed that the statement that plaintiff was colored was made by the mistake of the printer hired to print the directory, and that the error was corrected on its discovery, the court properly submitted the case to the jury.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 356-364; Dec. Dig. 123.]

Appeal from City Court of Birmingham;
C. W. Ferguson, Judge.

Action by Mary A. Jones against R. L. Polk & Co. and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Burgin, Jenkins & Brown, of Birmingham, for appellant. Smith & Wilkinson, of Birmingham, for appellees.

SAYRE, J. Appellant sued appellee in an action of libel for that appellee falsely, maliciously, and with intent to defame her, published of and concerning her in a book known as "Selma City Directory" that appellant was a colored person, etc. The proof was that on page 180 of the directory printed by appellee appellant's name was printed with an asterisk before it. On page 87 of the same book it was shown that an asterisk before a name denoted that the person named was colored. Appellant's name was printed in the same column with a dozen or more Joneses, some of whom were properly designated as colored. Appellant is of pure Caucasian descent.

[1] The general statement that a person is "colored" imputes no crime, no misconduct, no mental, moral, or physical fault for which one may be justly held accountable to public opinion; and yet in the peculiar social conditions prevailing in this jurisdiction, to

publish of and concerning a white woman that she is colored, meaning that she is a negro, or has negro blood in her veins, is libelous within the definition of libel commonly found in the books. *Flood v. News & Courier Co.*, 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 686. Whether, then, such a publication is libelous in any particular case depends upon circumstances. Here then is room for innocent mistakes.

[2, 3] Appellee offered evidence that this asterisk got in front of appellant's name by mistake of the printer hired by it to print its directory, and that immediately upon discovery of the error it was corrected, and on this evidence, under the charge of the court stating the law of the case, the jury acquitted appellee. Appellee's evidence made a case on which it was proper to leave it to the jury to find whether appellee's publication came within the saving of the following principle of the law of libel: The publisher of matter, in its nature calculated to defame and injure another, but not necessarily libelous, must be presumed to have intended to do that which the publication is calculated to bring about, and so must be presumed to have made the publication with malice, unless he can show the contrary; and it is for him to show the contrary. In other words, appellee was properly allowed to acquit itself by satisfying the jury that it made the publication complained of neither recklessly nor with knowledge that the same was libelous. *Smith v. Ashley*, 11 Metc. (Mass.) 367, 45 Am. Dec. 216. In *Flood v. News & Courier Co.*, supra, the majority of the court held good the complaint in a similar case on the ground that it charged that the publication was willful and malicious, thus in effect, as we conceive, acting upon the view above expressed. The general charge requested by appellant was properly refused, leaving the case to be decided by the jury, and, that ruling constituting the single assignment of error, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(190 Ala. 1)

DE WYRE v. STATE. (No. 863.)

(Supreme Court of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 21, 1915.)**1. CRIMINAL LAW — 1116 — APPEAL — QUESTIONS
PRESENTED FOR REVIEW — PLEA IN
ABATEMENT.**

Alleged error in failure to dispose of defendant's plea in abatement before trial on the merits cannot be considered, where no such plea is in the record; the only indication thereof being a recital that one was interposed and made before a prior trial, and there being no indication that the plea was insisted on.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2924; Dec. Dig. 1116.]

2. CRIMINAL LAW §1166½ — APPEAL — HARMLESS ERROR—RULING AS TO SPECIAL VENIRE.

Where defendant was acquitted of murder in the first degree, and convicted of murder in the second degree, and on reversal it was properly recorded as a capital case until defendant interposed plea of former jeopardy, after which it was not a capital case, and he was not entitled to a special venire, error in giving him the special venire from which to select the jury was harmless under rule of Supreme Court No. 45 (175 Ala. xxi, 61 So. ix).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3114-3123; Dec. Dig. § 1166½.]

3. CRIMINAL LAW §789 — INSTRUCTIONS — CHARACTER—REASONABLE DOUBT.

An instruction that defendant's good character "alone," when taken in connection with all the other evidence in the case, will generate a reasonable doubt of defendant's guilt, was misleading by use of the word "alone."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.]

4. CRIMINAL LAW §776 — INSTRUCTIONS — CHARACTER.

An instruction that the good character of defendant established by the evidence in the case to your satisfaction may be sufficient to authorize an acquittal was erroneous, as premitting proof of good character in connection with other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.]

5. CRIMINAL LAW §829—INSTRUCTIONS COVERED BY THOSE GIVEN.

Defendant could not complain of refusal of requested instructions on character, fully covered by other instructions given at his request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. § 829.]

6. CRIMINAL LAW §811 — INSTRUCTIONS — CHARACTER—SINGLING OUT EVIDENCE.

An instruction that, under the uncontradicted evidence, defendant was a man of general good character was defective, as singling out evidence and stating a fact and not a rule.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.]

7. HOMICIDE §300 — INSTRUCTIONS — SELF-DEFENSE.

The court properly refused defendant's requested instruction that defendant is not allowed to swear or to introduce testimony other than the facts to show that he had reasonable grounds to apprehend danger at the hands of deceased at the time he fired the fatal shot, and therefore the jury are authorized from all the facts and circumstances in this case, and from their common knowledge of human affairs, to determine from all the facts and circumstances proven, including the conduct of the parties as shown by the testimony and other material facts shown by the evidence, whether or not at the time he fired the fatal shot he had reason to apprehend an attack by deceased, or had reason to apprehend danger to his life, or great bodily harm at the hands of deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

8. HOMICIDE §300 — INSTRUCTIONS — SELF-DEFENSE.

An instruction that, under the facts in this case, defendant was under no obligation or duty, as a matter of law, to retreat, but had the

right to stand his ground, and, if free from fault in bringing on the difficulty, and if from all the evidence you believe that from the conduct of deceased he was reasonably impressed with an honest and reasonable belief that deceased was about to shoot him and kill him, or to do him great bodily harm, he would have the right to defend himself even to the taking of the life of deceased, and in so doing would be innocent of any violation of the law, was bad, for relieving defendant, as a matter of law, of the duty to retreat; the killing not occurring at a place where defendant was under no duty to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

9. CRIMINAL LAW §814 — INSTRUCTIONS — APPLICATION TO EVIDENCE.

A requested instruction on self-defense on the theory that defendant was not obliged to retreat because the attack was at his place of business was erroneous, where the attack did not, in fact, occur there.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. § 814.]

10. HOMICIDE §300 — INSTRUCTIONS — SELF-DEFENSE.

A requested instruction that, from all the facts and circumstances as they reasonably appear to defendant at the time of the fatal difficulty, there was danger either real or apparent to him at the hands of deceased immediately before he was shot, and if you believe from the evidence that defendant was free from fault in bringing on the difficulty, then I charge you, as a matter of law, that defendant had a right to act on appearances, even though you may further believe from the evidence that, as a matter of fact, the appearance of danger was not real, but only apparent, was bad, as premitting a bona fide belief by defendant that he was in danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

11. HOMICIDE §300 — SELF-DEFENSE — INSTRUCTIONS.

A requested instruction was erroneous which not merely invoked the idea that defendant need not retreat if he could not do so without increasing his peril, but authorized him to stand his ground and defend himself with force, whether or not he was at fault in bringing on the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

12. CRIMINAL LAW §759 — INSTRUCTIONS — MALICE—INVADING PROVINCE OF JURY.

A requested instruction that, where the attending circumstances of the killing are shown in detail, if some of the circumstances tend to disprove the presence of purpose to kill, the mere fact that death was caused by the use of a deadly weapon does not raise the presumption of malice, but the question of whether or not malice existed must be determined from all the facts and circumstances in the case, invaded the province of the jury, and was misleading.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1738, 1790-1793; Dec. Dig. § 759.]

13. HOMICIDE §286 — INSTRUCTIONS — MALICE.

The court properly refused, as argumentative and misleading, requested instructions that malice is a condition of mind which shows a heart regardless of social duties and fatally

bent on mischief, the existence of which is inferred from acts committed or words spoken, and it consists of the dictates of a wicked, depraved, and malignant heart and a corrupt motive; malice means an intent to do such bodily harm as may produce death, without mitigating facts or justifying circumstances, or a formed design to do such mischief as may endanger life, or an intent of the mind and heart which prompts the doing of a wrongful act without justification, fraud, or excuse, in the absence of anything which reduces the grade of the crime; malice means that condition of the mind which prompts one person to take the life of another person without just cause or justification, signifying a heart regardless of social duties and fatally bent upon mischief.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. ¶ 286.]

14. HOMICIDE ¶300 — SELF-DEFENSE — INSTRUCTIONS—PROVOKING DIFFICULTY.

A requested instruction that the burden is on the state to show that defendant was not free from fault in provoking or encouraging the fatal difficulty, if defendant has shown that the killing was done by defendant when he was apparently in imminent danger to his own life from which there was no reasonable mode or escape without increasing the danger, was properly refused, as premitting the necessary requirement that defendant must entertain a reasonable or bona fide belief that he was in danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. ¶300.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

George De Wyre was convicted of murder in the second degree, and sentenced to 35 years in the penitentiary, and he appeals. Affirmed.

The following charges were refused to defendant:

(16) Defendant's good character alone, when taken in connection with all the other evidence in the case, if proven to your satisfaction, may generate a reasonable doubt of defendant's guilt, and demand an acquittal at your hands.

(17) The good character of defendant, if established by the evidence in this case to your satisfaction, may be sufficient to authorize an acquittal.

(40) Under the uncontradicted evidence in this case, the defendant is a man of general good character.

(41) Same as 40.

(22) Defendant is not allowed to swear or to introduce testimony other than the facts to show that he had reasonable grounds to apprehend danger at the hands of deceased at the time he fired the fatal shot, and therefore the jury are authorized from all the facts and circumstances in this case, and from their common knowledge of human affairs to determine from all the facts and circumstances proven, including the conduct of the parties as shown by the testimony and other material facts shown by the evidence, whether or not at the time he fired the fatal shot he had reason to apprehend an attack by deceased, or had reason to apprehend danger to his life, or great bodily harm at the hands of deceased.

(23) I charge you that the law does not require a defendant to retreat if attacked at his place of employment, and, if he was so attacked, or was about to be so attacked, he could defend himself with such force as was reasonable and proper under all circumstances of the case pro-

vided he was free from fault in bringing on the difficulty.

(24) Under the facts in this case, defendant was under no obligation or duty, as a matter of law, to retreat, but had the right to stand his ground, and, if free from fault in bringing on the difficulty, and if from all the evidence you believe that from the conduct of deceased he was reasonably impressed with an honest and reasonable belief that deceased was about to shoot him and kill him, or to do him great bodily harm, he would have the right to defend himself, even to the taking of the life of deceased, and in so doing would be innocent of any violation of the law.

(25) From all the facts and circumstances as they reasonably appear to defendant at the time of the fatal difficulty, there was danger either real or apparent to him at the hands of deceased immediately before he was shot, and, if you believe from the evidence that defendant was free from fault in bringing on the difficulty, then I charge you, as a matter of law, that defendant had a right to act on appearances, even though you may further believe from the evidence that, as a matter of fact, the appearance of danger was not real but only apparent.

(28) Where the attending circumstances of the killing are shown in detail (as in this case), if some of the circumstances tend to disprove the presence of matter or purpose to kill, the mere fact that death was caused by the use of a deadly weapon does not raise the presumption of malice, but the question of whether or not malice existed must be determined from all the facts and circumstances in the case.

(33) Malice is a condition of mind which shows a heart regardless of social duties and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken, and it consists of the dictates of a wicked, depraved, and malignant heart and a corrupt motive.

(34) Malice means an intent to do such bodily harm as may produce death, without mitigating facts or justifying circumstances, or a formed design to do such mischief as may endanger life, or an intent of the mind and heart which prompts the doing of a wrongful act without justification, fraud, or excuse, in the absence of anything which reduces the grade of the crime.

(35) Malice means that condition of the mind which prompts one person to take the life of another person without just cause or justification, signifying a heart regardless of social duties and fatally bent upon mischief.

(36) and (37) Affirmative charge for defendant.

(39) The burden of proof in this case is on the state to satisfy the jury beyond a reasonable doubt of every material fact included or charged in the indictment, and, if the state has failed to do so, you cannot find defendant guilty.

(43) The burden is on the state to show that defendant was not free from fault in provoking or encouraging the fatal difficulty, if defendant has shown that the killing was done by defendant when he was apparently in imminent danger to his own life from which there was no reasonable mode of escape without increasing the danger.

Allen & Bell, of Birmingham, for appellant.
R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

ANDERSON, J. [1] Counsel for the appellant, in their brief, insist upon error because the defendant's plea in abatement was not disposed of before he was put to trial upon the merits of the case. We find no plea in

abatement in the record, and the only thing to indicate that one was interposed is a recital in the judgment entry of May 28, 1910, that one was interposed. The case was subsequently tried, and there is nothing to indicate that the plea was pressed or insisted upon, or that the defendant objected to the trial upon the merits until said plea was disposed of by the trial court. The defendant was then tried and convicted, and the judgment was reversed by the Court of Appeals, and we find no plea in abatement upon the second trial, and which is the one from which this appeal was taken. There is no merit in this point.

[2] Although the defendant was acquitted of murder in the first degree, and was convicted of murder in the second degree, yet, when said case was reversed, it stood as a capital case, and was properly treated as such until the defendant interposed his special plea of former jeopardy, and it was properly regarded as a capital case when first set down for trial, and when the jury was drawn for the week for the trial of capital cases. The plea of former jeopardy was not interposed until February 9, 1914, the day set for the trial. It is true that, when said plea was on said day confessed by the state the case ceased to be a capital case, and the defendant was not, as matter of law, entitled to a special venire, and the trial court could have reset it for another time, and tried it before a regular jury as any other ordinary felony, without committing reversible error; but, as the case had been set down for hearing, and the witnesses subpoenaed for said date, it would have been a useless trouble and expense to have reset the case, and we cannot conceive of any injury to the defendant in giving him the benefit of the special venire from which to select the jury to try him, instead of confining him to the regular jury for said subsequent week, notwithstanding he was not entitled, under the law and as matter of right, to a special venire. We think that it can be safely said that this action of the court, if error, but which we do not decide, was error without injury, and think that this is a fit question for the application of rule 45, which will be found in 175 Ala. xxi, 61 South. 1x, and which is as follows:

"Rule 45. Reversals; New Trial; Error Without Injury. Hereafter no judgment will be reversed or set aside, nor new trial granted by this court or by any other court of this state, in any civil or criminal case on the ground of misdirection of the jury, the giving or refusal of special charges or the improper admission or rejection of evidence, nor for error as to any matter of pleading or procedure, unless in the opinion of the court to which the appeal is taken, or application is made, after an examination of the entire cause, it should appear that the error complained of has probably injuriously affected substantial rights of the parties."

[3] Charge 16, refused the defendant, was calculated to mislead by the use of the word "alone," which said word did not appear in

the charges approved in the cases of Taylor v. State, 149 Ala. 32, 49 South. 996, and Bryant v. State, 116 Ala. 445, 23 South. 40.

[4, 5] Charge 17 pretermitted proof of good character in connection with the other evidence. Moreover, if these two charges were not subject to the vice assigned, the refusal of same would not be reversible error, as the defendant got the full benefit of the legal effect of good character in his given charges 15 and 42.

[6] There was no error in refusing the defendant the requested charges 40 and 41. They assert no principle of law, and single out a certain part of the evidence. It may be true that a charge upon the legal effect of good character is countenanced, and is an exception to the rule as to singling out the evidence, but these charges do not attempt to define the legal rule as to the consideration of the evidence of good character; they simply state the fact that the defendant had a good character under the evidence.

[7] Charge 22 was palpably bad.

[8] Charge 24, if not otherwise bad, relieved the defendant, as matter of law, of the duty to retreat. The killing did not occur upon the premises of the defendant or any other place where he was under no duty to retreat; it occurred on the side of the railroad, where the deceased had as much right to be as the defendant, and after both of them had left their places of duty.

[9] Charge 23, if not otherwise bad, hypothesized the attack at the defendant's place of business, when such was not the case.

[10] Charge 25, refused the defendant, was bad. If not otherwise faulty, it pretermitted a bona fide or reasonable belief on the part of the defendant that he was in danger, and which said omission differentiates it from charge 1 approved in the case of Kennedy v. State, 140 Ala. 1, 37 South. 90.

[11] Charge 26, if not otherwise bad, pretermits the defendant's freedom from fault in provoking the difficulty. It does not merely invoke the idea that he need not retreat if he cannot do so without increasing his peril, but authorizes him to stand his ground and defend himself with force whether he was at fault in bringing on the difficulty or not.

[12] Charge 28 invaded the province of the jury, and was also misleading.

[13] There was no error in refusing charges 33, 34, and 35. It is true that malice is an ingredient of murder, and a defendant ought to have it defined to the jury, when upon trial for murder, as applicable to murder, but it is not every definition of malice generally, or excerpt from a text-book of opinion in defining and discussing the same, that would constitute a proper charge. The charges in question are argumentative or misleading, and do not conform to the definition of malice as an ingredient to murder as

set out in the case of *Cribbs v. State*, 86 Ala. 613, 6 South. 109, and which seems to have been taken from the case of *Hadley v. State*, 55 Ala. 31.

The defendant was clearly not entitled to charges 36 and 37.

Whether charge 39 is or is not correct, it was sufficiently covered by the defendant's given charges.

[14] There was no error in refusing charge 43. It is true that the burden is upon the state to show that the defendant was not free from fault in provoking the difficulty after he establishes the other elements of self-defense, and it is also true that he has the right to act upon appearances, but he must entertain a reasonable or bona fide belief that he was in danger, and which said belief is pretermitted by this charge.

Each objection and exception to the ruling upon the evidence has been examined and considered, and none of them constitute reversible error, and it can serve no good purpose to incumber this opinion with a discussion of same.

The judgment of the criminal court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(190 Ala. 616)

PEARCE v. MILLS et al. (No. 730.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MORTGAGES \S 313—PAYMENT—RELEVANCY OF EVIDENCE.

Where, on the issue of the payment of a mortgage on land, witnesses claimed that either in the year 1902 or 1903 enough cotton was delivered, in their presence, to the mortgagee to pay the debt, the mortgagee could show that during the two years mentioned, he held cotton crop mortgages for money loaned, which mortgages called for the total cotton crop of the mortgagor.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 909; Dec. Dig. \S 313.]

2. LIENS \S 18—MORTGAGES \S 376—APPLICATION OF PAYMENTS.

Proceeds of mortgaged property or property charged with a lien must be applied to the debts secured, unless by agreement to the contrary.

[Ed. Note.—For other cases, see *Liens*, Cent. Dig. \S 80; Dec. Dig. \S 18; *Mortgages*, Cent. Dig. \S 1125-1132; Dec. Dig. \S 376.]

3. WITNESSES \S 177—TRANSACTIONS WITH DECEDENT—DENIAL OF CONVERSATION.

In statutory ejectment by the widow and heirs of a deceased mortgagor, in which witnesses detailed a conversation between the deceased and the mortgagee, the mortgagee, though incompetent to testify as to any transaction with the decedent, may deny that he had such conversation.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 718; Dec. Dig. \S 177.]

Appeal from Circuit Court, Marion County; C. P. Almon, Judge.

Statutory ejectment by Lissie Mills and others against James P. Pearce. From a

judgment for plaintiffs, defendant appeals. Reversed and remanded.

E. B. & K. V. Fite, of Hamilton, and A. H. Carmichael, of Tuscombula, for appellant. Ray & Cooner, of Jasper, for appellees.

DE GRAFFENRIED, J. James P. Pearce held a mortgage on certain lands which belonged to William W. Mills. The mortgage was executed by Mills, and there was evidence tending to show that Pearce was in possession of the land under and by virtue of the said mortgage or of a sale of the lands described in the mortgage made by Pearce as assignee of said mortgage under the power contained in the mortgage and at which sale he became the purchaser. William W. Mills is dead, and this suit in statutory ejectment was brought by the widow and heirs of Mills against Pearce to recover possession of the land.

[1] The plaintiff introduced two witnesses, who testified that, prior to his death, William W. Mills in their presence delivered to Pearce more than enough cotton to pay off the mortgage, and that it was then agreed between Mills and Pearce that the mortgage was paid in full, and that the balance of the proceeds of the sale of the cotton would be credited by Pearce on the store account of Mills with Pearce. These two witnesses gave testimony to all that occurred in the alleged conversation with Pearce. For the purpose of contradicting these witnesses—and for no other purpose, as Mills is dead and Pearce is a party to a cause in which the estate of Mills is interested—Pearce was permitted by the trial judge to testify that he had no such conversation with the said deceased as was testified to by the said witnesses. The two witnesses who testified to the above alleged agreement stated that it was made either in the latter part of the year 1902 or in the latter part of the year 1903, but the witnesses were unable to say which year.

[2] It appears from the evidence that Pearce is a merchant, and that Mills during the years 1902 and 1903 obtained his supplies from Pearce. The main features of the plaintiff's case depend upon the veracity of the two witnesses above referred to, or at least upon the integrity of their recollection, and these witnesses give their recollection as to the details of a conversation which the deceased is alleged to have had with Pearce, and which conversation Pearce denies. Pearce received cotton from Mills in 1902 and in 1903, and he offered to prove, as sustaining his claim, that the mortgage on the land had not been paid, that in 1902 he had a mortgage made to him by said Mills to secure a note for \$267, which matured on October 15, 1902, and which mortgage conveyed to said Pearce all of the crop of cotton raised by Mills during the year 1902,

and that he held a similar mortgage made to him by Mills on the crop of cotton grown by Mills during the year 1903, to secure a note for \$220, and which matured on October 15, 1903. The cotton which was delivered by Mills to Pearce during the years 1902 and 1903 was grown by Mills, and it seems clear that, for the purposes for which the mortgages were offered, the mortgages were competent. Proceeds of mortgage property or of property charged with a lien *must* be applied to the debts secured, unless by agreement to the contrary. *Strickland v. Hardie*, 82 Ala. 412, 3 South. 40. If Pearce made no agreement with Mills to apply the cotton to the debt secured by the mortgage on the land, then the *law* applied the proceeds to the payment of the debt secured by the mortgage on the cotton, and we think that the fact that Pearce had these two crop mortgages—the fact that if the witnesses who testify for the plaintiff as to the above conversation testify truthfully, or are not mistaken in their recollection, then that Pearce relinquished a part of his chattel mortgage security and applied it on a debt secured by a mortgage on real estate without any well-defined reason or consideration therefor—was relevant, material and legal.

[3] For the reasons stated in *Frank v. Thompson*, 105 Ala. 220, 16 South. 634, Pearce had a right to deny that he had the conversation with the said two witnesses, and we think that the fact that Pearce had the two chattel mortgages should have gone to the jury as tending to corroborate the testimony of Pearce.

For the error pointed out the judgment of the lower court is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 419)

MUSGROVE v. CORDOVA COAL, LAND & IMPROVEMENT CO. (No. 744.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. COVENANTS §97—DEEDS—CONSTRUCTION.

A covenant in a deed that the grantor and his heirs, executors, and administrators should defend title to the grantee and his successors against the lawful claims of all persons whatsoever is, in substance, a covenant for possession and quiet enjoyment, and its obligation is not that the grantor is the true owner, or that he is seised in fee with the right to convey, but that he will protect the grantee against the rightful claims of all the persons that may thereafter be asserted; hence it is not broken so long as the grantee's possession and enjoyment are not interfered with.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 130-137; Dec. Dig. §97.]

2. COVENANTS §97—BREACH—"EVICTION."

An entire tract of land was sold with a covenant for possession and quiet enjoyment. The grantee had only constructive possession. The owner of an outstanding interest in the

land also had constructive possession. *Held*, that there was an "eviction," which is a disturbance in the grantee's possession, by the assertion of a title paramount to which a party has been compelled by law or satisfactory proof of genuineness to submit, and hence the grantee, having bought in the outstanding interest, may recover.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 130-137; Dec. Dig. §97.]

For other definitions, see *Words and Phrases*, First and Second Series, *Eviction*.]

3. ACKNOWLEDGMENT §49—CERTIFICATE—CURING VARIANCE BETWEEN GRANTOR'S NAME AND SIGNATURE.

Though the first initial of a grantor's subscription to a deed looked more like a J. than a T., the variance, if any, between the subscription and the recital in the body of the deed, that the conveyance was by T. H. Watson is cured by the notary's certificate that the grantor, T. H. Watson, was known to him, etc.

[Ed. Note.—For other cases, see *Acknowledgment*, Cent. Dig. §§ 255-263; Dec. Dig. §49.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by the Cordova Coal, Land & Improvement Company against L. B. Musgrove. From a judgment for plaintiff, defendant appeals. Affirmed.

Lacy & Lacy, of Jasper, for appellant. Bankhead & Bankhead and F. A. Gamble, all of Jasper, for appellee.

SAYRE, J. [1] This action was brought in 1911 by appellee against appellant, to recover damages for the breach of a covenant of general warranty of title to land. About 15 years before the suit was brought defendant had sold the land described in the complaint to plaintiff's predecessor in title, Fred Sloss, trustee, executing a deed purporting to convey the entire fee and containing this warranty:

"We will, and our heirs, executors and administrators shall, defend the same to the said Fred Sloss, trustee, his successor or successors, heirs, executors, and assign forever against the lawful claims of all persons whomsoever."

At that time there was an undivided one-fifth interest in the minerals in, under, or upon the land outstanding in one Copeland, and shortly before this action was commenced the heirs of said Copeland, who had died in the meantime, laid claim to this interest, whereupon plaintiff, recognizing the validity of their claim, purchased the same from them. Plaintiff has declared as for a breach of the covenant quoted above.

This covenant, in substance and effect, is the same as a covenant for possession and quiet enjoyment. Its obligation is, not that the covenantor is the true owner, or that he is seised in fee with the right to convey, but that he will defend and protect the covenantee against the rightful claims of all persons that may be thereafter asserted. It is not broken, therefore, so long as possession and enjoyment are not interfered with. *Oliver v. Bush*, 125 Ala. 534, 27 South. 923; *Cald-*

well v. Kirkpatrick, 6 Ala. 60, 40 Am. Dec. 36; Green v. Irving, 54 Miss. 450, 28 Am. Rep. 360. It operates in futuro, unless the true owner is in actual possession at the time the covenant is entered into, in which case there is a breach eo instanti; it runs with the land, that is, it is intended for the benefit of the ultimate grantee in whose time it is broken, and there can be no breach except by an actual or constructive eviction. Prestwood v. McGowin, 128 Ala. 267, 29 South. 386, 86 Am. St. Rep. 136. These principles are of common statement in the authorities.

[2] It does not appear that defendant was ever in the actual possession of the premises, or that there has been any actual possession since the time of his conveyance to plaintiff's predecessor in title. The parties so treat the case, and inferences to be drawn from the record justify that treatment as proper. On the basis of the fact that there has been nothing more than a constructive possession of the premises by any of the parties to this suit or the transaction out of which it has arisen, defendant (appellant) makes an argument which seems to us to come to this: That since plaintiff and Copeland—so for convenience by this one name to designate the persons who have owned the outstanding interest—have in law and fact all along been tenants in common, each holding constructive possession for the benefit of the other, there has not been nor could be any constructive eviction of one by the other.

"An eviction, according to all the best authorities, means some change in the possession of the party [covenantor or his successors in interest] by the disturbance of an actual or constructive possession, which has been displaced by a paramount title to which the party has been compelled by law or by satisfactory proof of genuineness to submit." *Matteson v. Vaughn*, 38 Mich. 373, quoted in *Rawle on Cov.* (5th Ed.) p. 184, note.

There must be an eviction, actual or by construction of law. But the covenantee need not submit to the harassment and expense of a lawsuit and legal process. Acting in good faith, upon the hostile assertion of right by the true owner of the paramount title, he may yield possession or purchase the outstanding title from the adverse claimant. This, according to all the modern authorities, will amount to an eviction and establish a breach of the covenant of general warranty. *Oliver v. Bush*, supra.

Plaintiff and its predecessors in interest are now, and at all times since defendant entered into his covenant have been, in the undisputed constructive possession of an undivided interest in the land. It is said for defendant that this has not amounted to a possession, actual or constructive, of the outstanding interest, and therefore that as respects that interest there has been no eviction, actual or constructive. But if plaintiff had been in actual possession, it could not be ousted because of the unity of possession by

which estates in common are held. Nevertheless the outstanding title might have been asserted against plaintiff in a judicial proceeding, and this would have been the equivalent of an eviction. Now plaintiff bargained for possession of the entire fee, and the rule of reason and authority is that where there has been no actual possession, or where disposssession of the covenantee is impossible, as in the case at bar or in case the vendee has been prevented from taking possession by an adverse holding at the date of the conveyance, in order to make the covenant of warranty effectual according to the intention of the parties, the vendor shall be estopped to deny that actual possession has been conveyed whenever such possession is necessary to enable the vendee to assert his covenant against the vendor—otherwise the covenant would be wholly inoperative. *Green v. Irving*, supra; *Rawle on Cov.* § 153.

[3] The only other point made against the proceedings below is that the identity of a deed executed by one Watson, which stood in the chain of title between defendant and plaintiff, should have been submitted to the jury as a question of fact. The original of this deed had been lost, and by agreement the original record of it in the office of the judge of probate was used in evidence. We have before us a photographic copy of the record. The first initial of the grantor's subscription to the deed as it appears of record, considered apart from the rest of the recorded instrument, would, most likely, be taken for J. But it is not at all impossible to read it as T. In the body of the deed grantor's name is clearly written as T. H. Watson. The notary by whom the acknowledgment was taken certified that T. H. Watson, known to him, acknowledged, etc. About the name as written in the body of the deed and in the acknowledgment there can be no doubt. In these circumstances we suppose the court would have been justified in treating the J. in the signature, if taken as J., as a clerical misprision in the record. Anyhow, in view of the certificate, the variance, if variance there was, did not avoid the deed. 13 Cyc. 554.

There is no error in the record.
Affirmed.

MCCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(190 Ala. 22)

FORMAN v. STATE. (No. 666.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW §376—CHARACTER EVIDENCE.

At common law, a defendant's general character was not subject to attack until he himself put his character in issue.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836-839, 841, 843; Dec. Dig. §376.]

2. WITNESSES \hookrightarrow 337—IMPEACHMENT—CHARACTER.

Under the statute permitting a defendant to be a witness in his own behalf, the general character of defendant is admissible, but only as affecting his credibility as a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. \hookrightarrow 337.]

8. WITNESSES \hookrightarrow 337—IMPEACHMENT—CHARACTER EVIDENCE.

Where, in a homicide case in which self-defense is claimed, defendant testified as a witness, but did not put his general character in issue, the state could not show that prior to the homicide defendant was a man whose general character for peace and quiet was bad, though, to impeach him, the state could show that prior to the homicide his general character was bad.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. \hookrightarrow 337.]

4. CRIMINAL LAW \hookrightarrow 1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Where, in a homicide case, self-defense was claimed, admission in evidence that defendant's general character for peace and quiet was bad is prejudicial error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. \hookrightarrow 1169.]

5. WITNESSES \hookrightarrow 352—IMPEACHMENT—CHARACTER EVIDENCE.

In criminal cases, evidence of defendant's character must be limited to a time prior to the crime charged; his general character on the day of the offense being immaterial.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 729; Dec. Dig. \hookrightarrow 352.]

6. CRIMINAL LAW \hookrightarrow 317, 721½—PRESUMPTION—ARGUMENT OF COUNSEL—ABSENCE OF TESTIMONY.

No unfavorable inference can be drawn and no unfavorable argument of counsel can be made because of absence of the testimony of a witness equally accessible to both parties.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 732, 1673; Dec. Dig. \hookrightarrow 317, 721½.]

7. HOMICIDE \hookrightarrow 300—INSTRUCTIONS—SELF-DEFENSE.

A request to charge that, if the jurors cannot say beyond a reasonable doubt whether defendant acted on a reasonable belief that it was necessary to take the life of deceased to save himself from great bodily harm, or death, and that he shot before such impending necessity arose, defendant could be acquitted, is erroneous, as omitting to hypothesize defendant's freedom from fault in bringing on the difficulty.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \hookrightarrow 300.]

8. HOMICIDE \hookrightarrow 122—SELF-DEFENSE—PROTECTION OF OTHERS.

The right to interfere for the protection of others to the extent of taking life when necessary includes such persons as master and servant, parent and child, guardian and ward, and uncle and nephew.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. \hookrightarrow 122.]

9. CRIMINAL LAW \hookrightarrow 813—ABSTRACT INSTRUCTION.

A requested abstract instruction is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. \hookrightarrow 813.]

10. CRIMINAL LAW \hookrightarrow 785—INSTRUCTIONS—IMPEACHMENT OF WITNESS.

As there are no degrees to the several methods of impeaching a witness, a requested charge speaking of the highest form of impeachment is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1774, 1776-1781, 1889-1894; Dec. Dig. \hookrightarrow 785.]

11. CRIMINAL LAW \hookrightarrow 720—ARGUMENT OF COUNSEL.

Counsel in a homicide case may not state that there is no evidence reflecting on the character of deceased.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1670, 1671; Dec. Dig. \hookrightarrow 720.]

Appeal from Circuit Court, St. Clair County; J. E. Blackwood, Judge.

Beauregard, alias Bory, Forman was convicted of murder in the first degree, and he appeals. Reversed and remanded.

The evidence for the state tended to show a conspiracy between this defendant and his codefendant to take the life of Carney Compton, and the killing of said Compton pursuant to this conspiracy by the defendant G. B. Forman. The evidence for defendant tended to show that Grady Forman and Carney Compton engaged in a difficulty in which Grady Forman was free from fault, and that during this difficulty Compton was about to take the life of Grady Forman, or do him great bodily harm, and that this appellant, for the purpose of protecting Grady Forman, engaged in the difficulty, and, after becoming so engaged, in self-defense fired the shots which caused the death of deceased. After defendant had taken the stand in his own behalf, but had not put at issue his character, otherwise than as a witness, Kay Simmons was introduced, and asked by the solicitor the following question: "Do you know whether Mr. Forman bears a reputation and character there of a violent, dangerous, troublesome, bloodthirsty man, or a peaceful, quiet, law-abiding citizen; which reputation does he bear?" Over objection, the witness answered: "Bad; dangerous." The court overruled the motion to exclude the answer.

The following charges were refused defendant:

(7) That if, after looking at all the evidence in the case, your minds are left in such a state of uncertainty that you cannot say beyond a reasonable doubt whether this defendant acted upon a well-founded and reasonable belief that it was necessary to take the life of deceased to save himself from great bodily harm or death, or that he shot before such impending necessity arose, then this is such a doubt as will entitle this defendant to an acquittal, and you should so find.

(8) The court charges the jury that, if you believe from the evidence that Grady Forman accosted Carney Compton and told him that, if he would apologize to his Uncle Bory, he thought he could get a warrant which had been issued dismissed, and Carney Compton entered into a struggle or fight with Grady, and Grady was free from fault in bringing on this scuffle or fight, and during this scuffle or fight Compton got hold of Grady's pistol,

and Grady thereby became endangered of his life or serious bodily harm, and defendant was the uncle of Grady, then I charge you that, under the law, defendant had the right to interfere in said difficulty between Grady and Compton.

(Y) If the jury believe that Grady Forman became involved in a difficulty with Carney Compton, and was free from fault in bringing on this difficulty, and did not have an opportunity to retreat without increasing his peril, and was in danger then impending of serious bodily harm, then I charge you that Bory Forman had the right to take part in said difficulty in aid of his nephew, and perform the same acts and defense of Grady Forman as he himself could perform.

(X) If the jury believe that defendant, at the time he is said to have killed Carney Compton, was so much under the influence of whisky that he was incapable of forming a purpose to do a voluntary act, then he cannot be convicted of any offense higher than manslaughter in the second degree.

(W) If you believe that any witness in the trial of this case willfully swore differently from what you believed he swore in reference to the same matter on the preliminary trial in this case, and about a material matter, then I charge you that this may be considered by you as the highest form of impeachment, and you could disregard and reject his or her entire testimony.

(C) It is not necessary under the evidence in this case that defendant should have been actually in danger of death or great bodily harm at the time he killed deceased in order for him to have been justified in shooting deceased. He had a right to act upon the appearance of things at the time, taken in connection with the light of all the evidence, and he had the right to interpret the conduct of deceased in the light of any threats that the evidence showed that deceased had made against defendant. If the circumstances attending the killing were such as to justify a reasonable man in the belief that he was in danger of great bodily harm or death, and he honestly believed such to be the case, then he had the right to shoot deceased in his own defense, although, as a matter of fact, he was not in actual danger; and, if the jury believe that defendant acted under such conditions and circumstances as above set out, the jury should find defendant not guilty.

Percy, Benners & Burr, of Birmingham, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

The opinion in this case was prepared for the court by DE GRAFFENRIED, J.

The defendant in this case was indicted for, and convicted of, murder in the first degree.

[1, 2] At common law, a defendant's general character was not subject to attack by the state until he himself had put his character in issue. Since the adoption of the statute which permits a defendant in a criminal case to take the stand as a witness and testify as such in his case, this court has held that, for the purpose of impeaching his testimony, the state may introduce evidence tending to show his general bad character. A general inquiry, in such a case, into the moral character of the defendant is permissible for the purpose of affecting his credibility as a witness, and for no other purpose.

Sweatt v. State, 156 Ala. 85, 47 South. 194; Dolan v. State, 81 Ala. 11, 1 South. 707.

[3, 4] In this case the defendant testified in his own behalf as a witness, but he offered no evidence as to his general character or as to his general character for peace and quiet. This being the situation, the state had no right, against the seasonable objection of the defendant, to offer evidence tending to show that the defendant was a man whose general character for peace and quiet was bad; and in permitting the state, against the seasonable objection of the defendant, to offer this evidence to the jury, the trial court committed reversible error. Sweatt v. State, supra; Dolan v. State, supra.

The state had a right, for the purpose of impeaching the defendant as a witness, to offer evidence tending to show that he was a man whose general character prior to the homicide was, in the community in which he lived, bad; but, as already stated, under the situation of the evidence in this case, it had no right to show that, prior to the homicide, the defendant's general character for peace and quiet was, in the community in which he lived, bad.

[5] 1. We deem it wise to direct attention to the fact that in all criminal cases, whenever the character of the defendant becomes the subject of evidence on the part of the state or of the defendant, the evidence as to such character must be limited to the character which the defendant bore in his community prior to the time of the commission of the offense for which he is being tried. The question in all such cases is: What was the general character of the defendant up to the time of the commission of the alleged offense? and not, what was the general character of the defendant on the day of the trial? Robinson v. State, 5 Ala. App. 45, 59 South. 321.

In the instant case the trial court seems to have disregarded the above rule.

[6] 2. It is the unquestioned law of this state that no unfavorable inference can be drawn, and no unfavorable argument to a jury made, by counsel against a party to a cause because of the absence of the testimony of a witness in a cause, when that witness is accessible to both parties, and can be introduced by and examined by either party as a witness. Hutcherson v. State, 165 Ala. 16, 17, 50 South. 1027, 38 Am. St. Rep. 17; Du Bose v. Conner, 1 Ala. App. 456, 55 South. 432; Etheridge v. State, 124 Ala. 106, 27 South. 320; Earle v. State, 1 Ala. App. 183, 56 South. 32.

In this case, so the bill of exceptions recites:

The "solicitor, in his closing argument to the jury, made the following argument to the jury: 'Where is Raymond Smith? How do they account for the fact that Raymond Smith did not testify in this case?'"

The defendant seasonably objected to this argument of the solicitor, but the court over-

ruled the objection, and permitted the argument to remain with the jury.

As Raymond Smith was equally accessible to the state and the defendant, and as the state could, if it had seen proper so to do, have used the said Raymond Smith as a witness, the court committed reversible error in not sustaining the defendant's objection to said argument and in not excluding it from the jury. Authorities *supra*.

[7] 3. Charge 7, requested by the defendant, is a copy of a charge which this court held to be bad under the facts shown by the bill of exceptions in *Gaston v. State*, 161 Ala. 37, 49 South. 876. Under the facts shown by the bill of exceptions in the present record the trial court was free from error in refusing said charge.

[8] 4. A critical examination of the evidence in this case convinces us that, under the evidence as it exists in the bill of exceptions, the trial court committed no error in refusing charges Y and F. We recognize the integrity of the rule which says that the right to interfere for the protection of others to the extent of taking life when necessary includes such persons as master and servant, parent and child, guardian and ward, and uncle and nephew; but, in our opinion, that rule, under the evidence in the bill of exceptions in this case, furnished no basis to the trial court for giving to the jury the above charges. The case must be again tried, and we refrain from discussing this phase of the evidence.

[9] 5. Charge X was abstract, and was properly refused.

[10] 6. There are several methods whereby a witness may be impeached. There are no degrees in these forms or methods of impeachment. One method is as effectual as the other, provided the impeaching evidence is believed by the jury. The trial court properly refused charge W, which was requested in writing by the defendant.

7. Under the evidence set out in the present bill of exceptions the trial court was free from error in refusing charge C, requested by the defendant. A charge somewhat similar to this charge was held to be good by the Court of Appeals in *Black v. State*, 5 Ala. App. 87, 59 South. 692, but we direct attention to the fact that this charge is not a copy of the charge which was held good as applied to the facts in *Blutt v. State*, 161 Ala. 14, 49 South. 854.

[11] 8. During the progress of the solicitor's argument he was permitted by the trial court to comment upon the fact that no evidence had been developed on the trial tending to reflect upon the character of the deceased. This being the situation of the evidence, the trial court might well have excluded this portion of the argument of the solicitor from the jury. We make this statement in view of the fact that this case must

again be tried. *Dryman v. State*, 102 Ala. 130, 15 South. 433.

9. In the above opinion we have discussed all of the questions presented by this record which we deem of importance.

For the errors pointed out the judgment of the court below is reversed, and the cause is remanded to the court below for further proceedings in accordance with the views above expressed.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

(191 Ala. 392)

KIMBRELL v. LOUISVILLE & N. R. CO.

(No. 445.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. CARRIERS \S 12—CHARGES—ORDER OF COMMISSION—CONSTRUCTION.

An order of the railroad commission relating to charges, indicating that it applies to all railroads, but naming several roads specifically, will be construed to apply to one not specifically named, as otherwise it might be void for discrimination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. \S 12.]

2. CARRIERS \S 12—EXTRA FARES—POWER OF COMMISSION.

An order of the railroad commission, authorizing an extra charge of 15 cents where no ticket is purchased by a passenger getting on at a ticket station, is authorized by Laws 1907, p. 711, giving the commission power to change rates, regardless of Code 1907, § 5563, fixing rates generally.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 7-11, 15-20; Dec. Dig. \S 12.]

3. STATUTES \S 109—TITLE OF ACT—CARRIER'S RATES.

Laws 1907, p. 711, authorizing the railroad commission to change rates for carriage of freight and passengers, does not violate Const. 1901, § 45, because the subject-matter of the act is broader than its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. \S 109.]

4. CONSTITUTIONAL LAW \S 62—DELEGATION OF LEGISLATIVE POWER—CARRIER'S RATES.

Laws 1907, p. 711, authorizing the railroad commission to change rates for carriage of freight and passengers, is not repugnant to the Constitution as an unauthorized delegation of legislative power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 94-102; Dec. Dig. \S 62.]

5. APPEAL AND ERROR \S 1040 — HARMLESS ERROR—DEMURRER TO PLEADING.

Where the second count of a complaint is based on the existence of a fact which the jury determine adversely to plaintiff in passing on the first count, the sustaining of a demurrer to the second count is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. \S 1040.]

6. CARRIERS \S 385—EJECTION OF PASSENGER—VERDICT—SEVERAL ISSUES—EFFECT OF DETERMINATION OF ONE.

The rule that a verdict for defendant under a simple negligence count does not acquit defendant of willful or wanton misconduct

charged in another count has no application, where one count in the complaint counted on the wrongful ejection of a passenger, and the other charged the same cause of action, with the addition of the words "willful" and "wanton," as such words added nothing to the cause of action in either count.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1501; Dec. Dig. ¶ 385.]

7. APPEAL AND ERROR ¶1068 — HARMLESS ERROR—INSTRUCTIONS.

Where a verdict is for defendant, any error in instructions as to the amount of damages is harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4225-4228, 4230; Dec. Dig. ¶ 1068.]

8. PLEADING ¶166—REPLICATION TO PLEA—EJECTION OF PASSENGER.

Where a carrier is entitled to demand an extra fare of a passenger boarding a train at a ticket station without a ticket, if plaintiff had any excuse for not purchasing a ticket, he should set it up by replication to the plea charging that the passenger boarded the train at a ticket station.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 321½-328; Dec. Dig. ¶ 166.]

9. APPEAL AND ERROR ¶1040—PLEADING—HARMLESS ERROR.

The elimination of a special plea asking attorney's fees as special damages for ejection of a passenger is harmless, where the jury found for defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. ¶ 1040.]

10. CARRIERS ¶382—EJECTION OF PASSENGERS—ATTORNEY'S FEES.

Attorney's fees may not be recovered as special damages, in an action for wrongful ejection of a passenger.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1478, 1483-1491; Dec. Dig. ¶ 382.]

11. APPEAL AND ERROR ¶1005—REVIEW—MOTION FOR NEW TRIAL.

Unless the verdict is manifestly opposed to the weight of the evidence, the trial court's action in denying a motion for new trial will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. ¶ 1005.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Action by Nelson Kimbrell against the Louisville & Nashville Railroad Company, for damages for being ejected from a passenger train. Judgment for defendant, and plaintiff appeals. Affirmed.

The case made by the complaint is that the plaintiff took passage on one of defendant's passenger trains at Marvell to go and be carried as a passenger to Gurnee Junction, both of which were stations on defendant railway, and that, when they reached a point about three miles from plaintiff's destination, defendant's conductor in charge of the train wrongfully and unlawfully ejected plaintiff from the train, and he had to walk three miles in the nighttime, and it raining, to reach his destination, wherefore he suffered the damages which are set out in extenso.

Plea 3 sets up general order No. 14, issued by the railroad commissioner of the state of Alabama on March 2, 1908, "applicable to all common carriers in the state of Alabama," which order is set out in full, the second section of which is as follows:

That, unless the passenger boards a train at a station where there is no ticket office, the carrier may charge and collect from such passenger 15 cents in addition to the price of the ticket at the agent's rate.

The inducement leading up to the order is as follows:

By virtue of certain agreements heretofore made between the state of Alabama and the Southern Railway, the Alabama Great Southern Railroad, the Mobile & Ohio Railroad, the Northern Alabama Railroad, and the Atlantic Coast Line Railroad, wherein it is provided that, in consideration of concessions made to the above railroads in the passenger charges, the said railroads would, in the event of a lower charge being instituted in other states, establish and maintain a like charge in Alabama, and whereas certain of the above railroads have made known to the commissioner that they would on April 1, 1908, establish the charges named below in other states, and all of the above-named railroads made application for the promulgation of the necessary order to put in operation said rates for Alabama, it is therefore hereby ordered, etc.

The plea further alleges that Marvell was a ticket office station in charge of an agent for the sale of tickets to those desiring to take passage on defendant's train; that the rate from Marvell to Gurnee Junction was 13 cents, and plaintiff did not purchase a ticket, but boarded the train without a ticket; that the conductor demanded the ticket which plaintiff failed or refused to give him, whereupon the conductor demanded of him the cash fare of 28 cents, the same being 13 cents for the regular fare and 15 cents additional as provided by said order, the said sum of 28 cents being the lawful and proper fare, which plaintiff refused to pay, whereupon the conductor in charge of the train ejected plaintiff therefrom using no more force than was necessary.

Estes, Jones & Welch, of Bessemer, for appellant. Tillman, Bradley & Morrow, of Birmingham, for appellee.

ANDERSON, C. J. [1] The defendant's special plea 3 set up an order of the railroad commission authorizing the collection of 15 cents extra from those boarding the train at ticket stations without tickets. It is first urged by the appellant that the order in question does not apply to or include this defendant. It may be true that the preamble of the order names certain lines and omits this one, but the order itself, beginning with paragraph 1, says, "That no carrier in Alabama," etc., indicating that it applies to all railroads, whether mentioned in the preamble or not. The order is not only susceptible of this construction, and which we should give

it, else it might be an unwarranted discrimination against this and other roads not mentioned in the preamble.

[2-4] We also think that the commission had authority to make the order under the terms of the act of 1907 (page 711), regardless of section 5563 of the Code of 1907, which fixed the passenger rate. Nor do we think that the act in question violates section 45 of the Constitution of 1901, because broader and not comprehended within the title, as the title is sufficiently broad to cover the act and to authorize everything therein enacted. Neither are we willing to hold that the act is repugnant to the Constitution as an unauthorized delegation of legislative authority. *Railroad Com. of Ala. v. Northern Ala. R. R.*, 182 Ala. 357, 62 South. 749, and cases there cited. The trial court did not therefore err in overruling the plaintiff's demurrer to plea 3.

[5, 6] Since plea 3 was in and set up a good defense, there was but one issue between the parties; that is, whether or not the plaintiff tendered the fare covered by the plea, and, if he did, whether or not the conductor exacted of him a greater sum and caused him to get off the train for failing to pay said excess. There was but one theory upon which the plaintiff could recover under either count of the complaint, and that was that the conductor exacted of him 40 cents instead of 28 cents. The plaintiff admitted that he did not give or offer the conductor but 25 cents, which was insufficient, but claims that he was made to leave the train because he failed to pay an additional 15 cents, making 40 cents demanded of him by the conductor. Therefore the only theory upon which the plaintiff could recover upon either count was that he was wrongfully ejected because failing to pay 40 cents demanded of him by the conductor, and this issue was squarely submitted to the jury under the plaintiff's given charge 1, which instructed a finding for the plaintiff if the conductor demanded a 40 cents fare of the plaintiff. The jury found for the defendant, and the effect of which was that the conductor did not demand 40 cents of the plaintiff, as testified to by him and his witnesses, and, with this fact determined adversely to him by the jury, he could not recover under either count of the complaint, and, if there was error in sustaining the demurrer to the second count, it was error without injury, as the one fact necessary to sustain same was involved in the first count, and which was submitted to the jury and found against the plaintiff. It is true that a verdict for a defendant under a simple negligence count does not, in all cases, acquit him of willful or wanton misconduct (*Ex parte McNeil*, 63

South. 993), yet as recognized in this case, *supra*, if the two counts present the identical issues of fact, the doctrine of error without injury could have application. In the case at bar the plaintiff could not, under the complaint and evidence, have recovered under the second count if not entitled to recover under the first one, as the gravamen of each of them was wrongfully ejecting the plaintiff because of a failure or refusal to pay 40 cents demanded of him by the defendant's conductor, and which said demand was never made according to the verdict of the jury. Moreover, the first and second counts were identical as to the plaintiff's cause of action, both being for the wrongful ejectment of the plaintiff, and the addition of the words "willful" or "wanton" in the second count did not change the gravamen of the action or enhance the measure of damages, as each count, without the words "willful" or "wanton," as added to the second count, were grounded upon a wrongful and intentional ejectment of the plaintiff, and which, if true, authorized punitive damages.

[7] Since the jury found that the plaintiff was not entitled to recover, any errors, if any there were upon the instructions as to the amount of damages, was error without injury.

[8] If the plaintiff had a legal excuse for not purchasing a ticket, the plea charging that he boarded the train at a ticket station, the same should have been set up by a special replication.

[9, 10] As to the special claim in the second count, as amended, for attorney's fees for bringing the suit by way of special damages, the elimination of same was innocuous to the plaintiff, as the jury found that he was not entitled to recover. We will add, however, that we know of no case in this jurisdiction authorizing the recovery of attorney's fees for bringing actions of this character, and the great weight of authority seems to be against the appellant's contention, as will be seen from an examination of the note to the case cited by appellant. *United Power Co. v. Mathney*, 81 Ohio St. 204, 90 N. E. 154, 28 L. R. A. (N. S.) 761.

[11] The trial court saw the witnesses and heard the evidence, and we are not prepared to say that the verdict of the jury was so manifestly opposed to the weight of the evidence as to warrant this court in reviewing the action of the trial court in denying the motion for a new trial. *Cobb v. Malone*, 92 Ala. 630, 9 South. 738.

The judgment of the city court is affirmed. Affirmed.

MCOLLELLAN, MAYFIELD, and SOMERVILLE, JJ., concur.

(191 Ala. 429)

**ALABAMA GREAT SOUTHERN R. CO. v.
H. ALTMAN & CO. et al.
(No. 331.)**

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. SALES ⇨201—PASSING OF TITLE—DELIVERY TO CARRIER FOR DELIVERY TO BUYER.

Where a seller bought goods from a manufacturer, who, under orders of the seller, delivered the goods to a carrier for shipment to the buyer under a bill of lading in his name, title passed to the buyer on delivery to the carrier.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 529-541; Dec. Dig. ⇨201.]

2. CARRIERS ⇨76—Loss of Goods—ACTIONS—PARTIES.

Where goods consigned to independent buyers under independent contracts with the same seller were loaded in a car and destroyed by fire, each buyer had a separate right of action, and the seller, aside from a possible right of stoppage in transitu, could not maintain an action in his name.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 256-271, 363; Dec. Dig. ⇨76.]

3. PLEADING ⇨418—RULINGS ON PLEADINGS—REVIEW.

Where plaintiff, on the sustaining of a demurrer to his complaint, filed an amended complaint, instead of declining to plead further, the sustaining of the demurrer was not, in view of Code 1907, § 3017, reviewable on appeal from a judgment on the amended complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403-1406; Dec. Dig. ⇨418.]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Action by Drewry, Hughes & Co. against the Alabama Great Southern Railroad Company. The complaint was amended by substituting H. Altman & Co. and others as plaintiffs, for use of Drewry, Hughes & Co. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

As originally filed, the complaint was for \$1,327.61, for the failure to deliver certain goods—to wit, 28 cases of Caledonia outing—received by defendant as common carrier to be delivered to the following parties: (Here follows the number of cases consigned to each party and the name of the party to whom the different consignments were made). This suit was by Drewry, Hughes & Co., a corporation, against the Alabama Great Southern Railroad Company. As amended, the complaint was subdivided, and each party to whom a consignment was made was substituted as a party plaintiff suing for the use of Drewry, Hughes & Co., a corporation, and was brought for the amount of the goods consigned to that particular party; each count in the complaint being the same, except as to the party plaintiff and the amount, that being governed by the consignee to whom the goods were shipped and the number of cases shipped to such consignee. The demurrers raise the question of the legality of the action

against defendant, and the other question decided in the opinion.

A. G. & E. D. Smith, of Birmingham, for appellant. Oliver, Verner & Rice, of Tuscaloosa, for appellees.

DE GRAFFENRIED, J. In this case Drewry, Hughes & Co., a corporation, sold to a large number of people separate lots of cotton cloth. Each purchase was independent of, and had no connection whatever with, any other purchase. Indeed, the several purchasers lived in different states, and had no connection with each other. Drewry, Hughes & Co. bought the cloth which it sold to these purchasers from a cotton mill at Cottondale, and the cotton mill, acting under the orders of Drewry, Hughes & Co., shipped the goods, in separate, distinct lots, to such purchasers. Each purchaser's goods were put in a separate package, his name was marked upon the package, and a bill of lading was taken from the railroad, in his name, for his goods. The goods were all put in one car by the Alabama Great Southern Railroad Company, and before the car containing the goods left Cottondale the car containing the goods, and the goods, were destroyed by fire.

[1] 1. When the goods were delivered by the cotton mill to the railroad company, and were by the railroad company accepted for transportation, they were not the goods of Drewry, Hughes & Co., but were the goods of the several, distinct consignees. Each purchaser, upon the delivery of his goods to the railroad company for shipment to him and the issuance, by the railroad company, of the bill of lading in his name for his goods, became the owner of such goods. The title to the goods was in him, and for their loss or destruction while in transit he alone had the right to sue. The casualties incident to the transportation of the goods from Cottondale to the point of their destination were matters with which the consignee alone was concerned. Jones v. Sims, 6 Port. 138; Southern Express Co. v. Armstead, 50 Ala. 350; M. & G. R. R. Co. v. Williams, 54 Ala. 168; S. & N. A. R. R. Co. v. Woods, 72 Ala. 451; 2 Mayf. Dig. p. 621, and the authorities cited on that page.

[2] 2. When, therefore, the goods were destroyed, each separate consignee had a separate, independent cause of action against the railroad company for the destruction of his goods, provided, of course, their loss is to be attributed to the actionable fault of the railroad company. The separate consignees had, of course, no joint right of action against the railroad company, because the purchases were separate, and the shipments were separate. It is therefore plain that the consignees, as they had no joint right of action against the railroad company, had no right to join in one suit, in a law court, against the railroad company, for their separate losses.

For his particular loss each consignee had only his independent, separate right of action.

In the case of *Childress v. McCullough*, 5 Port. 54, 30 Am. Dec. 549, this court, through Goldthwaite, J., said:

"It is a well-recognized rule that courts of law will not take cognizance of distinct and separate claims, or liabilities of several persons in one suit, though standing in the same relative situations."

The above rule has not, in this state, been changed by statute or decision.

3. In so far as the rights of the parties to this litigation are concerned, we may as well say, at this point, that, as a matter of law, Drewry, Hughes & Co. under the amended complaint are shown to be clothed with no more rights than they would have possessed if they had not sold the goods to the various consignees. The consignees had ordered the goods of Drewry, Hughes & Co., and, when that company delivered the goods to the railroad company, and the railroad company issued to the various consignees bills of lading in their respective names for the goods, Drewry, Hughes & Co. had performed all of the duties which they owed the consignees, and the consignees were the absolute owners of the goods.

Of course, there may have resided in Drewry, Hughes & Co., under certain conditions which are of no value here, the right of stoppage in transitu, but, in so far as this case is concerned, Drewry, Hughes & Co. occupy the same relation to the railroad company as if they had not sold the goods, and, after their destruction, had bought the separate rights of action which existed in favor of each consignee—if the goods were destroyed under such circumstances as rendered the railroad company liable for their loss—against the railroad company.

4. This court has not departed from the common-law rule that, except in certain well-recognized exceptions to the general rule, an assignee of a chose in action must ordinarily, at law, sue in the name of the assignor. There is not, as was pointed out in *Birmingham Railway, Light & Power Co. v. Aetna Accident & Liability Co.*, 64 South. 44, under the terms of sections 2490 and 3667 of the Code of 1907, much reason left for the enforcement of the above rule; but the rule, never having been expressly changed by statute, still obtains in this state. It has not been changed by decision. *B. R., L. & P. Co., v. Aetna Accident & L. Co.*, supra; *Ex parte Bromberg*, 121 Ala. 361, 25 South. 994; *Southern Ry. Co. v. Stonewall Ins. Co.*, 177 Ala. 327, 58 South. 313.

The reasons which existed at common law for the above rule arose out of the inflexibility of the rules of law as compared with those of equity, and the policy of the law to encourage repose by discouraging chicanery and maintenance. *Coffman v. L. & N. R. Co.*, 63 South. 527.

In the case of *Sutton et al. v. The Victor-*

ian No. 2, 26 Or. 194, 41 Pac. 1103, it was held that different claims against the same vessel, arising under a boat lien law, and assigned to the plaintiff, might all be sued for in one complaint. 1 R. C. L. p. 367, § 41. In that case, however, the assignee was entitled to sue, and actually sued, in his own name. His right to so sue in his own name was the reason upon which the court based, in that case, its decision.

5. We have, as above stated, in this case numerous plaintiffs, all suing in one action for the use of one person, and each nominal plaintiff's right of action is separate and distinct from every other right of action set out in the complaint. This, of course, is a complete departure from all precedent, and, upon principle and authority, cannot be done. It is true that Drewry, Hughes & Co., in the names of the several nominal plaintiffs, might have brought separate suits against the defendant, and the trial court, to facilitate its business, might have consolidated them for the purpose of trying them all together. In that case, however, there would have been separate judgments in each suit.

In this state our courts have clung to the distinction which was drawn by the English courts between courts of law and courts of equity with regard to the remedies peculiar to each jurisdiction; and our Legislature has not seen proper to destroy that distinction.

"At an early day courts of law began to recognize the equitable rights of assignees and others; and, to obviate the injustice to them resulting from the rule that only the person having the legal title can sue, the practice obtained of allowing the person equitably entitled to sue in the name of the person legally entitled. In such cases the person in whose name the suit is brought is called the record, nominal, or legal plaintiff, and the person for whose benefit the action is prosecuted is called the equitable, beneficial, or use plaintiff." 15 Ency. Pl. & Pr. 487.

In all such cases the rights and status of the equitable, beneficial, or use plaintiff are fixed by the rights and status of the nominal plaintiff; the nominal and use plaintiffs, in such cases, being regarded as one person. *Coffman v. L. & N. R. Co.*, supra.

We know of no case in which a beneficial plaintiff has been permitted, in one and the same action at law, to recover in the name of several nominal plaintiffs, on several separate and independent causes of action residing in such nominal plaintiffs. In all such cases each nominal plaintiff must bring his own separate, independent suit for the benefit of such beneficial plaintiff. Until this court can discard the necessity for the nominal plaintiff—and it can only do so through legislative enactment or by overruling a long line of decisions which are based upon cases which came to us, along with the great body of our law, from England—the naked legal right must determine who can sue and who can be joined in a suit at law. *Coffman v. L. & N. R. Co.*, supra.

The demurrer to the complaint, as amended, should have been sustained. R. C. L. vol. 1, p. 367, subd. 41.

[3] In the above opinion we have dealt with the only question which we are authorized to consider. The suit was originally brought in the name of Drewry, Hughes & Co., but the demurrer of the defendant to the original complaint was sustained. Thereupon the plaintiff amended the complaint. The action of the trial court in sustaining the demurrer to the original complaint is not before us for review, and we are without authority to review it. If the plaintiff had desired a decision upon the question presented by the demurrer to the original complaint, it could have declined to plead further after the demurrer to the original complaint was sustained, and, in this way, have presented to us, in the way provided by the Legislature, that question for review. This the plaintiff did not see proper to do. Code of 1907, § 3017; *Bush v. Russell*, 180 Ala. 590, 61 South. 373.

The judgment of the trial court is not in accordance with the above views, and the judgment of the trial court is reversed, and the cause is remanded for further proceedings in the court below.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 119)

SAUNDERS v. McDONOUGH et al.
(No. 743.)

(Supreme Court of Alabama. Nov. 7, 1914.
On Rehearing, Dec. 17, 1914.)

1. PARTNERSHIP ⇨15 — JOINT ADVENTURE DISTINGUISHED.

While a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, though it may comprehend a business to be continued for a period of years.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 2; Dec. Dig. ⇨15.]

2. JOINT ADVENTURES ⇨5 — REMEDIES OF PARTY.

One party to a joint adventure may sue the other at law for a breach of the contract or a share of the profits or losses on a contribution for advances made in excess of his share, but such action will not preclude a suit in equity for an accounting.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 7; Dec. Dig. ⇨5.]

3. JOINT ADVENTURES ⇨1 — IMPLIED CONTRACT.

A contract of joint adventure need not be express, but may be implied from the conduct of the parties.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

4. JOINT ADVENTURES ⇨4—GOOD FAITH OF PARTIES—INDIVIDUAL BENEFIT.

So far as mutual good faith and accountability are concerned, the relation of coadven-

turers is governed by the law of partnership, which exacts of all the utmost good faith in the prosecution of the common enterprise, and forbids the accrual of any advantage therein to one member which is not shared by his associates.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. §§ 3-6; Dec. Dig. ⇨4.]

5. JOINT ADVENTURES ⇨1—AGREEMENT CREATING RELATION.

Where persons holding an option in mining land hired a broker to market it, with a stipulation that, if a corporation was formed, he was to get a percentage of the capital stock or have a right to join in buying the land after the expiration of the agreement, and nothing was done at the date of termination of the contract, but thereafter the broker devised a plan to organize a corporation which should acquire the land by issuance of its stocks and bonds, and the capital stock of which should be divided among the associates, and the agreement was accepted by all the parties, each agreeing to use his best efforts to cause the same or a modification of the same to be carried out, the parties are joint adventurers.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

6. JOINT ADVENTURES ⇨4—RIGHTS OF PARTIES—REFUSAL TO CARRY OUT CONTRACT.

Where under such agreement a contract was entered into with the owners of the land by which a corporation was formed to take over the land, etc., but the owner refused to carry out the agreement at the time agreed, the broker could not be deprived of his rights by a modified agreement substantially similar to the one devised by him and entered into by the corporation and the owners.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. §§ 3-6; Dec. Dig. ⇨4.]

7. JOINT ADVENTURES ⇨5 — REFUSAL TO PERFORM—REMEDIES OF PARTIES.

If one associated in a joint adventure refuses to substantially perform his obligation, his associates may either terminate their relation with him and themselves carry out the enterprise to his exclusion with an action against him for damages or they could sue him for money or property agreed to be contributed to the common fund or to be supplied for a specified purpose, but they could not do both.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 7; Dec. Dig. ⇨5.]

8. JOINT ADVENTURES ⇨1—TERMINATION OF RELATION—NOTICE.

A joint adventure cannot be terminated as to a member, even if a valid reason exists for so doing, unless notice is given him.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. § 1; Dec. Dig. ⇨1.]

9. JOINT ADVENTURES ⇨4 — FAILURE TO MAKE CONTRIBUTIONS—RIGHT TO PROCEEDS.

Where a party to a joint adventure after the accomplishment of the enterprise fails on reasonable notice and demand to contribute his proportion to the expenses thereof, he cannot invoke the aid of a court to secure a share of the proceeds, but the mere fact that some of the parties paid all the expenses or furnished all the money used would not exclude nonparticipating associates from a share of the proceeds.

[Ed. Note.—For other cases, see *Joint Adventures*, Cent. Dig. §§ 3-6; Dec. Dig. ⇨4.]

10. JOINT ADVENTURES ⇨5 — PLEADING — PRESUMPTIONS.

Where the pleadings in a suit to recover share of proceeds of joint adventure do not show that the relationship had terminated, it will be

presumed, as a matter of law, that it had not terminated.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. ¶5.]

11. JOINT ADVENTURES ¶4—CONTRIBUTIONS—TENDER.

Though a joint adventurer refuse to participate in the common enterprise, if, before he receives notice of the termination of the relation as to him, he repents, and tenders whatever contributions are due from him as coadventurer, his rights are preserved.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. §§ 3-6; Dec. Dig. ¶4.]

12. JOINT ADVENTURES ¶5—CONTRIBUTIONS—PRESUMPTIONS.

A contract of joint adventure is not indefinite because the amount of pecuniary contributions to be paid by each of the parties is not stipulated, as it would be presumed that all expenses were to be shared equally.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. ¶5.]

13. VENDOR AND PURCHASER ¶49—CONSTRUCTION OF CONTRACT—PREAMBLE.

Where there is nothing in a contract to rebut the inference that a mutual contract of purchase and sale was intended, a preamble to the contract, being a part of it, reciting that A. and others are to sell, and S. and others are to buy, is conclusive.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 80; Dec. Dig. ¶49.]

14. VENDOR AND PURCHASER ¶79—CONDITIONS PRECEDENT—INCHOATE RIGHT OF VENDEE.

Though a contract for sale of land depends upon the performance of obligations made a condition precedent to performance by vendor, the vendees have an inchoate equity becoming vested on the performance of the conditions precedent.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 7, 8, 127-131; Dec. Dig. ¶79.]

15. VENDOR AND PURCHASER ¶187—CONDITIONS PRECEDENT—WAIVER.

Where vendors in a contract for sale of land notified the purchasers that they would not perform, the duty of the purchasers to tender performance of conditions precedent or concurrent conditions is waived.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 121, 374, 375; Dec. Dig. ¶187.]

16. VENDOR AND PURCHASER ¶349—CONDITIONS PRECEDENT—INCHOATE RIGHT OF VENDEE—PLEADING.

To prevent the extinction of the inchoate equity of vendees in a contract for sale of land dependent on performance of conditions precedent by expiration of the time limited, the refusal of the vendors to perform and the willingness of vendees to perform must be pleaded.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1033, 1039-1042; Dec. Dig. ¶349.]

17. SPECIFIC PERFORMANCE ¶65—NATURE OF AGREEMENT—CONTRACT FOR SALE OF LAND.

An agreement for the sale of mining property, conveyance to be made to a corporation to be formed, with condition that bonds be issued by the corporation for a portion of the price, with provision for a sinking fund, and the rest of the price paid by a division of the treasury stock, and that the corporation should develop and operate the property, and that the corporation should lend or procure loans for the vendors secured by personal note, etc., cannot be

specifically enforced, as the provisions could not be adequately enforced by the court.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 196; Dec. Dig. ¶65.]

18. PLEADING ¶204—DEMURRER TO BILL PARTLY GOOD.

Demurrers correctly raising the point that an alternative phase of the bill shows no equity cannot be sustained, where the demurrers are addressed to the whole bill.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. ¶204.]

On Rehearing.

19. JOINT ADVENTURES ¶5—PERFORMANCE OF AGREEMENT—PLEADING.

It is not a rule applicable to joint adventures that a complainant, to show a right to share in the proceeds of the joint enterprise, must allege either that he has performed his full share of all the acts incident to the accomplishment of the enterprise in accordance with the common agreement or else that he stood at all times ready and willing to do so, as such rule is applicable only to suits between parties to ordinary contracts where the complainant's obligations are precedent or concurrent.

[Ed. Note.—For other cases, see Joint Adventures, Cent. Dig. § 7; Dec. Dig. ¶5.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Warwick Saunders against R. N. McDonough and others to restrain and enjoin the selling, pledging, or transferring of certain shares of capital stock and bonds of the Self-Fluxing Ore & Iron Company, and for an accounting and other relief. From a decree sustaining demurrers to the bill, complainant appeals. Affirmed in part, and reversed and rendered in part.

The averments of the bill sufficiently appear from the opinion of the court. Exhibit A to the bill is as follows:

This memorandum of agreement made in triplicate, bearing date November 26, 1912, the same being in lieu thereof and as substitute for the terms of an agreement heretofore entered into between W. F. Aldrich and associates, of the one part, and John J. Shannon and R. N. McDonough, for themselves and associates, of the other part, said substituted agreement expiring January 1, 1913, wherein the said Aldrich and associates are to sell, and said Shannon and McDonough and associates are to buy, a certain tract of about 1,550 acres. [Here follows description by government subdivision.] We, the said W. F. Aldrich and associates [John Towers] propose and offer as follows: That for and in consideration of one dollar in hand paid and other valuable consideration, the receipt whereof is hereby acknowledged, to convey by general warranty deed free from all incumbrance, and with good and sufficient merchantable title, all of said lands to the McDonough Ore & Mining Company or such other corporation as the grantors may designate, on or before January 2, 1913, as the grantee may elect, and accept as full and complete payment therefor three thousand dollars in first mortgage, thirty-year, semiannual, 6 per cent. gold bonds to be issued by the grantee corporation: Provided said bond issue shall constitute the entire issue and to be of the denomination of one thousand dollars each. The said interest to begin January 1, 1913, and payable semiannually thereafter. And provided further that said bonds shall be the first mortgage lien on said lands to be hereby conveyed as aforesaid. And provided further that said corporation shall take

the necessary and substantial steps to develop and operate the said property within a reasonable time, now estimated to be within the next ninety days. And provided further that said grantee corporation shall provide in said bond issue an adequate sinking fund to retire the said bonds at maturity, said sinking fund to begin within five years from date of said bonds. And provided further that said bonds are subject to call and cancellation by said grantee corporation at any interest bearing date upon giving sixty days' notice at per plus 5 per cent. The title deeds to be deposited with the Birmingham Trust & Savings Bank, who are to be the trustees under the above said mortgage and bond issue. Said deeds to be delivered to said grantee corporation at the same time the bonds are delivered to said parties of the first part. And as further purchase price of said lands, the said grantee corporation agrees to issue or pay to said parties of the first part, W. F. Aldrich and John Towers, fifty thousand dollars in the capital stock of said grantee corporation, the same to be taken out of the treasury stock of said grantee corporation at the same price the said treasury stock shall be offered for sale. And provided further that the said grantee corporation hereby agrees to lend or negotiate loans for said parties of the first part, to wit, W. F. Aldrich and John Towers, as follows: Twenty-five thousand dollars by January 2, 1913, fifteen thousand by February 1, 1913, and ten thousand by March 1, 1913. Each of said loans payable on or before date of said loans at 6 per cent. interest. The said parties of the first part, W. F. Aldrich and John Towers, in order to secure said loans, hereby agree to furnish for each of said loans the said first mortgage bonds as collateral on a basis of seventy-five cents on the dollar and in sufficient amounts to equal the amount of each of said loans, together with their, the said first parties, W. F. Aldrich and John Towers, personal notes for like amounts of each of said loans and running for the same length of time and bearing the same rate of interest of 6 per cent. However, it is expressly agreed by parties hereto that the said grantee corporation shall have the right to retire and cancel said fifty thousand dollars or any number thereof of said bonds so used as collateral security for said loans at par and accrued interest, and the proceeds from such redemption of said bonds to be applied as payment on said loans. It is hereby mutually agreed and understood by and between all parties hereto that all conveyances, bonds, mortgages, and such other papers and documents as may be necessary to the closing of the foregoing transaction shall be prepared, and the same executed and exchanged as early as practicable, and not later than January 2, 1913. It is mutually understood and agreed that all parties hereto shall, at their option, be elected to and remain directors of the said grantee corporation, or its assigns, for the term of three years from its organization. It is also agreed that Attorney E. J. Smyer shall be the attorney to pass upon the title of said lands and all other papers necessary and incident to the completion of this transaction. The above clause and all corrections and interlineations were made before signing.

Tillman, Bradley & Morrow and W. B. White, all of Birmingham, for appellant. Garber & Garber and H. O. Selheimer, all of Birmingham, for appellees.

SOMERVILLE, J. [1-3] "The subject of joint adventures is of comparatively modern origin. It was unknown at common law, being regarded as within the principles governing partnerships. While some courts hold that a joint adventure is not identical with

a partnership, it is regarded as of a similar nature, and governed by the same rules of law. One distinction lies in the fact that, while a partnership is ordinarily formed for the transaction of a general business of a particular kind, a joint adventure relates to a single transaction, although the latter may comprehend a business to be continued for a period of years. * * * The principal distinction, however, is that in most jurisdictions, where 'any is regarded as existing, one party may sue the other at law for a breach of the contract or a share of the profits or losses or a contribution for advances made in excess of his share; but this right will not preclude a suit in equity for an accounting. The contract need not be express, but may be implied from the conduct of the parties." 23 Cyc. 453, A. This text is well supported by the numerous authorities cited.

[4] So far as the questions of mutual good faith and accountability are concerned, the authorities are unanimous in holding that the relation of coadventurers is governed by the law of partnerships, which exacts of all the utmost good faith and fairness in the prosecution of the common enterprise, and forbids the accrual of any profit or advantage therein to one member which is not shared by his associates. *Berry v. Colborn*, 65 W. Va. 493, 64 S. E. 636, 17 Ann. Cas. 1018, and note; *Jones v. Kinney*, 146 Wis. 130, 131 N. W. 339, Ann. Cas. 1912C, 200, and note; *Botsford v. Van Riper*, 33 Nev. 191, 110 Pac. 705; *Edwards v. Johnson*, 90 S. C. 90, 72 S. E. 638; 23 Cyc. 455, A.

The complainant's bill, in its primary aspect, seeks an accounting by certain of the respondents for the proceeds of an alleged joint adventure, undertaken by complainant and the said respondents as his associates, and completed by his associates alone without his participation in its final stages; the allegation being that his said associates have received in that behalf \$1,000,000 in certificates of corporate stock, in which complainant is entitled to share equally with them, and from which he has been by them excluded.

In its secondary aspect, the bill seeks, by alternative prayer, to compel the specific performance of a certain contract, by the terms of which he and his associates were to buy, and the other respondents, Aldrich and Towers, were to sell to them, a valuable tract of mineral land, to be conveyed to a corporation to be organized, and which land was to be the basis for the issuance of the capital stock in which complainant and his associates were to share; the allegation being that this contract had been wrongfully breached and repudiated by the vendors, who, however, shortly afterwards executed the contract in a modified form for and with complainant's said associates, without complainant's participation therein. These vendors,

and complainant's four alleged coadventurers, and also the corporation organized by them to hold and develop the lands purchased, are made parties respondent to the bill.

[5] The foundation for complainant's rights, as here asserted, are in substance thus stated by the bill:

The respondents R. N. McDonough, J. H. McDonough, W. A. Porter, and J. J. Shannon, had an option for the purchase of certain lands from the respondents Aldrich and Towers, and in February, 1912, McDonough and associates engaged complainant as a broker to market and sell these lands. Later, in July, 1912, they gave him an exclusive written commission to procure a sale. This commission, accepted and signed by complainant, contained these stipulations:

"This agreement will be considered in force and effect until the 15th day of November, 1912. We will further agree that, in the event we decide it is to the best interest of all parties to this agreement to form a corporation with the view of purchasing the lands mentioned above, we will allow the privilege of bonding the lands to enable us to develop and mine the ore. If you are successful in this undertaking, we will give you 33 per cent. of the corporation's stock, after all incumbrances, including our profits, together with your pro rata, are paid on the properties. In the event we should sell either tract of the land by November 15, 1912, or no sale be effected, we will give you the option or right to join us in the purchase of either or both tracts of land at the same rate per acre as we pay, to the extent of 20 per cent. of same."

No sale was effected before November 15, 1912, but about October 26, 1912, complainant devised and proposed to said associates a plan to organize a corporation which should acquire these lands by the issuance of its stock and bonds, whereby it was contemplated that complainant and his associates should receive approximately \$1,000,000 par value of the capital stock, to be equally divided between them. This plan was accepted by said associates, "and your orator and his said associates thereupon mutually agreed to use their best efforts to cause the same, or some modification thereof, to be carried out and to divide equally, one-fifth to each, the proceeds received by them pursuant to the same or to any modification thereof, and (that) all transactions thereafter had between your orator and his said associates were had in contemplation of such mutual agreement and pursuant thereto."

Thereupon complainant negotiated with respondents Aldrich and Towers, procured them to cancel their pending option agreement, and to execute and deliver to complainant and said associates an agreement for the sale and purchase of these lands, upon terms therein fully specified (this document is Exhibit A to the bill, and the reporter will set it out in full). This agreement was in turn executed and delivered to said Aldrich and Towers by complainant and his said associates. By its terms it was to be performed on or before January 1, 1913.

Pursuant to this agreement (of November

26th), the respondent corporation, the Self-Fluxing Ore & Iron Company, was organized on or about December 30, 1912, with an authorized capital stock of \$3,000; and on or about January 3, 1913, its authorized capital stock was increased to \$1,500,000. On or about the same day said corporation duly authorized an issue of first mortgage 6 per cent. gold bonds.

In the meantime, on or about December 20, 1912, said Aldrich and Towers notified complainant and his said associates that "they declined to perform said agreement dated November 26, 1912, according to its terms, conditions, and covenants," and said agreement was, in fact, not performed by them on or before January 3, 1913.

On or about January 3, 1913, complainant's said associates "proceeded without any participation therein by your orator to carry out and perform said agreement dated November 26, 1912, substantially in accordance with the terms thereof, except that they attempted to modify their obligations, covenants, and conditions therein, in certain respects, and particularly in respect to the obligation of said associates to cause said proposed corporation to make or procure to be made a loan of \$50,000 to respondents Aldrich and Towers."

Thereupon complainant demanded of said associates that they account to him, and deliver to him certificates for his one-fifth share of the shares of respondent corporation's capital stock, received by them in and about the performance of the agreement of November 26, 1912, which they refused and still refuse to do (as charged on information and belief). Said associates received \$1,000,000 par value of said shares of capital stock.

On or about January 20, 1913, complainant offered to pay and deliver to respondents, his said associates, "any proportionate share that might be proper, in cash or other consideration, required in said performance by them of said agreement dated November 26, 1912, as finally modified and performed by them, and then again requested of them a delivery to him of his one-fifth share of the profits realized by them in said transactions; but they all refused, and still refuse, to recognize any rights of complainant in the premises, and refused and still refuse to receive any payment from him in that behalf."

The chancellor in his decree sustained the demurrers to the bill, both general and special. His views are expressed in a brief opinion as follows:

"It is held that complainant and respondents, other than Aldrich and Towers, were joint adventurers, under the agreement dated November 26, 1912, and that their relations under such agreement were fiduciary. Said agreement recites that it expires January 1, 1913. It is held that said fiduciary relation expired on that date, except the liability to account for acts or omissions, or both, done or suffered while it was in force. The demurrers of Aldrich and Towers are sustained upon the ninth ground assigned. The demurrers of the other respondents are sustained upon the seventh ground assigned."

These grounds are, respectively:

"(9) Said contract of November 26, 1912, is in the nature of an option agreement under which many acts were to be performed by the purchasers on or before a certain date, and there is a failure to allege the performance of these acts."

"(7) It is not sufficiently shown wherein or in what manner or to what extent complainant is entitled, under the allegations of said bill, to stock and bonds of the respondent company, Self-Fluxing Ore & Iron Company, or to profits arising or to accrue from transactions with respondents."

[6] It seems clear to us that the status of joint adventurers, upon which rests the equity of the bill, was created by the alleged agreement of October 26, 1913, and that the contract made with Aldrich and Towers on November 26, 1912, was but a step in the accomplishment of the joint adventure. In this view of the case, the expiry of the Aldrich and Towers contract by express limitation on January 1 or 2, 1913, would not of itself terminate the agreement of joint adventure made between complainant and his associates on October 26, 1912. That agreement was not limited as to its duration. It was therefore not terminable at the pleasure of any of the parties, so long as its purpose remained unaccomplished, and had not become impracticable. *Berry v. Colborn*, supra, 17 Ann. Cas. 1022, note; *Jones v. Kinney*, supra, Ann. Cas. 1912C, 202, note; 23 Cyc. 454, E.

[7] It could, of course, have been terminated by mutual agreement. And, if one of the parties had refused to substantially perform his obligations in the premises, his associates could undoubtedly have either terminated their relations with him, and themselves carried on the enterprise to his complete exclusion, with an action against him for damages for his breach (*Yeager's Appeal*, 100 Pa. 88; *McCreery v. Green*, 38 Mich. 173; *Davidor v. Bradford*, 129 Wis. 524, 109 N. W. 576; *McIntire v. Carr*, 164 Mich. 37, 128 N. W. 1079); or they could hold such defaulter to the obligations of his contract, and sue him for money or property agreed to be contributed to the common fund, or to be supplied for a specified purpose (*Pillsbury v. Pillsbury*, 20 N. H. 90; *Finlay v. Stewart*, 56 Pa. 183; *Armstrong v. Henderson*, 99 Va. 234, 37 S. E. 839).

[8] But, manifestly, they could not do both of these things. And, both upon reason and authority, if for any valid reason they chose to terminate the relationship, they could do so only by giving notice to their associate that the relationship was then and there to be ended. *Edwards v. Johnson*, 90 S. O. 90, 72 S. E. 638; *Marston v. Gould*, 69 N. Y. 220, 224; *Annon v. Tupper*, 21 Nova Scotia, 11, 16 Can. Sup. Ct. 718.

[9] It is, we think, a sound rule of equity, if not of law also, that if one of the parties, after the accomplishment of the enterprise, fails or refuses, upon reasonable notice and demand by his associates, to contribute his due proportion to the expenses thereof, he

cannot invoke the aid of a court to secure a share of the proceeds. See *Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, 50 L. R. A. (N. S.) 1046. But the mere fact that some of the parties paid all the expenses, or furnished all the money used, does not exclude nonparticipating associates from a share of the proceeds. *Botsford v. Van Riper*, 33 Nev. 191, 110 Pac. 705; *Lind v. Webber*, 36 Nev. 623, 134 Pac. 461, 135 Pac. 139, 141 Pac. 458, 50 L. R. A. (N. S.) 1046.

In *Botsford v. Van Riper*, supra, it was said:

"The evidence discloses, and the findings of the lower court are to the effect, that the respondents performed their part of the contract entered into, and stood ready at all times to further aid, as far as lay in their power, pursuant to their agreement, the consummation of the deal originally agreed upon. That they were not called upon to do so by appellant is not a sufficient reason in law or equity to invalidate their right to share in the profits of the deal, because the appellant saw fit to take the reins and do most or all of the work himself after the original agreement was made and entered into."

[10] It does not appear from the bill of complaint that the joint adventure shown has ever been legally terminated, and it will be presumed as a matter of law, that it has not, in the absence of allegation and proof to the contrary by way of defense to the bill.

[11] The fact that complainant was voluntarily associated in the joint enterprise is sufficient evidence that he desired to participate therein; but, whether he so desired or not, until he abandoned it, or was legally excluded therefrom, he was entitled to share in its proceeds. And, even if the allegation that his associates finally completed their common undertaking "without any participation therein by him" is fairly susceptible of the construction that complainant refused then to participate therein—which is at least doubtful—if thereafter, before he was notified by them of a termination of their relations with him, he repented of his default, and offered whatever contribution was due from him as a coadventurer, his status and rights therein were thereby effectually preserved.

[12] We think the joint adventure agreement of October 26, 1912, is sufficiently definite as to the character, condition, and terms of the undertaking. It is true that the amount of the pecuniary contribution to be paid by each of the parties is not stipulated in terms. But in such a case the law will presume that all expenses are to be shared equally, just as it would also presume, in the absence of expression, that the proceeds or profits were to be divided equally. In that aspect of the bill which we have above discussed, we are of the opinion that it is free from demurrable defects.

[13] A very careful analysis of the Aldrich and Towers agreement of November 26, 1912, convinces us that it was intended to be, and in fact was, a mutual contract of purchase and sale between them, on the one hand, and complainant and his associates,

on the other. Indeed, the preamble to the contract, which is a part of it, is conclusive of the question. It recites that by this agreement "said Aldrich and associates are to sell, and said Shannon and McDonough and associates are to buy, a certain tract of land," etc., and there is nothing in the rest of the contract to rebut the obvious meaning and effect of this declaration.

[14] Conceding the contention of respondents that this contract exacted of the associated grantees the performance of several stipulated obligations as a condition precedent to the acquirement of the title from the vendors by a deed of grant, nevertheless the contract vested in the purchasers an inchoate equity which would become a vested equitable estate upon a seasonable tender of performance by them, if afterwards kept good.

[15] The bill does not allege such a tender of performance. It does allege, however, that on or about December 20, 1912, while the contract was still in force, the vendors notified complainant and his associates (the vendees) that they declined to perform their agreement according to its terms.

Under all the authorities, this repudiation of the contract by the vendors relieved the vendees of the duty of actually and formally tendering performance of their obligations in the premises, though they were conditions precedent to, or concurrent with, performance by the vendors. *Root v. Johnson*, 99 Ala. 90, 10 South. 293; *Campbell v. Lombardo*, 153 Ala. 489, 44 South. 862; 39 Cyc. 1562, C.

[16] But, in order to prevent the extinction of the inchoate equity of the vendees in the present case by the expiration of the period allowed them for performance, it is necessary for them to allege and prove, not only the refusal of the vendors to perform, but that they were themselves able, ready, and willing to perform during that period of time. *Moss v. King*, 65 South. 180, and cases therein cited. In the absence of such an allegation in the bill, it does not show that the vendees had, after January 2, 1913, even an inchoate equitable interest in the lands. This conclusion invalidates a minor theory and agreement of complainant's that, independently of the further prosecution of the joint adventure after December 20, 1912, complainant and his associates had and have such a joint interest in the lands under their contract of purchase as to entitle complainant to an accounting by his co-owners for its proceeds, even though the joint adventure was abandoned.

[17] In regard to the alternative prayer for relief by a specific performance of the Aldrich and Towers contract, for which purpose those vendors are brought in as additional parties respondent, a careful scrutiny of the provisions of that contract convinces us that it cannot be adequately and equitably en-

forced by the court by any decree of specific performance.

In its alternative aspect, therefore, the bill is without equity, and the general demurrer of Aldrich and Towers was properly sustained. So also their special demurrer was properly sustained, on the ground that the bill does not show any equitable interest now in the vendees under their contract of purchase. If those respondents have wrongfully abandoned or breached their contract with complainant, he must seek his redress by an action for damages in a court of law.

[18] We have pointed out that in its primary aspect the bill is not subject to any of the grounds of demurrer interposed. In its alternative aspect it was subject to the general demurrer, and also to several of the grounds of special demurrer, interposed by the "associate" respondents; but these were all directed to the bill as a whole, and not limited to the aspect stated. They could not therefore be properly sustained.

It results that the decree of the chancellor sustaining the demurrers of R. N. and J. H. McDonough and W. A. Porter and J. J. Shannon to the bill of complaint was erroneous. To that extent the decree will be reversed, and a decree here rendered overruling those demurrers.

It results also that the decree of the chancellor in sustaining the demurrers of W. F. Aldrich and John Towers to the bill of complaint was without error, and will be affirmed.

Reversed and rendered in part, and affirmed in part.

ANDERSON, C. J., and McCLELLAN and SAYRE, JJ., concur.

On Rehearing.

SOMERVILLE, J. [19] The appellants, complainant's coadventurers, insist with much earnestness that the same rules as to pleading and proof must be applied to transactions and obligations between coadventurers as are applied to ordinary contractual obligations; that is to say, that, in order for complainant to show a right to share in the proceeds of the joint enterprise, he must allege and prove either that he has performed his full share of all the acts and services incident to the accomplishment of the enterprise, in accordance with the common agreement, or else that he stood at all times able, ready, and willing to do so. That rule, however, is applicable only to suits between parties to ordinary contracts, where the complainant's obligations were precedent to or concurrent with those of the defendant. It cannot be justly applied, and we believe it has never been applied, to obligations arising out of partnerships or quasi partnerships, which are founded upon trust and confidence, and which, without some express stipulation, are not presumed to

exact, as conditions precedent to the continuance of the relation and the enjoyment of its fruits, the prompt and equal discharge, or readiness to discharge, by each partner or associate, of his various obligations concurrently with the occasion. For his defaults of duty a partner may be taxed with the loss he inflicts upon the business; and in grave cases the partnership may be dissolved by judicial decree; but it is not dissolved *ipso facto*.

As we have already noted, joint adventures are governed substantially by the laws of partnership; one difference to be noted here being that a dissolution for proper cause may be effected by his coadventurers against a defaulting associate without judicial decree.

It was in view of these considerations that we held that complainant makes out a *prima facie* case for relief against these respondents by showing that he was a party to the adventure, and that, upon being informed of its accomplishment, and while the relation continued undissolved—as it presumptively did—he offered to bear his share of its burdens. A reconsideration of that holding confirms our confidence in its soundness and justice, and its harmony with the general principles of the law.

(191 Ala. 436)

SOUTHERN RY. CO. v. HARRISON.
(No. 768.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. RAILROADS §297—INJURY TO PERSON ON TRAIN—PLEAS—VIOLATION OF RULES.

In an action for the death of a brakeman employed by another company while on a train operated over defendant's line, plea setting up deceased's violation of a rule of his employer, but not setting up any facts to show that such rule was made for defendant's benefit, or that it was in any wise connected therewith, and plea setting up a violation of the defendant's rule, but not showing facts making a decedent subject thereto, were bad upon demurrer.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 944-953; Dec. Dig. §297.]

2. PLEADING §8—FACT OR CONCLUSION—CONTRIBUTORY NEGLIGENCE.

Pleas that deceased negligently rode upon the engine were not good as pleas of contributory negligence, since the averment of negligence was a mere conclusion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. §8.]

3. RAILROADS §297—INJURY TO THIRD PERSON—CONTRIBUTORY NEGLIGENCE.

It could not be said as matter of law that it was negligence upon the part of deceased brakeman to ride upon the engine.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 944-953; Dec. Dig. §297.]

4. APPEAL AND ERROR §1056—INJURY TO THIRD PERSON—EXCLUSION OF EVIDENCE—HARMLESS ERROR.

In an action for the wrongful death of a brakeman employed by another company in a collision on defendant's line, where the conductor of defendant's train had stated that he had not worked for defendant since the collision, the exclusion of evidence as to whether he was

laid off by defendant on the morning of the accident was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. §1056.]

5. WITNESSES §372—EXAMINATION—BIAS.

If the fact that witness had been laid off by defendant was a circumstance showing his ill feeling against defendant and affecting his credibility, the purpose of the question as to whether he had been laid off by defendant on the morning of the accident should have been suggested by asking witness as to his state of feeling toward the defendant, and if he said that it was good by a resort to facts and circumstances tending to show his bias.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. §372.]

6. RAILROADS §297—INJURY TO THIRD PERSON—QUESTION FOR JURY—WANTON NEGLIGENCE.

On evidence, in an action for the death of a brakeman employed by another company in a collision of his train while operated over defendant's line, held that the issue of wanton negligence and whether defendant's conductor, whose watch showed the correct time, read it correctly were for the jury.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 944-953; Dec. Dig. §297.]

7. RAILROADS §296—INJURY TO THIRD PERSON—NEGLIGENCE—COMPANY LIABLE.

That the conductor of defendant's train read his watch wrong, and in reliance thereon ran his train in violation of orders, was negligence on his part making defendant liable, if the death proximately resulted therefrom.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 943; Dec. Dig. §296.]

8. TRIAL §240—INSTRUCTIONS—ARGUMENTATIVE INSTRUCTION.

An instruction that in arriving at the verdict the jury might consider in connection with all the evidence the fact that the life of defendant's engineer was in danger in the event of a collision in determining whether his conduct was willful or wanton was properly refused as being argumentative.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 561; Dec. Dig. §240.]

9. TRIAL §244—INSTRUCTIONS—SINGLING OUT EVIDENCE.

The instruction was properly refused because it singled out certain parts of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 577-581; Dec. Dig. §244.]

10. RAILROADS §297—INJURY TO THIRD PERSON—DAMAGES—INSTRUCTIONS.

In an action for a brakeman's death, defendant's requested charge that the damage, if any, was such sum as would sufficiently punish defendant for the wrongful act of its servants, which sum could not be increased because decedent's widow would get the amount assessed by the jury as punishment, was erroneous.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 944-953; Dec. Dig. §297.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Action by Flora Harrison, as administratrix, against the Southern Railway Company, for damages for the death of her intestate. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint alleges in effect that plaintiff's intestate was the servant, agent, or employé of the Mobile & Ohio Railroad Company; that said company then and there operated a train over and upon defendant's line of railway with the consent of defendant for a reward; that plaintiff's intestate was then upon said train so operated by the Mobile & Ohio Railroad Company in the performance of his duty as such servant, agent, or employé when the said train on which plaintiff's intestate was, was run into or against by a train or engine which was a part thereof, then and there operated by defendant Southern Railway Company. The first count alleges the negligence of defendant in the negligent management and operation of said train under its control, as aforesaid. The second count alleges the negligent collision. The third count, the negligence of a person in the service or employment of defendant, who had charge or control of the train which ran into or collided with the train upon which plaintiff's intestate was, and the fourth count alleges wanton or willful injury. The pleas are as follows:

"(9) Plaintiff's intestate was himself guilty of contributory negligence * * * in that at the time of said collision he was riding on the engine of said Mobile & Ohio Railroad Company train in violation of a rule of said company, which was known to him, requiring him to ride on the top of his train while running, and defendant avers that at the time of said collision said Mobile & Ohio train was running, and that plaintiff's intestate had negligently left his post of duty, and was negligently riding on the fireman's seat on the engine of said train, instead of on the top thereof, as required by said rule.

"(10) Negligently riding on the engine of said train, which was running, in violation of a rule of the defendant company, of which he had knowledge, and to which he was subject in the discharge of his duty; said rule requiring him to ride on the top of said train while the same was running, and as a proximate consequence of the violation of said rule, as aforesaid, he was injured when said engine on which he was riding collided with another engine on defendant's track.

"(11) Defendant had in force and effect a rule governing freight brakemen, of which the intestate, who was at the time employed as a freight brakeman, had knowledge, and to which he was subject, which said rule is as follows: 'When their trains were running they must ride on top of them, and in such positions as to be able to control them most effectively, and to pass signals the whole length of said train.' And defendant avers that plaintiff's intestate, in violation of said rule, negligently left the top of his train and rode negligently on the engine of said train while the same was running."

The conductor in charge of the train which struck the engine in which plaintiff was riding was alleged to be one Hudson Ernest.

The following charges were given for plaintiff:

"(8) I charge you that if Hudson Ernest was the conductor of a special train pulled by engine No. 736, it was the duty of said Ernest as such conductor to operate said train according to proper orders and instructions given him by the authority in charge of the movements of that train, and if said Ernest as such conductor read his watch wrong, and in reliance on

such reading ran the train in violation of such orders so given him, this was at least negligence, and defendant is responsible for its proximate consequences if the death of plaintiff's intestate was one of such consequences.

"(9) The fact, if it be a fact, that Ernest read the time on his watch as a few minutes after 4 o'clock, when it was by the watch in fact a few minutes after 5 o'clock, was negligence on the part of Ernest.

"(10) I charge you that if the conductor in charge of the special train violated his orders in operating the train, and so caused the collision, and that this violation was caused by a reading of a watch as one hour earlier than the right time, and one hour earlier than the time actually shown by the watch, then this was negligence."

The following charges were refused defendant:

"(5) In arriving at your verdict, you have a right to consider in connection with all the other evidence in this case the fact, if it be a fact, that the life of Engineer Dean was in danger in the event of a collision, as determining whether his conduct was wanton or willful on the occasion in question."

"(7) The damages against defendant in this case, if any, are such sum as will sufficiently punish defendant for the wrongful act of its agents or servants, and this sum cannot be increased because of the fact that deceased's widow will get the amount assessed by the jury as punishment."

Stokely, Scrivner & Dominick, of Birmingham, for appellant. Allen & Bell, of Birmingham, for appellee.

ANDERSON, C. J. [1] There was no error in sustaining the plaintiff's demurrer to the defendant's special pleas 9, 10, and 11. Plea 9 sets up the violation of a rule of the Mobile & Ohio Company, but does not set up any facts to show that said rule was made for defendant's benefit, or that it was in any wise connected therewith. Pleas 10 and 11 set up a violation of the defendant's rules, but fail to show any facts making the plaintiff's intestate subject thereto or bound by them. The intestate was employed by and was working for the Mobile & Ohio Company, and the rules of this defendant as to its own brakemen had no application to the servants of the Mobile & Ohio Company.

[2] Nor can we pronounce the pleas good as to contributory negligence upon the theory that the intestate, independent of the rules, voluntarily placed himself in a place of danger, as the averment that he negligently rode upon the engine is a mere conclusion. One of the pleas says he was riding in the fireman's seat on the engine, while the others simply aver that he was negligently on the engine.

[3] We cannot say as matter of law that it is negligence upon the part of a brakeman to ride upon the engine. He might be much safer upon certain parts of the engine than upon the top of the cars. The case of *Warden v. L. & N. R. R. Co.*, 94 Ala. 277, 10 South. 276, 14 L. R. A. 552, is not an authority to uphold the pleas in question. There the court was not dealing with pleading.

but with the evidence, which showed that the plaintiff improperly left the place where he belonged and was riding upon the pilot or crossbeam to which the cowcatcher was attached, with his legs hanging out in front of the pilot, and this while the train was out on the main line proceeding from one station to another, and when the only duty he could have possibly had to perform was upon the top of the train.

[4, 5] The trial court committed no reversible error in declining to let the defendant ask the witness Ernest, on cross-examination, to state whether or not he was laid off by the Southern Railway Company on the morning of the accident. The witness had just stated he had not worked for the defendant since that time, and it was therefore immaterial to the issues involved whether he quit or was laid off by the company, unless, as now suggested in brief of counsel, that the fact that he was laid off by the defendant was a circumstance showing ill feeling towards the said defendant, and was a circumstance affecting his credibility. If this be true, the purpose or relevancy of the evidence should have been suggested to the trial court, as there is nothing in the question which would indicate that it was being asked to show bias on the part of the witness. Moreover, the more proper and orderly way to have shown bias or ill will was to have asked the witness the direct question as to his state of feeling towards the defendant, and he may have admitted that it was bad. On the other hand, if he said it was good, then the defendant could resort to the introduction of facts and circumstances showing that the witness was biased against the defendant.

[6] We do not think that the defendant was entitled to the general charge as to the wanton count. The defendant's conductor who caused the train to proceed before waiting for the arrival of the Mobile & Ohio train, then due or nearly due, was familiar with conditions and surroundings; he knew of train 92; had known of it for years; knew that it made its run daily on that track; knew its schedule independent of the timetable; had just had it all solemnly called to his attention by the order received at Coalburg; knew from these orders that No. 92 was coming west; knew from these orders, which he said he received correctly, that No. 92 would be at Bryan at 5:15; a short while before the collision consulted his watch; the watch showed the correct time; looked at his watch; read it; the watch showed 5:10; he went on, conscious of the approaching train, conscious that a wreck would occur should they meet; knew they were on the same track; knew that if a wreck occurred some one would be probably killed or injured; yet he went on with a reckless indifference as to consequences; the trains met, there was a wreck, and the in-

testate was killed. It is practically conceded that if Ernest read the watch correctly and then proceeded, he would be guilty of wantonness, but it is contended that as he misread his watch he was guilty only of simple negligence. It was a question for the jury as to whether or not he read his watch correctly; he examined it, and it spoke the correct time. This was positive, affirmative evidence as to the time. He says he examined it, but did not read it as it was. This was negative evidence, and it was a question for the jury as to whether or not he read it correctly or incorrectly. Moreover, we do not mean to hold that it would not be a question for the jury as to wantonness even if the conductor was honestly mistaken as to the time. In matters of such hazard and importance as the running of trains, we are not prepared to say, as matter of law, that the failure to have the correct time or the failure to properly read and translate train orders is a sufficient excuse to reduce the conduct of the men in charge of the train to simple negligence merely. The disastrous consequences and results from collision are too hazardous and destructive of human life to permit ignorance and negligence as to the contents of train orders or as to the correct time to authorize derelicts in charge of trains to escape a charge of wantonness, as matter of law, upon the excuse that they were merely mistaken as to the time or had misread the train orders, etc. These are matters which call for the highest degree of care and prudence, and we cannot hold that negligence and mistakes in this respect will, as matter of law, excuse the derelict trainmen of wanton misconduct.

The cases of Birmingham Waterworks v. Wilson, 2 Ala. App. 581, 56 South. 760, and Birmingham Waterworks v. Murray, 1 Ala. App. 443, 55 South. 271, have no bearing upon the present question, in principle or by analogy, as there is quite a distinction between mistakes in ordinary bookkeeping and those relating to the control and handling of dangerous and hazardous instrumentalities, not the least important of which is the running and handling of trains where the preservation of human life often hinges upon minuteness and accuracy to the slightest degree.

[7] There was no error in giving the plaintiff's charges 8, 9, and 10, as the conductor Ernest was guilty of negligence, as matter of law, under the facts therein hypothesized.

[8, 9] There was no error in refusing the defendant's charge which we have marked "5" on page 43 of the record. It is argumentative, and singles out certain parts of the evidence.

[10] Charge 7, refused the defendant, was palpably bad.

The other insistences as to the ruling upon the evidence are so plainly without merit that a discussion of same can serve no good

purpose and would only lengthen and incur this opinion.

The judgment of the city court is affirmed. Affirmed.

MC CLELLAN, MAYFIELD, and DE GRAFFENBRIED, JJ., concur.

(191 Ala. 249)

RAINS v. PATTON. (No. 562.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. FRAUDS, STATUTE OF §108—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.

Under Code 1907, § 4289, requiring that an agreement not to be performed within one year shall be void unless in writing, expressing a consideration, etc., a written agreement, reciting plaintiff's purchase of the stock and fixtures of a drug company, wherein defendant, one of the company, promised to repurchase such stock, at plaintiff's election within two years, expressing no consideration for the promise, was void, whether or not there was a consideration in fact; and the contract was not relieved of such requirement by Code 1907, § 3966, providing that a written contract upon which suit is founded is prima facie presumed to be supported by a sufficient consideration, that being a rule of evidence not affecting the validity of the contract.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 214-221; Dec. Dig. § 108.]

2. FRAUDS, STATUTE OF §125—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR—CONTINUING OFFER.

The rule that an offer to buy or sell becomes binding if seasonably accepted before its lapse or withdrawal can operate only in subordination to the statute of frauds requiring an agreement not to be performed within one year to be in writing, stating the consideration, which presupposes an offer in form such as if accepted would constitute a contract within the statute, so that, where the agreement was void when made, it could not thereafter be validated by a so-called acceptance.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 275-277½; Dec. Dig. § 125.]

3. FRAUDS, STATUTE OF §125—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.

Code 1907, § 4289, subd. 1, providing that an agreement not to be performed within one year shall be void unless in writing, expressing the consideration, etc., applies to all agreements unilateral as well as bilateral, and a plaintiff who would hold a defendant liable for breach of any agreement within the statute must show that it is evidenced by such a writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 275-277½; Dec. Dig. § 125.]

Appeal from Circuit Court, Jefferson County; John C. Pugh, Judge.

Assumpsit by A. B. Rains against John W. Patton. Judgment for defendant, and plaintiff appeals. Affirmed.

The complaint contained the common count, and certain counts claiming damages for breach of the contract, which is set out in the opinion. The defense set up was that of the statute of frauds.

Allen & Bell, of Birmingham, for appellant. Frank S. White & Sons, of Birmingham, for appellee.

SOMERVILLE, J. [1] The vital and decisive question in this case is whether or not the written agreement upon which the plaintiff must rely for a recovery is obnoxious to the statute of frauds.

The agreement in question is as follows:

"Birmingham, Ala., 5/23/08.

"This agreement witnesses that whereas A. B. Rains has purchased the drug stock and fixtures of the Patton-Pope Drug Co. situated on the corner of Second Ave. and Twentieth St., Birmingham, Ala., and has paid the said P. P. Drug Co. in cash for the same, now John W. Patton of the said firm hereby covenants and binds himself unto the said A. B. Rains to repurchase said stock and fixtures from the said Rains at the same price he has paid for the same at the expiration of two (2) yrs. from this date should the said Rains elect to sell the same. That is, the said Patton agrees to purchase said stock and fixtures at cost as they shall inventory in two years if Rains elects to sell the same. Wear and service to be deducted from fixtures."

It will be observed that this agreement is upon its face a nudum pactum—a purely gratuitous promise on the part of the defendant, Patton, to buy a drug business at the end of two years if the plaintiff, Rains, then offered to sell it to him. Rains is utterly without obligation in the matter, and has, prima facie, neither given value to Patton nor suffered any detriment himself.

It is claimed by the plaintiff that there was in fact a consideration of value which moved to the defendant. It is, however, so far as the statute of frauds is concerned, wholly immaterial whether there was or was not a consideration in fact. If the consideration be not expressed in the writing, the agreement does not bind.

This agreement was by its terms not to be performed for more than a year, and hence falls within subdivision 1 of the statute (section 4289, Code 1907); and, no consideration for the defendant's promise being expressed in the writing, the promise is without legal value or effect.

Contracts within the statute are, of course, not relieved of this requirement by section 3966 of the Code, under which a written contract upon which the suit is founded is prima facie presumed to be supported by a sufficient consideration. *Rigby v. Norwood*, 34 Ala. 129; *Speer v. Crowder*, 32 South. 658. That is a mere rule of evidence, and has nothing to do with the formal validity of the contract.

[2] The effect of the statute of frauds is supposed by plaintiff to be avoided by the rule of law that an offer to buy or sell becomes binding on the offeror if it be seasonably accepted by the offeree before its lapse or withdrawal; the theory being that this agreement to buy at the end of two years

may be regarded as a continuing offer to buy, which became thus binding.

This rule, however, can operate only in subordination to the statute of frauds, and not in contravention of it. It presupposes an offer in such form as, if accepted, would constitute a mutual contract in conformity with the requirements of the statute. In the instant case the agreement to purchase at the end of two years was void and unenforceable when made, and could not thereafter be rendered valid and enforceable by a so-called acceptance of it.

[§] The statute is applicable to all agreements, unilateral as well as bilateral and mutual; and a plaintiff who would hold a defendant liable for the breach of any agreement within the scope of the statute must show that it is evidenced by such a writing as the statute prescribes.

The writing here exhibited was deficient in this respect, and imposed upon its maker no obligation, present or prospective, actual or potential. It was therefore properly rejected as evidence by the trial court.

Without its aid the plaintiff could not sustain any cause of action against the defendant, and it therefore becomes unnecessary to consider other questions presented by the record.

The judgment is affirmed.
Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 411)

SOUTHERN BITULITHIC CO. v. PERRINE. (No. 418.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ¶323—PARTIES ENTITLED TO APPEAL—JOINDER OF PARTIES.

Where, in tort against defendant and co-defendant, a single judgment for plaintiff against defendant and for codefendant was rendered, defendant could alone appeal, though where there is one judgment against two or more defendants, fixing a joint or a joint and severable liability, all must join in the appeal or one must appeal in the name of all and give notice to the others, and, if they fail to join in the appeal, have a severance.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1796, 1798-1805; Dec. Dig. ¶323.]

2. MUNICIPAL CORPORATIONS ¶816—EXCAVATION IN STREETS—ACTIONS—EVIDENCE—ADMISSIBILITY.

Where, in an action against a city and its contractor to pave a street for injuries to a pedestrian falling into an excavation, the contractor alleged that the accident was caused by the negligence of a third person, who was an independent contractor, plaintiff could show the relation of the third person to the contractor and the work he was doing, for the proper execution of which he was responsible, and could prove by the city engineer, who looked after the work, the channels through which such work was usually done and what relation the city

and its contractor had with laborers and others engaged in such work.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. ¶816.]

3. EVIDENCE ¶502—OPINIONS—CROSS-EXAMINATION—REASON FOR CONCLUSION—IRRESPONSIVE ANSWERS.

Where a witness on cross-examination was pressed to state the reasons for her conclusion, it was not error to decline to exclude an answer not responsive to a question.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2306, 2307; Dec. Dig. ¶502.]

4. WITNESSES ¶268—CROSS-EXAMINATION—SCOPE.

Where, in an action for personal injuries, a witness for defendant testified that he had heard that a person was injured and had visited plaintiff to inquire about her condition, it was proper to allow plaintiff's counsel to cross-examine the witness as to what his information was and from whom he received it; the witness being very indefinite on that subject.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948, 959; Dec. Dig. ¶268.]

5. MUNICIPAL CORPORATIONS ¶818—INJURIES TO PEDESTRIANS—ACTIONS—EVIDENCE.

In an action against a city and its contractor to pave a street for injuries to a pedestrian falling into an excavation, the contract between the city and contractor was admissible to prove the allegation of the complaint that the contractor had a contract with the city to pave the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. ¶818.]

6. EVIDENCE ¶553—EXPERTS—HYPOTHETICAL QUESTIONS.

Questions put to experts need not hypothesize all the facts which the evidence tends to show, but each party may seek the expert's opinion on the state of the evidence supporting his theory of the case, and on cross-examination other phases of the evidence may be hypothesized.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. ¶553.]

7. APPEAL AND ERROR ¶971—EVIDENCE ¶546—DISCRETION—EXAMINATION OF EXPERTS.

In the examination of expert witnesses, the competency of the witness and the forms of the questions are within the trial court's discretion and will not be disturbed unless the discretion has been abused.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3852-3857; Dec. Dig. ¶971; Evidence, Cent. Dig. § 2363; Dec. Dig. ¶546.]

8. EVIDENCE ¶548—DISCRETION OF TRIAL COURT—EXAMINATION OF EXPERTS.

In an action for a personal injury by plaintiff falling on her side into an excavation and receiving an injury to her ribs, the sustaining of an objection to a question asked a physician, as to whether a blow on the ribs would tend to produce plaintiff's condition described by him, was within the court's discretion; the physician as an expert having examined plaintiff and described the condition in which he found her.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2346, 2365; Dec. Dig. ¶548.]

9. APPEAL AND ERROR ¶1056—HARMLESS ERROR—ERRONEOUS RULINGS ON EVIDENCE.

Where a physician declined to give an expert opinion as to the cause of the condition of

plaintiff, suing for a personal injury, when all the facts in evidence were hypothesized, error, if any, in excluding a question as to whether a blow would tend to produce the condition of plaintiff, was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.]

10. APPEAL AND ERROR § 1002—VERDICT—CONCLUSIVENESS.

A verdict on conflicting evidence, and not the result of bias, passion, or prejudice, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.]

Appeal from Circuit Court, Jefferson County; John C. Pugh, Judge.

Action by Lillian Perrine against the Southern Bitulithic Company and the City of Birmingham. There was a judgment for plaintiff as against the Southern Bitulithic Company and for the City, and the Southern Bitulithic Company appeals. Affirmed.

Motion was made for a severance. The nature of the pleadings sufficiently appear from the opinion, as do several of the objections and exceptions to evidence. The following are the assignments of error mentioned in the complaint:

(2) The court erred in overruling defendant's objection, upon the ground that it was not responsive to the question, to the statement of the witness Mrs. Caldwell, as follows: "If you saw negroes working for that company every day as long as they were in front of my house, would you suppose any of those negroes would have any right to come there for any other company on the same company's ground?" The question being, "Do you know it of your own knowledge?" (3) Overruling defendant's objection to the following question put by plaintiff's counsel to witness Webb: "Were there any repairs being done on Park avenue on February 15th of this year?" (4) Same witness: "With whom did the city of Birmingham have a contract for paving Park avenue, February, 1911?" (5) Overruling motion of defendant to exclude the answer of the witness the Southern Bitulithic Company. (7) Overruling objection to the same witness, "But the Southern Bitulithic Company did perform this contract, did they not?" (8) Erred in admitting over the objection of this defendant the proposal of the Southern Bitulithic Company to do certain work referred to in the proposal. (9) Overruling defendant's objection to the following question propounded to the witness Webb: "Now, I notice in this proposal that 3,000 lineal feet of the curbing was to be taken up and reset. Just explain what that is, please." (10) Overruling defendant's objection to the following question to witness Nicholson: "Did the Southern Bitulithic Company execute this portion of their proposal, which I have asked you to explain to the jury a moment ago, in words and figures as follows: 8,000 lineal feet of curbing, reset at 10 cents per foot?" (11) Objection overruled to question to same witness: "Now, did that curbing mentioned in that contract extend along the south side of Park avenue from Nineteenth street to Twentieth street?" (12) Overruling defendant's objection to question to same witness: "What is the custom, under a contract like this, when the contractor begins the work?" (14) Objection to question to the witness Robinson: "What were you told by some of the men?" (15) "What did the workmen say to you?"

Percy, Benners & Burr, of Birmingham, for appellant. Denson & Denson, of Birmingham, for appellee.

MAYFIELD, J. Appellee sued appellant and the city of Birmingham to recover damages for personal injuries, the result of her stepping into a hole or depression in the sidewalk or street at or near the junction of Twentieth street and Park avenue.

It was claimed by plaintiff that appellant had contracted with the city of Birmingham to pave Park avenue, and that in doing this work it had negligently left the hole or depression into which plaintiff fell.

The trial was had on the general issue on count 8 of the complaint. The gravamen of this count was as follows:

"Plaintiff fell into an excavation in said avenue, which excavation was made as follows: The city of Birmingham entered into a contract with the Southern Bitulithic Company to pave said avenue, and as a part of said contract said Southern Bitulithic Company agreed to take up and reset the curbing of said avenue and said excavation was the hole left in the ground by the taking up of said curbing by said Southern Bitulithic Company in executing said contract."

* * * Said injuries were proximately caused by the negligence of the defendants which negligence consisted in this, the defendants negligently failed to take reasonable precautions necessary to prevent people in the lawful use of said avenue from falling into said excavation."

The trial resulted in a verdict in favor of one defendant, the city of Birmingham, but against the other defendant (appellant) for \$3,750, from the judgment for which amount the latter prosecutes this appeal.

[1] There can be no doubt that appellant can prosecute this appeal, and sever, and separately assign errors, as has been done in this case. While there was but one judgment, it was not such a joint judgment that both defendants must unite in the appeal. The interest of the defendants in the judgment was not joint or mutual. Their interests were separate, distinct, and different, one from the other. The interest of the city was that it should not be reversed, while the interest of the paving company was that it should be reversed. There is no joint liability established by this judgment, but a several one. The liability alleged was both joint and several; that is, it was one in tort against two defendants. But the verdict and judgment made it several only, and the plaintiff failed as to the joint feature alleged, and she does not complain on this appeal. The paving company is therefore the only proper party to complain, it being the only one against whom judgment was rendered. The city could not assign errors, even if it were a party and desired so to do.

Where there is one judgment against two or more defendants, which fixes a joint, or a joint and several, liability, all must join in the appeal, or one must appeal in the names of all and give notice to the others, and, if they fail to join in the appeal, have a sever-

ance; but, where there is no joint judgment or no joint liability, the judgment fixing a several liability against one only, then, of course, the above rule as to joint judgments and liabilities cannot apply. *Craig v. Carswell*, 4 Stew. & P. 267; *Hunt v. Houtz*, 62 Ala. 36.

[2] The defendant paving company denied all the material matters alleged, and also sought to show that if there was any negligence in making the excavation, or in failing to guard or protect the public who were using the street from falling into the same, it was the negligence of one William Findley, employed by the appellant, as an independent contractor, to do the work in question, alleged to be not intrinsically dangerous to the public; and that for the mere negligent execution of the work the appellant was not liable.

This was made one of the contested questions on the trial, and the evidence is not without conflict on this issue. Hence the trial court properly declined to give the affirmative charge on this theory of the defense.

There was evidence from which the jury might infer that the capacity in which Findley was working was not that of an independent contractor, but was such as to make the appellant liable in this case for his negligence in the execution of the work intrusted to him by the appellant.

This question being made an issue in the case, it was competent and proper for the plaintiff to introduce proof of any circumstance which tended to show the relation of Findley to appellant, and the work he was doing.

There are a number of assignments of error going to the rulings of the trial court, in the admission of evidence to show the character and capacity in which Findley did the work.

The fact that the city was being sued, also, made it proper for the plaintiff to show the work that was being done on Park avenue, and who was doing the work, and who was responsible for the proper execution thereof. For these reasons there was no error as to the admission of evidence offered by the plaintiff, and shown by assignments of error 2, 3, 4, 5, 7, 8, 9, 10, 11, 12, 14, 15.

[3] While Mrs Caldwell's answer to defendant's question was not strictly responsive, it was not error to decline to exclude it. Defendant was cross-examining the witness, and was pressing her, by questions, to state the reasons which had led her to the conclusion that the men doing the work were working for the defendant, and she merely answered these questions by asking defendant's counsel a question; but it did in fact state the reason which induced her to conclude that the men were working for the defendant.

[4] Defendant's witness Robinson, having testified that he had heard a lady was injured or hurt on or near Park avenue, and that he visited plaintiff's residence to inquire about

her condition, it was proper to allow plaintiff's counsel to cross-examine this witness as to what his information was, and from whom he received it, as the witness was very indefinite in this regard.

[5] It was alleged that appellant had a contract with the city to pave Park avenue, and, of course, there was no error in allowing plaintiff to prove this contract by the contract itself.

As before stated, there was a conflict as to the character or capacity in which Findley was working—whether as a mere agent of plaintiff, or as an independent contractor. It was competent for the plaintiff to prove by the city engineer, who looked after such work for the city, the channels through which such work was usually done, and what relations the city and the contractor had with the laborers and other persons engaged in such work.

[6] We are of the opinion that there was no reversible error in declining to allow Dr. Prince to answer the question propounded to him. The question was: "Would a blow on the ribs tend to produce the condition you describe in this woman?" This witness was an expert as to the matter inquired about, and had examined the plaintiff, and described the condition in which he found her; and a material inquiry was whether or not the physical condition of the plaintiff was the result of her falling into the depression in the street. She and her husband, who was present when she fell into the depression, had testified that she fell on her side and hurt her ribs. The ground of objection to the question was that it did not hypothesize the facts.

It is not necessary that questions to experts should hypothesize all the facts which all the evidence tends to show. Each party has the right to seek the expert's opinion upon that state of the evidence which tends to support his respective theory of the case. It is the object of a cross-examination of such witnesses to get their opinions upon other phases of the evidence, and, if desired, by hypothesizing all the facts. *B. R. L. & P. Co. v. Fisher*, 173 Ala. 627, 55 South. 995.

It was said by this court, speaking through McClellan, C. J., in the case of *Morrisette v. Wood*, 123 Ala. 391, 26 South. 309, 82 Am. St. Rep. 127:

"It is not necessary for such questions to postulate every fact of which there is any evidence before the jury, but they are unobjectionable if they hypothesize a state of facts which the jury is authorized to find."

The same rules are announced in *Parrish's Case*, 139 Ala. 16, 36 South. 1012.

[7] In the examination of expert witnesses, the competency of the witness, and the forms of the questions, are for the court, and not for the jury; and the court's decisions on these questions will not be revised, unless it is made clearly to appear that they were erroneous, or an abuse of the discretion.

[8, 8] In this case we are not willing to

say that it is made clearly to appear that it was error to decline to allow Dr. Prince to answer this question, and certainly not that there was any abuse of the discretion. It also appears that this witness declined to give an expert opinion as to the cause of the condition of plaintiff, when all the facts in evidence were hypothesized, including the one hypothesized by the defendant in its question the answer to which was refused. If the witness could not answer when all the facts were hypothesized, then certainly he could not answer when only a part were hypothesized. There was consequently no injury from this ruling.

[10] Whether the evidence as to the cause or extent of plaintiff's injury was true or false is not a question for the trial court or for us, if believed by the jury (and this was exclusively a question for them). There was evidence to support the verdict, and the amount thereof is not so great that we can say it was the result of bias, passion, or prejudice. It therefore results that we cannot say the trial court erred in denying defendant's motion for a new trial.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 398)

BURNWELL COAL CO. v. SETZER.
(No. 748.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MASTER AND SERVANT §256—ACTIONS—COMPLAINT—SUFFICIENCY.

A complaint, alleging that deceased was employed by defendant company as a laborer in its mine, that the company negligently failed to provide a reasonably safe place, as was its duty, and that as the proximate result thereof, deceased met his death, states a cause of action under Homicide Act (Code 1907, §§ 2485, 2486), giving rights of action for wrongful death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 809-812, 815; Dec. Dig. §256.]

2. DEATH §78—ACTIONS—DAMAGES.

In an action for wrongful death brought under the Homicide Act (Code 1907, §§ 2485, 2486), punitive damages, and not compensatory damages, are recoverable.

[Ed. Note.—For other cases, see Death, Dec. Dig. §78.]

3. MASTER AND SERVANT §118—INJURIES TO SERVANT—DUTY OF CARE.

Where a master failed to equip coal cars with safety appliances to prevent them from running back down the slope upon miners when the cars got loose, there was a defect in the master's ways, works, machinery, or plant within Employers' Liability Act (Code 1907, § 3910).

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. §118.]

4. MASTER AND SERVANT §118—INJURIES TO SERVANT—STATUTE—APPLICABILITY—ENACTMENT.

Act April 18, 1911 (Laws 1911, p. 500), regulating coal mining, having been passed aft-

er an accident in a mine, has no application to the rights of the parties.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 177, 202, 209; Dec. Dig. §118.]

5. MASTER AND SERVANT §228—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Code 1907, § 3910, provides that the master is not liable if the servant or employé knew of the defect or negligence causing the injury and failed within a reasonable time to give information thereof, unless the master already knew of the defect or negligence, but that in no event should it be contributory negligence or assumption of risk for a servant to remain in the service of the master after knowledge of the defect or negligence, unless he was charged with remedying such defect. *Held*, that while under the proviso the fact that the servant continued in the employment cannot be shown as an assumption of risk or contributory negligence, the fact that the servant, knowing of the danger of coal cars breaking loose on a slope, went on the slope without precautions may be shown as contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 670, 671; Dec. Dig. §228.]

6. MASTER AND SERVANT §236—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

That the mine slope was the only way of egress from the mine does not warrant a miner in going upon the slope without taking precautions to avoid runaway coal cars, where it did not appear that the cars were being constantly drawn up the slope.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 681, 723-742; Dec. Dig. §236.]

7. APPEAL AND ERROR §878—REVIEW—DECISIONS APPEALABLE.

On defendant's appeal, the propriety of the overruling of demurrers to the pleas will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. §878.]

8. EVIDENCE §546—OPINION EVIDENCE—EXPERTS.

The determination of the qualification of a witness as an expert is a preliminary matter addressed to the trial court's discretion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2363; Dec. Dig. §546.]

9. EVIDENCE §553—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.

While an hypothetical question propounded to an expert is objectionable if it contains elements of fact not shown in the evidence, it is not objectionable because it omits to hypothesize every fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2369-2374; Dec. Dig. §553.]

10. EVIDENCE §552—OPINION EVIDENCE—HYPOTHETICAL QUESTIONS.

The frame and substance of hypothetical questions to experts is a matter resting largely in the trial court's discretion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2368; Dec. Dig. §552.]

11. EVIDENCE §513—OPINION EVIDENCE—EXPERTS.

An expert witness may give his opinion as to the safety of a place or an appliance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2317, 2318; Dec. Dig. §513.]

12. MASTER AND SERVANT §270—INJURIES TO SERVANT—EVIDENCE.

Where a servant was injured, evidence of repairs after the accident is not admissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 918-927, 932; Dec. Dig. §270.]

13. MASTER AND SERVANT §267—INJURIES TO SERVANT—ACTIONS—EVIDENCE.

Where there was no statute authorizing the mine inspector to make recommendations to mine operators or enforce remedies, evidence in an action for death of a miner that the mine inspector made certain suggestions to the mine operators is inadmissible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 909, 911; Dec. Dig. §267.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by Russ Setzer, as administrator, against the Burnwell Coal Company, for damages for the death of his intestate. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Count 1 alleges that Roy Setzer, the deceased, was employed by the defendant company as a trapper or laborer in the mines of said company, and that it was the duty of the company to provide and maintain a reasonably safe place for said Setzer to work, and that the defendant company, unmindful of its said duty, negligently failed to provide a reasonably safe place for deceased to work, and as a proximate consequence thereof deceased was run over, upon or against by a car or cars in said coal mine, then and there killed as a proximate consequence of the negligence of the defendant in negligently failing to provide and maintain a reasonably safe place for defendant to work. The averments of the other counts sufficiently appear from the opinion.

The following are the pleas referred to:

(2) Proximate contributory negligence in that deceased knew that a loaded car was likely or liable to break loose on the slope and injure him, but nevertheless he negligently attempted to walk up said slope without ascertaining whether or not a trip of loaded cars was being pulled to the tippie from said slope, when as a matter of fact there was a trip of loaded cars being so pulled from said slope, which became uncontrolled and ran back down the slope and struck intestate, whereby he was proximately killed.

(4) Plaintiff's intestate was aware that the cars in said mine were not equipped with safety drags or attaches, and that the track in said mine was so laid and constructed that loose or uncontrolled cars thereon were likely or liable to jump therefrom and injure him while attempting to walk along or be in the slope at the place where he was killed, and with the knowledge and appreciation of the danger arising therefrom, and thereafter plaintiff's intestate voluntarily remained in the service or employment of defendant an unreasonable time, and voluntarily went to a place in said slope or manway where loose and uncontrollable cars were likely or liable to jump from the track and injure him.

(5) Proximate contributory negligence, in that said intestate, with knowledge that loose or uncontrolled cars were likely or liable to run down

the slope from the direction of the tippie and injure or kill him at the point where he was hurt, nevertheless negligently went to or dangerously near the said point or place in said mine whereby loose or uncontrolled cars did run down to said place, and so injure intestate that he died.

(6) Intestate was guilty of negligence which proximately contributed to his death in that he was warned by the superintendent, a very short time before he was killed, not to go into the place where he was killed, as it was dangerous to do so on account of the danger of loose cars, but that intestate negligently disregarded said warning, and negligently went into the slope, and was thereby killed.

The following were the replications:

(1) Joinder and issue as to plea 1.

(2) It was not the duty of intestate to remedy the defect complained of in either count in the complaint.

(3) To plea 4 he interposes replications 1 and 2.

(4) To plea 5, plaintiff replies replications 1 and 2.

(5) For replication to each of defendant's pleas 2, 4, 5, and 6, plaintiff says there was no other means or way of egress from said mine except said slope, and that at the time he was killed, he was going out of said mine from his place of employment in said mine.

Demurrers 6 and 7 to replication 5 were as follows:

(6) It does not appear that it was necessary or imperative for intestate to go out of the slope at the time of his death.

(7) It does not appear that intestate could not have waited until the slope became a safe way of egress.

Bankhead & Bankhead, of Jasper, for appellant. Allen & Bell, of Birmingham, and Ray & Cooner, of Jasper, for appellee.

McCLELLAN, J. Plaintiff's intestate, a boy about 15 years of age, was killed on March 21, 1911, while in the employ and service of the defendant (appellant) in its operation of a coal mine. The cause of his death was a trip of coal cars, which, while being hauled up the slope, got loose and ran back down the slope upon him. The counts passing to the jury were those numbered 1, 11, and 15, and one lettered A. The first count ascribed intestate's wrongful death to negligence in respect of the safety of the place in which he worked. The eleventh count was framed under the first subdivision of the Liability Act (Code, § 3910), and charged that the defect in the condition of the ways, etc., consisted in the negligent failure to provide or maintain a dead latch or derailing switch to derail cars when becoming loose on the incline in the mine. The fifteenth count was framed under the first subdivision of that statute, and alleged the defect to have consisted in the absence of a drag, attached to a car or cars, which while ascending a slope in said mine became detached and ran back down the slope, causing intestate's death. Count A was framed under the second subdivision of the statute, ascribed the negligence to Superintendent Wooten, and described his dereliction to have

been that he allowed the work of the defendant, therein described, to be performed in a manner dangerous to the safety of plaintiff's intestate.

[1, 2] Count 1 sufficiently states a cause of action under the Homicide Act (Code, §§ 2485, 2486), as for wrongful death resulting from the breach of a common-law duty. The recovery under this count (1) could only be punitive in character. So much of the argument, suggested by the idea that only compensatory damages were awardable, predicated of excessiveness in the verdict, originally or as remitted by the plaintiff, thus becomes inapt. See *Choate v. A. G. S. R. R. Co.*, 170 Ala. 590, 54 South. 507; *Sou. Ry. Co. v. Cooper*, 172 Ala. 505, 512, 513, 55, South. 211.

[3, 4] Counts 11 and 15 are not subject to the argued criticism that the omission to aver a duty to afford the preservative instrumentalities described in the counts numbered these defective. They each declare upon a breach of the duty, under the statute, in respect of the defect in the condition of the ways, works, etc. The allegation of each is of a described defect in that condition. It cannot be said as a matter of law that the absence of the defined safety appliances was not a defect in condition of the ways, etc. The counts were sufficient, and the issues they made in that regard were of fact. The act, approved April 18, 1911 (Acts, 1911, pp. 500-538), effecting the regulation of coal mining, had not become a law at the time of the injury to plaintiff's intestate. So the provisions of section 63½ (page 522) are without bearing on the rights or issues here involved.

Count A was not subject to the demurrer.

The report of the appeal will contain a statement, in substance, of pleas 2, 4, 5, and 6. According to the recitals of the minute entry, demurrers to these pleas were overruled, a ruling in favor, of course, of the defendant appellant. To these pleas, plaintiff replied by replications 1 to 5, inclusive. Replication 1 was a joinder in issue on plea 1, which plea was the general issue. By reference, replications 1 and 2 were interposed to pleas 4 and 5, thus joining issue on pleas 4 and 5, as well as replying specially with the matter averred in replication 2, which was that it was not the duty of intestate to remedy the defect complained of in any count in the complaint. Replication 5 asserted, in avoidance of pleas 2, 4, 5, and 6, that the only means of egress afforded for him to leave the mine in which he was employed was the slopeway, in which he was killed when leaving the place of his employment. Demurrer to special replication 2 was overruled.

[5] The only theory upon which this action could be rested is that assumption of risk or contributory negligence cannot avail as a defense to an action laid in the breach of duty described in subdivision 1 of the Liability Act (section 3910). Such is not the case.

The statute noted was changed in the Code of 1907, by the addition of the italicized expressions in the quotation to follow:

"Section 3910. * * * The master or employer is not liable under this section, if the servant or employé knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision 1, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition; *provided, that in no event shall it be contributory negligence or an assumption of the risk on the part of a servant to remain in the employment of the master or employer after knowledge of the defect or negligence causing the injury, unless he be a servant whose duty it is to remedy the defect or who committed the negligent act causing the injury complained of.*"

The only effect of the addition (italicized) to the statute was to remove as a basis of *assumption of risk* and of *contributory negligence* on the part of an employé, in respect of a defective condition within the purview of the first subdivision of the Liability Act (section 3910), the remaining in service after knowledge by the employé, injured in consequence of the defect in condition to which the complaint or a count thereof attributed the injury for proximate cause, of the defect in condition of the ways, works, machinery, or plant of the master, except in cases where the employé injured was under the duty to remedy the defect causing his injury, or where the employé injured committed the negligent act causing the injury complained of. There is no *general* legislative purpose expressed, or necessarily impliable, to deny the existence or the defensive effect of contributory negligence or assumption of risk in all cases.

Here replication 2 asserted in assumed avoidance of the defense interposed by plea 2, which was a plea of contributory negligence, the mere fact that no duty rested on the intestate to remedy the defects in condition described in the complaint. It does not appear from the plea that any such duty was imposed on intestate under his contract of employment. The plea avers that intestate, with knowledge that a loaded car was likely or liable to break loose on the slope and injure the intestate, nevertheless negligently, without ascertaining whether loaded cars were being drawn up the slope, took the thus known dangerous course, and loaded cars then being pulled up the slope became loose and ran back down the slope, injuring him. If the plea had undertaken to exonerate the defendant (master) because of intestate's *remaining in the service* after knowledge of the defective condition counted on, then the

replication (2) would have been apt and effective to avoid the defense so asserted. There was error, therefore, in overruling the demurrer to replication 2. Like considerations lead to the conclusion that replications 3 and 4 were similarly faulty in so far as these replications adopt, by reference, replication 2 to pleas 4 and 5.

[6] Replication 5 was subject to the sixth and seventh grounds of the demurrer. It does not aver such a case of necessity or imperativeness at the time intestate, as alleged in the pleas 2, 4, 5, or 6, undertook to go up the slope as would or did excuse his entry into a known hazardous place or situation. Certainly, under the circumstances set forth in the pleas, intestate could not justify, or avoid the effect of, his action by the mere fact that the way he went was the only way he could go. It is not made to appear by the replication (5) that the known hazardous situation made by the handling of loaded cars up the slope without the presence of the safety appliances described in the complaint, was or would be so constant or so long existent as not to have allowed intestate the opportunity of egress within a reasonable time.

[7] The appeal being by the defendant and the demurrers to pleas 2, 4, 5, and 6 having been overruled, this court has not, as indeed it could not, consider the sufficiency of the pleas indicated.

[8] It is settled with us that the determination of the qualification vel non of a person to form and give an expert opinion on a definite subject is a preliminary matter; that its decision is addressed to the sound discretion of the trial court under the evidence bearing upon that preliminary inquiry. *White v. State*, 133 Ala. 122, 32 South. 139; *L. & N. R. Co. v. Sandlin*, 125 Ala. 585, 28 South. 40; *Ins. Co. v. Stephens*, 51 Ala. 123; *Ala. C. & I. Co. v. Heald*, 168 Ala. 626, 643, 644, 53 South. 162; *L. & N. R. Co. v. Elliott*, 166 Ala. 419, 51 South. 976. *Jones on Evi.* § 369.

[9, 10] Under the rule long prevailing here, the finding of the court upon the facts presented on that inquiry will not be held for error, unless the ruling is plainly erroneous, while an hypothetical question, propounded to an expert, is objectionable if it contains elements of fact not shown in the evidence, yet such a question to an expert witness is not objectionable because it omits to hypothesize every fact in evidence. An examiner of an expert witness may lay as the basis for the opinion invited only those facts in evidence which conform to the theory he would establish. Of course such questions must also incorporate sufficient of the facts in evidence to fairly justify the formation of an opinion on a material issue in the case. The frame and substance of hypothetical questions to expert witnesses is a matter largely

committed to the sound discretion of the trial court. *B. R. & E. Co. v. Butler*, 135 Ala. 388, 395, 33 South. 33; *Morrissett v. Wood*, 123 Ala. 384, 26 South. 207, 82 Am. St. Rep. 126; *Parrish's Case*, 139 Ala. 16, 43, 36 South. 1012; *Long Distance T. Co. v. Schmidt*, 157 Ala. 391, 47 South. 731; *B. R. L. & P. Co. v. Saxon*, 179 Ala. 136, 59 South. 591; *Jones on Evi.* §§ 370-371; 17 Cyc. pp. 244, 250. On the retrial, likely to follow the remandment to which the errors stated must lead, these general rules will be of service in field of their application as indicated by the examination of expert witnesses on the trial now being reversed.

[11] An expert witness, qualified to that end, may give his opinion as to the safety or danger of a place, or an appliance, when that issue is involved on the trial. *McNamara v. Logan*, 100 Ala. 187, 196, 197, 14 South. 175; *Stewart v. S. S. S. & I. Co.*, 170 Ala. 544, 54 South. 48, Ann. Cas. 1912D, 815.

[12] The court was in error in admitting, over objection, evidence of the installation of "drags" subsequent to the injury complained of. The true rule, with the conclusive reasoning supporting it, is thus stated in *Jones on Evi.* § 288:

"In actions based on negligence the attempt is often made to draw an inference of prior negligence from the fact that, since the act complained of, the defendant has repaired the alleged defect or adopted some new precaution. A few exceptional cases under peculiar circumstances admit such evidence, but the great weight of authority holds such evidence incompetent. In some instances evidence of this character has been rejected on the ground that persons making the change were not shown to have authority to make admissions for or charge the defendant by such acts. But evidence of this character is clearly open to a much more serious objection, as was well stated in Minnesota case: 'Such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.' In the Court of Exchequer Baron Bramwell thus expressed the same view: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it grows older, therefore it was foolish before.' But evidence of this character may be competent for the purpose of showing that the place of accident was *under the control of the defendant*, if this becomes an issue, or that the place or machinery complained of is *not at the time of the trial in the same condition as at the time of the accident.*" *N. C. & St. L. v. Ragan*, 167 Ala. 277, 52 South. 522.

[13] Unless there was in June or July, 1910, some statute authorizing the chief mine inspector or his assistants to make recommendations to mine operators, or to enforce remedies, with reference to the safety of their plants in respect of appliances to avert injury from cars getting beyond control in the slope and running down to the endangering of persons below, we do not see how the report of Associate Inspector Neill and the letter of his chief could be admissible, even though the subject-matter of each was communicated or delivered to the mining company. We have not been able to find any such statute in effect in 1910. If there was, in fact, no such positive law, then the matter of this report and the letter of July 2, 1910, was, at most, just as if two expert miners had communicated to the company *their* idea of the hazard of operating such a mine without a "dead switch" on the entry (slope) track. Certainly that character of matter would be inadmissible to charge the operator with negligence or make aggravated wrong. The operator is not an insurer of the absolute safety of the plant, appliances, ways, etc. Individuals, though experts, have no power or authority to define what is the exaction of duty, or to point out actions or precautions which, if taken or observed, would be the performance of duty. If such individual, though expert, judgment, so communicated to the operator, was admissible as evidence, then the operator would, of necessity, be entitled to show that other individual experts advised him that no such acts or precautions were necessary or desirable in the premises, and so an issue would be injected that would cloud and confuse the trial on the real issue, whether the operator had, *in fact*, breached his duty to the proximately thereby caused injury of the party complaining.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 444)

STANDARD PORTLAND CEMENT CO. v. THOMPSON. (No. 709.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. MASTER AND SERVANT §204, 228—INJURIES TO SERVANT—LIABILITY OF MASTER—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISK—STATUTE.

Under the Employers' Liability Act (Code 1907, § 3910, subd. 1), amending Code 1896, § 1749, assumption of risk and contributory negligence on the part of an injured servant by remaining in the employment after knowledge of a dangerous condition cannot be pleaded in bar of a recovery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 670, 671; Dec. Dig. §204, 228.]

2. PLEADING §8—FACTS OR CONCLUSIONS.

A plea alleging a dangerous condition in the employment should set forth facts and not mere conclusions drawn by the pleader.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 12-28½, 68; Dec. Dig. §8.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by J. Lucian Thompson against the Standard Portland Cement Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Count 4 is indicated sufficiently in the opinion. The following are the pleas:

(3) Plaintiff was guilty of negligence which proximately contributed to his said injuries in this: That plaintiff knew of the alleged defect or negligence causing his alleged injury, and negligently failed within a reasonable time to give information thereof to his employer, or to some one superior to himself engaged in the service or employment of his employer, and defendant avers that his employer, defendant in this case, did not already know of such defect or negligence, which was known to plaintiff.

(4) Plaintiff was guilty of negligence in this: That plaintiff knew of the alleged defect or negligence causing his alleged injury, and negligently failed within a reasonable time to give information thereof to his employer, or to some one superior to himself engaged in the service or employment of his employer, and defendant avers that plaintiff was not aware that his employer or such superior already knew of such defect or negligence, and defendant in fact did not know of such defect or negligence, which negligence on plaintiff's part proximately contributed to his alleged injury.

(6) Plaintiff assumed the risk of the alleged injuries in this: That the danger of the alleged defective matter was plain, open, and obvious to one of plaintiff's experience, and that he had been upon said ladder on the day of the accident in the performance of his alleged duties, to wit, three times, and several times daily or at night according to his turn, for, to wit, two months prior to the date of his said injuries, and he knew and appreciated the danger of going upon said ladder in its then alleged condition.

The authorities noted in brief of counsel for appellee as supporting count 4 of the complaint are: A. G. S. v. Davis, 119 Ala. 576, 24 South. 862; Gloss-S. S. & I. Co. v. Mobley, 139 Ala. 425, 36 South. 181; Jackson L. Co. v. Cunningham, 141 Ala. 213, 37 South. 445; Goling v. Ala. S. & W. Co., 141 Ala. 537, 37 South. 784; Grasselli-Chem. Co. v. Davis, 166 Ala. 476, 52 South. 35; Riddle v. Bessemer S. P. Co., 170 Ala. 559, 54 South. 525.

Charles A. Calhoun, of Birmingham, for appellant. Mathews & Mathews, of Bessemer, for appellee.

MCCLELLAN, J. Action for damages by the servant (appellee) against the master (appellant) for injuries sustained while in the service. The fourth count was the only count submitted to the jury. That count is drawn under the first subdivision of the liability statute (Code, § 3910), and ascribes

the plaintiff's injury to a defect in the condition of a ladder, about 40 feet in length, from which plaintiff fell to the floor of the building. Under numerous decisions delivered here, some of which are noted on brief for appellee, the sufficiency of the count cannot now be the subject of question.

The court sustained demurrers to pleas 3 and 4. These pleas will be set out in the report of the appeal.

In the opinion, now in manuscript, in *Burnwell Coal Co. v. Russ Setzer*, as Administrator, 87 South. 604, Code 1907, § 3910, so far as presently important, is set out, and the addition made to the previous statute (Code 1896, § 1749) in the codification of 1907 is indicated by the use of italics. It is not necessary at this time to again quote the statute as it is now of force. And it may be added that a construction, in part, of the present statute will be found in the opinion in the mentioned cause.

[1] The statute must be construed as a whole; and, when so considered, it is apparent that error affected the sustaining of the demurrer to pleas 3 and 4. The statute, after the addition of the italicized feature in the Code of 1907, has not destroyed or affected the doctrine of assumption of risk or contributory negligence except in the single particular that those defenses, to an action under the first subdivision of the liability statute (Code, § 3910), cannot be predicated of the fact that the injured servant remained in the service of the master after he (servant) had knowledge of the defective condition or negligence to which in his complaint he attributes his injury, unless it was the injured servant's duty to remedy the defect, or the negligent act causing his injury was committed by him. In other words, the sum of the effect of the added feature of the statute was simply to say: If it was not the duty of the injured servant to remedy the defect and if he did not commit the negligent act causing his injury, then assumption of risk or contributory negligence of the servant in remaining in the service cannot be pleaded in bar of a recovery under the first subdivision of the liability statute. Hence the preceding feature of the statute, to which pleas 3 and 4 are referable and which they invoke, was not affected by the addition of the provisions in the Code of 1907.

[2] Plea 6 was vitally defective in its omission to aver the facts from which the mere conclusion of alleged obviously dangerous condition of the ladder was deduced by the pleader. There was no error in sustaining the demurrer to plea 6.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 339)

McCORMICK v. BADHAM. (No. 735.)

(Supreme Court of Alabama. Nov. 7, 1914.
On Rehearing, Dec. 17, 1914.)

1. CONTRACTS \S 173—DEPENDENT OR INDEPENDENT COVENANTS — INTENTION OF PARTIES.

Whether stipulations in a contract are dependent or independent covenants depends on the intent of the parties, ascertained from the contract and the surrounding circumstances at the time of its execution, though it is presumed that performance of respective acts shall be in the order of time indicated by the covenants.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 762-764; Dec. Dig. \S 173.]

2. CONTRACTS \S 147—CONSTRUCTION—INTENTION OF PARTIES.

The court, in construing a contract, must ascertain the intent of the parties, and give effect thereto, if lawful.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 730, 743; Dec. Dig. \S 147.]

3. CONTRACTS \S 173—MUTUAL AND DEPENDENT COVENANTS.

Where a thing is to be done by one party as the consideration of a thing to be done by the other, the covenants are mutual and dependent, if to be performed at the same time, and, where one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done or tendered before suit is maintainable against the other party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 762-764; Dec. Dig. \S 173.]

4. CORPORATIONS \S 116 — SALE OF STOCK—CONTRACTS—CONSTRUCTION.

A contract of sale of corporate stock, which provides that the stock shall be paid for in dividends of the corporation after payment of its present indebtedness, that the price shall bear interest only after accrual of dividends, that in the event the seller shall desire to sell his interest in the corporation within a specified time he shall have an option to purchase the buyer's stock for a specified sum, and that on the buyer voluntarily severing his connection with the corporation within the specified time he shall surrender the stock, makes payment of the price from accruing dividends after discharge of the indebtedness a condition precedent to any obligation on the seller to transfer the stock or to any right in the buyer to require a transfer.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. \S 116.]

5. TRIAL \S 169 — AFFIRMATIVE CHARGE ON AMENDED COMPLAINT—JUSTIFICATION.

A general affirmative charge for defendant on an amended count to the complaint cannot be justified on the ground of error in allowing the count as an amendment over objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 341, 381-387, 389; Dec. Dig. \S 169.]

6. CORPORATIONS \S 121 — SALE OF STOCK—CONTRACTS—RIGHTS OF PARTIES.

A buyer of corporate stock, with right to demand a transfer on payment of the price out of dividends within a specified period, agreed shortly before the expiration of the period that the seller might sell the stock to a third person and account for the price obtained. The seller sold the stock, but refused to account. Held, that the promise of the seller to account was supported by a consideration consisting of the buyer's surrender of his right to demand a transfer of the stock on payment therefor from dividends, and the buyer could enforce the

promise unless he consented to a rescission of the sale made by the seller.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. ¶121.]

On Rehearing.

7. CORPORATIONS ¶121—SALE OF STOCK—CONTRACTS—RIGHTS OF PARTIES.

Where a seller of corporate stock, to be paid for in dividends of the corporation after discharge of a present indebtedness, sold the stock to another before payment of the price, he did not thereby relieve the buyer of the obligation to pay the price from dividends, and the buyer could not maintain an action for breach of contract without first performing the condition precedent of paying the price from dividends.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. ¶121.]

8. CONTRACTS ¶335—ACTIONS—ALLEGATION OF PERFORMANCE OF CONDITION PRECEDENT.

The complaint in an action on a contract requiring performance by plaintiff within a specified period, which alleges performance before bringing suit, instituted some time after the specified period, does not allege performance of the condition precedent within the stipulated period.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1664-1676; Dec. Dig. ¶335.]

Appeal from City Court of Birmingham; O. F. Ferguson, Judge.

Action by A. H. McCormick against Henry L. Badham. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

James A. Mitchell, of Birmingham, for appellant. Percy, Benners & Burr, of Birmingham, for appellee.

MCOLLELLAN, J. On July 7, 1904, H. L. Badham, appellee, and A. H. McCormick, appellant (plaintiff below), executed a contract, of which the following were the substantial terms:

"Witnesseth, that A. H. McCormick, of Birmingham, Ala., and the Dorchester Lumber Company, Badham, S. C., have entered into a certain contract as to his connection with and services to said Dorchester Lumber Company, to which contract this agreement is made a part.

"It is understood and agreed by and between H. L. Badham and A. H. McCormick that, as part of said contract, H. L. Badham will sell to A. H. McCormick \$4,500.00 of stock of said Dorchester Lumber Company, to be paid for in dividends or earnings of said Dorchester Lumber Company after its present indebtedness of approximately \$75,000 has been discharged, and that purchase price of said stock shall bear interest at 6 per cent. only after said dividends begin to accrue.

"It is further understood and agreed that in the event H. L. Badham should desire to sell his interest in said Dorchester Lumber Company, within two years from date he shall have option of purchase of said \$4,500.00 of stock held by A. H. McCormick for sum of \$2,500.00.

"It is further understood and agreed that in the event A. H. McCormick should, of his own accord, sever his connection with the Dorchester Lumber Company within two years from date, he shall surrender said \$4,500.00 of stock."

McCormick performed the personal services contemplated by his engagement, and the salary stipulated for was paid him.

At the time of the execution of the contract quoted H. L. Badham and his brother, V. C. Badham, each owned 500 shares of the 1,000 shares of the capital stock of the Dorchester Lumber Company, operating at Badham, S. C. The corporation was heavily indebted, and for a part of this indebtedness H. L. Badham was an indorser. The provision made in the contract quoted for the sale of 45 shares of H. L. Badham's half of the capital stock was to serve, and did serve, as an inducement to McCormick to engage for his personal services in an effort to improve the operating and financial condition of the concern. Under the evidence and under the terms of the contract, it was in the nature of, if not in fact, a reward for successful results.

The plaintiff thus describes the acts and conduct of H. L. Badham, in respect of the shares referred to in the instrument, at the time the contract was made:

"Mr. Badham retained the stock; put it in an envelope at the time of the contract. There were 45 shares of \$100 each. The price at which the stock was to be paid for was agreed to be at par value. * * * The 45 shares of stock he had sold to me were at that time in Henry L. Badham's hands. * * * The stock I referred to in my direct testimony that Mr. Badham put up in an envelope was the stock he assigned to me at the time the contract was made. I did not see the stock; he explained to me that he put it in the envelope to keep it. I do not remember seeing any certificate for the 45 shares. I do not remember about the certificate. The fact is that Mr. H. L. Badham was to give me \$4,500.00 for his stock. * * * I did not read the certificate at the time it was put in the envelope. He showed it to me, and said: 'Here is the stock; I will put it in the envelope and keep it.' I did not know what it was; I took his word for it."

The concern remained in a bad financial condition during plaintiff's service therewith; due, he contends, to the unwise dominance of its direction and management by V. C. Badham. No dividends are shown to have accrued out of which, under the contract of July 7, 1904, payment for the 45 shares was to be made. It is not shown that the indebtedness of the corporation mentioned in the contract of July 7, 1904, was paid.

By this action the plaintiff sought, in counts other than that numbered 12, redress or recompense for the failure of H. L. Badham to perform his alleged contract to invest plaintiff with the title to the 45 shares or to account for its value under the contract of July 7, 1904.

The trial court gave effect in its rulings, adverse to plaintiff, to the view that the payment for the stock with dividends accruing after the discharge of the indebtedness mentioned in the contract of July 7, 1904, was a condition precedent to plaintiff's right to the 45 shares of stock; or, to state it otherwise, to the obligation on defendant to perfect its transfer to plaintiff. The legal principles governing the inquiry here presented are, of course, well established. It is

their application, only, that affords the basis of controversy in this connection.

[1] Whether parties to a contract have stipulated as for dependent or independent covenants, in respect of the obligations assumed thereunder, is, of course, a matter of intention, common to both, to be collected from the contract itself, together with the circumstances surrounding the parties at the time and those attending the engagement they make, and in the light of the common sense of it. *Nesbitt v. McGehee*, 26 Ala. 748, 755, 756; *Fulenwider v. Rowan*, 136 Ala. 287, 34 South. 975; *Loud v. Pomona Land Co.*, 153 U. S. 564, 14 Sup. Ct. 928, 38 L. Ed. 822.

[2] "The parties have an undoubted right, if they please, to make their covenants dependent or independent throughout, or to make the covenants independent as to one thing, and dependent as to another. They have a right to mould their contracts to suit their mutual convenience and interests; and, when the courts can ascertain their meaning, they are so to construe the contract as to give effect to that meaning, provided the purpose be lawful. They must be held to have intended the performance of their respective acts, in the order of time indicated by their covenants." *Nesbitt v. McGehee*, supra. The precedence of covenants "must," as said by Lord Mansfield in his quotation in *Nesbitt v. McGehee*, "depend on order of time in which the intent of the transaction requires their performance."

[3] "Where a specified thing is to be done by one party as the consideration of the thing to be done by the other, it is undeniably the general rule that the covenants are mutual, and are dependent, if they are to be performed at the same time; and if, by the terms or nature of the contract, one is first to be performed as the condition of the obligation of the other, that which is first to be performed must be done, or tendered, before that party can sustain a suit against the other." *Phillips Const. Co. v. Seymore*, 91 U. S. 646, 650 (23 L. Ed. 341); *Loud v. Pomona Land Co.*, supra.

[4] Our interpretation of the contract accords with that prevailing in the court below; viz., that the payment of the price for the stock with dividends accruing thereon, after the indebtedness mentioned had been discharged, was a condition precedent to any obligation on Badham to transfer the stock to McCormick, or to any right in McCormick to require a transfer thereof by Badham to him. The terms of the major, first provision of the contract, relating to the sale of the stock, shows an unmistakable intent to engage to sell in the future, upon the contingencies stipulated, thereby entirely refuting any idea of consummating a sale in present with only a postponement of the payment for the stock. The engagement was to sell when the dividends accruing paid Badham \$4,500. Any other construction would contradict the terms of the major provision, expressing the domi-

nating purpose, of the contract. The other clauses—viz., that assuring Badham the two-year option to buy this stock if he (Badham) desired to sell his interest in the corporation, and that stipulating for McCormick's surrender of the stock if he voluntarily severed his connection with the enterprise—must, necessarily, have been predicated of the effected purchase of the stock by McCormick, under the anterior provisions of the contract, which made precedent conditions to be met by him in perfecting his right to the stock. There is no inharmony of idea or of purpose created by the major, first provision in this connection and the subsequent clauses last referred to. It would be entirely unreasonable, and opposed to the manifest purpose the parties entertained, to interpret the instrument, which must be viewed as a whole, as if the first clause invested McCormick with the title, the right to the stock, regardless of the anticipated payment for it through accruing dividends. Nothing could be clearer, under the contract and under the evidence, than that McCormick's contribution of diligence and skill to the enterprise's conduct should afford the sum out of which his promised stockholdership should be earned and paid for. The conclusion is unescapable that, until the conditions precedent were met, McCormick had, under the contract of July 7, 1904, no right to the stock, and no obligation passed to or was upon Badham to effect its transfer to McCormick. Nor was McCormick in any position, under that contract, to implead Badham on any account in the premises until the conditions precedent had been performed, and his right to demand the stock had been perfected. There was therefore no error in sustaining demurrers taking this objection to counts of the complaint. Additionally, the evidence showed without dispute that the stock was not paid for by dividends declared and accruing after the discharge of the indebtedness mentioned in the contract.

The twelfth count declares upon the breach of a subsequent agreement between defendant and plaintiff, alleged to have been made in the month of February, 1907. Its substance is this: That H. L. Badham was negotiating to sell his interest in the corporation to his brother, V. C. Badham, at and for \$200 the share, and, in pursuit of this design, H. L. Badham, it is averred, "asked and obtained plaintiff's consent to include the said 45 shares which defendant had sold to plaintiff in the said sale, and in consideration thereof the defendant agreed with the plaintiff to account to the plaintiff or to settle with the plaintiff for the price of said stock; and the plaintiff avers that the defendant did thereafter, during the year 1907, close the said trade for the sale of the said 500 shares of the stock in the said company to the said V. C. Badham at and for the price of \$200 a share, and the defendant was paid a large part of the purchase money therefor." The further allegation is that H. L.

Badham failed and refused to account to the plaintiff according to the agreement averred.

[5] The demurrer to this court was overruled. So there is no question of its sufficiency presented for review. The objection to the allowance of count 12 as an amendment to the complaint was overruled. The propriety of the general affirmative charge given at defendant's instance cannot be justified by recourse to the assertion, even if it were well grounded, that error affected the allowance of count 12 as an amendment.

[8] As we have construed the contract of July 7, 1904, McCormick was without right to demand the transfer of the stock; the conditions precedent not having been performed. So when the agreement of February, 1907, declared on in count 12, was made, he had only a contingent, inchoate, contractual right to impose upon Badham the obligation to sell the stock to him. The opportunity to afford the performance of the conditions precedent was McCormick's contractual due, even though the period (three years) of its availability had nearly expired. The surrender, as it were, of this privilege by McCormick was a sufficient consideration to support Badham's asserted promise to account to McCormick, as is averred in count 12. McCormick testified that the contract of sale between the brothers was made, and that the price was \$200 a share. There was evidence to the contrary; but the conflict forbade the court's taking from the jury this feature of the issue made by the averments of count 12. There was evidence tending to support every material averment of count 12. The fact, if so, that in consequence of V. C. Badham's inability or failure to meet his obligations under the contract of sale made by H. L. Badham and V. C. Badham, the contract of sale was rescinded by their mutual consent, was, of course, ineffectual to annul the agreement between H. L. Badham and McCormick, alleged and declared on in count 12, and to deprive McCormick of his remedy for a breach thereof, unless McCormick consented to the rescission—a fact not shown in this record.

Our opinion is that the court erred in giving the general charge upon the issues made by count 12. The judgment is reversed, and the cause is remanded.

Reversed and remanded.

SOMERVILLE, DE GRAFFENRIED, and GARDNER, JJ., concur.

On Rehearing.

McCLELLAN, J. [7] In brief for appellant on original submission the question of condition precedent, discussed and decided in the opinion ante, was treated as the controlling inquiry presented by the demurrers

to all the counts except that numbered 12. It is now insisted that counts 10 and 11 are rendered immune from the effect of the prevailing interpretation of the contract therein declared on because of the averment that H. L. Badham sold the stock in question before the suit was instituted, and thereby disabled himself from performing his part of the contract, even though the performance of a condition precedent lay at the root of the plaintiff's rights in the premises. The doctrine relied on is that stated as cited in 9 Cyc. p. 698. Even if the averment in these counts had been that Badham sold the stock before the expiration of the period during which the performance by plaintiff of the condition precedent was stipulated to be effected, instead of the allegation that the sale was made before the suit was instituted, it is clear that such action by Badham would not relieve plaintiff of his obligation to perform the condition precedent resting upon him; since that action did not hinder or qualify plaintiff's opportunity to perform the condition precedent. 9 Cyc. pp. 701, 702, sub-head "d." Badham's obligation was to make an effective sale of the stock to plaintiff when, under the contract declared on in counts 10 and 11, the plaintiff met the precedent condition of payment therefor in a particular way; and until that condition was performed by plaintiff, or until the performance of the precedent condition was averted by Badham, there was no obligation on Badham in the premises of the breach of which plaintiff could complain. Aside from this, the contract appears to have expressly contemplated the sale of the stock by Badham, in which event he was to pay plaintiff a named sum—viz., \$2,500. Counts 10 and 11 were subject to the demurrers. Neither of them carried the essential allegation that the condition precedent, resting on plaintiff, had been performed within the period stipulated; nor was there any averment of fact in these counts wherefrom relief of plaintiff from performance of the condition precedent resulted.

[8] Referring to count 8, the condition precedent established by the written contract required performance within the period stipulated—namely, three years. The allegations of the count is that the indebtedness of the company was discharged and the dividends or earnings had paid for the stock before suit was brought. Manifestly, these averments did not accord with the precedent condition established by the written contract. The action was not instituted until some time after the three-year period had expired.

No reason appears to alter the conclusions announced in the original opinion. The rehearing is hence denied.

Rehearing denied.

(191 Ala. 457)

BIRMINGHAM WATERWORKS CO. v. BROWN. (No. 509.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. WATERS AND WATER COURSES ⇨203—WATERWORKS COMPANY—ORDINANCE CONTRACT—LEGALITY OF RATES.

A flat rate provided in an ordinance for water furnished to residences was the maximum rate which could be charged by the water company for such service, and, while the rate might be lawfully reduced, no reduction would be valid which did not operate alike on all in the same class, and where the company had not surrendered its right to exact such flat rate and no other rate had been legally provided, its contract to furnish to plaintiff's residence meter service for less than the ordinance rate, and less than the rate charged others for similar service, was illegal and invalid.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇨203.]

2. WATERS AND WATER COURSES ⇨203—WATER COMPANY—RATES—DISCRIMINATION.

Under an ordinance fixing maximum flat water rates for residences, it was intended that there should not be any discrimination by the company in its service to inhabitants of the city of the same class, since the general rule is that a corporation or municipality authorized to supply water to city residents may not discriminate as to the rates charged, at least among those of the same class, and since stability and equality of rates on the part of a public service corporation are more important than reduced rates.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇨203.]

3. WATERS AND WATER COURSES ⇨203—WATER COMPANY—ORDINANCE CONTRACT—EQUALITY OF RATES.

A water company operating under an ordinance is not a private, but a quasi public, corporation, and must exercise its opportunities for gain subject to the obligation to supply water without unjust discrimination and at uniform rates to all on its lines who apply for water and tender a reasonable compensation, and without discrimination in favor of or against any citizen or number of citizens, and if special privileges are given or equality of rights denied or unreasonable rates charged, any citizen may invoke the protection of the laws.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇨203.]

4. WATERS AND WATER COURSES ⇨203—WATER COMPANY—CONTRACT FOR SERVICE—ILLEGALITY—EFFECT.

A contract by a water company, which by ordinance was required to furnish service to residences at a fixed maximum flat rate, to furnish plaintiff's residence with meter service at less than the maximum rate and less than the rate charged others for similar services, was void, and could not be upheld in favor of the plaintiff by invoking defendant's estoppel to insist upon its invalidity.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. ⇨203.]

Sayre, J., dissenting.

Appeal from Circuit Court, Jefferson County; John C. Pugh, Judge.

Suit by Mary B. Brown against the Birmingham Waterworks Company. Judgment

for plaintiff, and defendant appeals. Reversed and remanded.

London & Fitts, of Birmingham, for appellant. A. G. & E. D. Smith, of Birmingham, for appellee.

DE GRAFFENRIED, J. This is the second appeal in this case. On the first appeal this court upheld, as valid, the contract which is the basis of this suit. *Brown v. Birmingham Waterworks Company*, 169 Ala. 230, 52 South. 915.

One of the principal questions presented on this appeal is whether this court, on the first appeal, was correct in upholding the contract as valid. For this reason, as well as on account of the importance of this case, the record has been carefully examined in consultation by the full bench, and this opinion is written for the purpose of expressing the views of those members of the court who appear as concurring in the opinion.

(1) In the case of *Smith v. Birmingham Waterworks Company*, 104 Ala. 315, 16 South. 123, this court said:

"The only cases in which water furnished to the 'inhabitants' is not to be charged for by measurement are specified in the first part of section 12, supra, and include only 'dwellings,' and then for 'water-closets' and 'bath tubs' for private families. For these the contract fixes a definite amount for water furnished without regard to measurement. We would not be understood as holding that the designated classes could abuse the privileges by unnecessary extravagance or waste of water; but for the use of water in reasonable quantities, sufficient without inconvenient economy for the purposes mentioned, the rates are fixed."

[1] The above opinion was rendered by a court which is regarded by the profession as one of exceptional ability, and since the rendition of that opinion this court has not—except in the opinion rendered on the first appeal in this case—upheld as legal any contract covering rates for water furnished by the water company to residences in the city of Birmingham which did not conform to the ordinance contract made by the water company with the city of Birmingham as construed in the above case. The flat rate provided in said ordinance contract for residences is the maximum rate which can be charged by the water company for water furnished to residences, and while undoubtedly that rate may be lawfully reduced, no reduction can be upheld which is not operative alike upon all who occupy the same class and which is not discriminatory in its character. *Birmingham Waterworks Company v. Mayor, etc., of Birmingham*, 42 South. 10; *Birmingham Waterworks Co. v. Truss*, 135 Ala. 530, 33 South. 657; *City of Mobile v. Bienville Water Supply Co.*, 130 Ala. 384, 30 South. 445.

In the above case of *Birmingham Waterworks Company v. Mayor, etc., of Birmingham*, 42 South. 10, this court, in holding

that the city court of Birmingham, sitting in equity, erred in sustaining the demurrer to paragraph J of the bill of complaint in that case, in reality declared that contracts containing stipulations similar to those contained in the contract now under consideration were illegal. On the former appeal in this case this court, in the effort to sustain the contract now under consideration, said:

"The second proposition is that a condition could arise under the provisions of said contract where a greater charge could be made by defendant than that provided by the maximum rate; that is, that the rate provided for water in excess of 3,333 gallons per month is such that the excess could be large enough to make the rate greater than the maximum rate fixed by the franchise contract. We think it a sufficient answer to this argument to say that the parties contracted with full knowledge of what the franchise contract provided, as well as the law, and what limitations the same imposed, and that a proper construction of the contract between appellant and appellee would be that there was implied the following: 'Provided, that the charge for water shall in no case be greater than the maximum provided by said franchise contract, and, provided further, that it shall not be greater than what is a reasonable charge.'"

The contract which is made the basis of this suit contains plain provisions to pay for all water in excess of 3,333 gallons per month "by the regular schedule of meter rates, which are made a part of this application and agreement." In other words, the contract now under consideration contains, as already stated, provisions substantially identical with those which were described in paragraph J of the bill of complaint considered in *Birmingham Waterworks Co. v. Mayor, etc., of Birmingham*, supra, and which were in that case, in effect, condemned as illegal. We find nothing in this record indicating that since the rendition of the opinion in *Smith v. Birmingham Waterworks Company*, supra, the water company has surrendered the right to exact the flat rates which are provided in the ordinance contract for residences in the city of Birmingham, or that any other rate has been legally provided for such residences, and, this being true, these rates are, in so far as the evidence in this record discloses, the only rates which the water company has the right to offer to, or exact of, its customers in the city of Birmingham. *Smith v. Birmingham Waterworks Co.*, supra; *Birmingham Waterworks Co. v. Mayor, etc., of Birmingham*, supra; *Birmingham Waterworks Co. v. Truss*, supra; *City of Bessemer v. Bessemer City Waterworks*, 152 Ala. 391, 44 South. 663; *Crosby v. City Council of Montgomery*, 108 Ala. 498, 18 South. 723; 3 Dillon on Mun. Corp. (5th Ed.) p. 2236, § 1326. In fact, the contract now under consideration is a contract which this court in *Smith v. Waterworks Co.*, supra, expressly declared the waterworks company had no authority, under its ordinance contract, to make with its customers.

(2) In the opinion on the first appeal this court said that:

The "*Birmingham Waterworks Company* had a right to contract with an individual to furnish water at a less rate than the maximum rate fixed by said franchise contract, and less than that charged other individuals for similar service so long as the discrimination is enjoyed by those having the favored rate at the expense of the company, and does not impinge upon any rights of other consumers."

This statement was based upon some expressions which are to be found in *State ex rel. C. W. Ferguson v. Birmingham Waterworks Company*, 164 Ala. 586, 51 South. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951. In that case there was a petition for a writ of mandamus, wherein it was claimed that the company had entered into contracts with some consumers similarly situated with the relator, by which it had undertaken to furnish to them water at a rate less than the maximum charges allowed by the ordinance contract. The relator did not claim that he was charged more than the maximum rate, nor that he was charged more than a reasonable price for the water furnished him, but he contended that he was entitled to receive water at the most favorable rate furnished to any others similarly situated. Upon these allegations of the petition for the writ of mandamus this court held that the relator was not entitled to the writ.

In the opinion in that case this court, after declaring that "the business of a company furnishing water to the public is naturally monopolistic and, being given the power of eminent domain to serve the needs of the public more effectually, must serve all consumers with equal facilities without discrimination," indicated that a contract made by the *Birmingham Waterworks Company* with a favored customer at a rate less than the rate fixed for residences, etc., by the ordinance contract as construed in *Smith v. Birmingham Waterworks Company*, supra, and at rate less than that charged its other customers, might, under certain circumstances, be upheld.

[2] This case of *State ex rel. Ferguson v. Waterworks Company*, supra, is reported in 164 Ala. 586, 51 South. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951, and in a note to that case (27 L. R. A. [N. S.] page 674) we find the following:

"It may be stated as a general proposition that a corporation or municipality authorized to supply water or light to the inhabitants of a municipality may not discriminate as to the rates charged, at least among those of the same class."

Cited, as sustaining the above proposition, we find in this note the following cases: *Danville v. Danville Water Co.*, 180 Ill. 235, 54 N. E. 224; *State ex rel. Latshaw v. Water & Light Com'n*, 105 Minn. 472, 117 N. W. 827, 127 Am. St. Rep. 581; *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240; *Armour Packing Co. v. Edison*

Electric Illuminating Co., 115 App. Div. 51, 100 N. Y. Supp. 605; Cincinnati, H. & D. R. R. Co. v. Bowling Green, 57 Ohio St. 336, 49 N. E. 121, 41 L. R. A. 422; Mobile v. Bienville Water Supply Co., 130 Ala. 379, 30 South. 445; Snell v. Clinton Electric Light, H. & P. Co., 196 Ill. 626, 63 N. E. 1082, 58 L. R. A. 284, 89 Am. St. Rep. 341.

When the city of Birmingham made its contract with the waterworks company it intended—and the contract so provides—that there should not be *any* discrimination made by the waterworks company in the matter of supplying water to the inhabitants of the city of the same class. The maximum rates provided for residences are specific and certain. Stability and equality of rates on the part of a public service corporation are more important than reduced rates. It was the fact that without a contract fixing the rates for water there would probably be instability and inequality of rates, and out of this instability and inequality, unjust discrimination, and other unlawful practices with reference to such rates, the city of Birmingham exacted the contract with appellant, and by that contract fixed a definite, uniform, maximum rate for residences in said city. The law must see that all citizens of the same class receive the same treatment at the hands of public service corporations, and the spirit which controlled the city of Birmingham in exacting this contract from the waterworks company was the same spirit which actuated the Congress of the United States in its legislation with reference to tariffs for freight transported by carriers engaged in interstate commerce. On that subject we quote the following from A. J. Poor v. Chicago, Burlington & Quincy R. R. Co. et al., 12 Int. Com. Com'n Rep. 418:

"Stability and equality of rates are more important to commercial interest than reduced rates. It was instability and inequality that were the special evils to be remedied; it was the possibility that one shipper, in one way or another, whether by mistake or otherwise, could, and actually did, get a lower rate than another shipper that led to more stringent legislation."

The case of Louisville & Nashville Railroad Company v. McMullen, 5 Ala. App. 662, 59 South. 683, in which the opinion of the Court of Appeals was prepared by the writer, deals with the many questions which are now under consideration, and cites some of the authorities which are pertinent to the subject now in hand. That the members of the public are entitled under the law to receive uniformity of treatment at the hands of public service corporations, and that contracts not partaking of a private nature, between public service corporations and some members of the public, whereby special privileges are obtained which are not commendable as matter of right by all other members of the public of the same class, will not be upheld, have become truisms of the law; and the trend of modern legislation, state

and federal, in so far as public service corporations are concerned, has been largely to that important end. That one member of the public of a particular class shall not be accorded the same identical treatment that is accorded to another member of the public of the same class, by a public service corporation, is not only not in harmony with an enlightened sense of right and fair play, but is opposed to the true reasons upon which such corporations are given their franchises and are permitted to exist. Indeed, whenever inequality in such treatment is attempted by a public service corporation, dissatisfaction is the necessary result, and this dissatisfaction ultimately finds expression in unpleasant and expensive litigation.

The city of Birmingham, when it made the contract with the waterworks company which was construed by this court in *Smith v. Waterworks Company*, supra, was acting for all of the inhabitants of the municipality. While, in *State ex rel. Ferguson v. Waterworks Company*, supra, this court stated that, under certain conditions, the Birmingham Waterworks Company might vary the terms of the contract which it made with the city for the benefit of some favored customer, the authorities cited in the note to that case, as it appears in 27 L. R. A. (N. S.) 674, will show with what sparingness the courts of last resort are willing to uphold contracts made with public service corporations which confer special favors upon individuals with whom they deal as servants of the public.

The pronouncement of the courts in the cases above cited, and the undisputed facts in the instant case, all show the wisdom of the courts in rigidly holding public service corporations, in their dealings with the public, to uniformity in rates. In the instant case, a contract by meter rates was entered into. The customer complied with the letter of her contract and tendered to the water company the amount due under the terms of her contract. This amount the company refused to accept, demanding the amount which, under the flat rate, was due to it. The customer, believing herself entitled to the benefits of the meter contract which she had made with the company, refused to comply with the demands of the company and thereupon the company cut its water from her residence. This act on the part of the company has caused the plaintiff great annoyance, inconvenience, and suffering, and in addition to this the present resulting litigation has caused expense and annoyance to all of the parties concerned. This record discloses that the plaintiff is not the only party in Birmingham with whom the water company has made a contract similar to that of the plaintiff, and all of this conflict between the parties, and all of the annoyance, inconvenience, and suffering which was occasioned the plaintiff by being denied the defendant's water, have been due to the lack of observ-

ance by the defendant and some of its customers of the above salutary rules which have been so plainly announced by this court in a large number of its decisions.

If contracts of this character are to be upheld and made the basis of recovery in an action at law, then uniformity of water rates in the municipality of Birmingham disappears, and the water company may discriminate among its customers as it pleases. This the law will not permit it to do. *Smith v. Birmingham Waterworks Co.*, supra; *Birmingham Waterworks Co. v. Mayor, etc.*, of Birmingham, supra; *Griffin v. Goldsboro Water Co.*, supra.

(3) That there is a divergence of views among the courts of last resort on the question as to whether, at common law, a public service corporation was under the necessity of furnishing to its customers of the same class the same identical rates there can be no doubt. *Ernest St. George Lough et al. v. Outerbridge et al.*, 143 N. Y. 271, 38 N. E. 292, 25 L. R. A. 674, 42 Am. St. Rep. 712; *L. & E. & St. L. Con. R. Co. v. Wilson*, 132 Ind. 517, 32 N. E. 311, 18 L. R. A. 105; *Cowden v. Pacific Coast S. S. Co.*, 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142; *Griffin v. Goldsboro Water Co.*, supra. An examination of those cases as above reported, including the notes and the cases cited in the briefs of counsel, will disclose the conflict to which we refer.

[3] The question however, was set at rest, in so far as this state and the franchise contract of the Birmingham Waterworks Company are concerned, by this court, in *Birmingham Waterworks Company v. Mayor, etc.*, of Birmingham, supra. In that case this court said:

"An examination of the contract clearly shows that it was the intention of the parties to secure to the citizens of Birmingham water at reasonable and uniform rates, without discrimination in favor of or against any citizen or number of citizens. This was one of the objects sought to be accomplished by the parties. Not only was this a moral duty, but it was a duty imperatively demanded of them by the law. A water company acts not as a private, but a quasi public, corporation. 'It enjoys and must exercise its opportunities for gain, subject to its obligation to the public that it will supply water without unjust discrimination and at uniform rates to all those along the lines of its mains, who apply and tender a reasonable compensation.' 30 A. & Eng. Ency. Law (2d Ed.) 426. Referring to the principle above announced, in the *City of Mobile v. Bienville Water Supply Co.*, 180 Ala. 384, 30 South. 447, it is said: 'The principle announced is reasonable and necessary. Without it the business interests and domestic comfort of the community, so far as dependent on supplies such companies furnish, would be at their mercy and make them masters, in this regard, of the city they were established to serve. As said by the Supreme Court of North Carolina: "A few wealthy men might combine and, by threatening to establish competition, procure very low rates, which the company might recoup by raising the price to others not financially able to resist—the very class which most needs protection of the law. The law will not and cannot tolerate discrimination in the

charges of these quasi public corporations. There must be equality of rights to all and special privileges to none; and, if this is violated or unreasonable rates are charged, the humblest citizen has the right to invoke the protection of the laws equally with any other." *Griffin v. Water Co.*, 122 N. C. 206, 30 S. E. 319, 41 L. R. A. 240." It will thus be seen that the complainant and respondent were without power to make a contract providing for unreasonable rates or rates not uniform to consumers; nor could they make a contract that would permit discrimination in favor of certain citizens and against others."

See further on the above subject *City of Montgomery v. Greene*, 180 Ala. 322, 60 South. 900, in which the above doctrine is reaffirmed.

[4] (4) The opinion on the first appeal in this case was prepared for this court by a careful and painstaking judge, and was, after consultation, adopted as the law of this case. It may be that it failed to measure up to the rigid exactions of the law because that sense of fair play which dictated the rules governing the subject of equality of rates, which we have above discussed, hesitated to concede to one engaged in the public service the right to make its own violation of its ordinance contract with the city of Birmingham a justification for denying to the plaintiff the right of supplying her residence with water under the terms of an agreement which it had made with her. The demands of the rules of law which we have above extracted from our own cases, appear to be inexorable, and those rules appear to rest upon foundations which are not only unassailable, but which were adopted for the public good. In our opinion the plaintiff's contract with the defendant was void for the reasons which we have above stated, and we do not think that it can be upheld in favor of the plaintiff under the doctrines announced in 1 Page on Contracts, §§ 330-332, *Packard v. Byrd*, 73 S. C. 1, 51 S. E. 678, 6 L. R. A. (N. S.) 547, 9 Cyc. 550, and *Trentman v. Wahrenburg*, 30 Ind. App. 304, 65 N. E. 1057. In this case the parties made a contract which the policy of the law prohibited either party to the contract from making, and it is familiar doctrine that an agreement void as against public policy cannot be rendered valid by invoking the doctrine of estoppel.

(5) In this case there was, it is true, a dispute as to what amount the plaintiff should pay the defendant for water for her residence. This dispute grew out of the fact that the plaintiff and the defendant had made with each other a contract which was void because the law itself condemned the contract which they made. The reasoning, therefore, of the Supreme Court of Maine in *Wood v. Auburn*, 87 Me. 293, 32 Atl. 908, 29 L. R. A. 376, and of the Supreme Court of Mississippi in *Telegraph Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702, has no applicability to the facts in this case.

(6) It follows, therefore, that the opinion of this court on the former appeal (*Brown v. Birmingham Waterworks Co.*, 169 Ala. 230, 52 South. 915) in so far as it conflicts with

the views expressed in this opinion, is expressly overruled. It also follows that in our opinion the trial judge committed reversible error in giving to the jury at the request of the plaintiff, affirmative instructions in her behalf. In our opinion, under the evidence in this case as it is disclosed in the bill of exceptions, the defendant was entitled to affirmative instructions in its behalf.

Reversed and remanded.

ANDERSON, C. J., and MCLELLAN, SOMERVILLE and GARDNER, JJ., concur. MAYFIELD, J., not sitting. SAYRE, J., dissents.

ANDERSON, C. J. While fully concurring in the foregoing opinion, I do not wish to be understood as approving the contract in question even if the terms and rate therein provided were uniform and applied to all of the dwellings of the city. The original ordinance contract between the waterworks and the city has been several times before this court and it was then held that said contract did not authorize a meter rate as to dwellings, and that they had to be supplied with water under a flat rate. *Smith v. Birmingham Waterworks*, 104 Ala. 315, 16 South. 123; *Waterworks v. Mayor, etc.*, 42 South. 10. It may be that the flat rate there provided was the maximum rate, and that a lower flat rate, if uniform, would be permissible, but to my mind, a contract on a meter rate is questionable under any condition. On the other hand, if it be conceded that the company could make an uniform meter rate which would be less than the maximum flat rate as fixed by the ordinance contract, it would have to affirmatively appear from the last contract that the rate so fixed could not exceed the maximum flat rate prescribed by the ordinance contract, and which fact does not appear in the present contract, or the provision guarding against this point was improperly read into same upon the former appeal of this case. 169 Ala. 230, 52 South. 915. It may be that the sale of water by the meter rate is more equitable to all parties concerned than by the flat rate, but this court must deal with contracts as they are, and not as they might or should be.

SAYRE, J. (dissenting). I do not concur in a reversal on the ground taken in the prevailing opinion. I have not examined the record to see whether there be other ground of reversal; for, as the case has been decided, that would be useless. I do not take issue with all the broad generalizations of the opinion. It is to be conceded, for example, that, in the absence of a statute controlling the subject, a public service corporation has no right to make unreasonable charges for its services, and that, if such corporation exacts a compensation in excess of that which is reasonable, the customer may recover the excess on an indebitatus count. Here the

opinion proceeds on the notion, not that plaintiff was required to pay too much, but that she may have been let off with too little. Three things are to be noted: The ordinance contract does not fix any rate absolutely, but only a maximum beyond which defendant could not go; there is no statute or ordinance requiring uniformity, though doubtless it would be better for convenience in administering the law in such cases that there should be; the defendant is a private corporation doing business primarily, it is safe to assume, for the benefit of its stockholders. A municipal corporation in many respects stands on the same footing as a private corporation engaged in the same line of business. It occurs to me, however, that there is this difference which may be worthy of consideration: That the public are quasi stockholders in any municipal business of a private character, and its members as such are entitled, as matter of law and right, to uniformity of treatment. Being a private corporation, defendant solicited plaintiff to enter into a contract with it. She did so. Defendant now contends, or the opinion so holds, that, the contract being void as against a general public policy requiring uniformity, plaintiff acquired under it no rights which defendant is bound to respect. I do not say she was entitled to the contract in the beginning, though, for aught appearing, she may have been. That she could not have required defendant to enter into the contract, assuming that she was tendered a contract unduly favorable to her, is all that a number of the cases cited in the prevailing opinion go to prove. I do say that neither the legal nor the moral aspects of the defendant's position with reference to the contract in question carries any appeal to my mind.

In the absence of statute or equivalent competent municipal ordinance to the contrary, mere inequality in the charges made by a public service corporation does not of itself amount to an unjust discrimination. "At the foundation of the whole matter lies the common-law rule, just and well settled, that in each particular case there should be charged a reasonable compensation, and no more." 2 *Hutchinson on Carriers* (3d Ed.) § 521.

This was the effect of the language used in *State ex rel. Ferguson v. Birmingham Waterworks Co.*, 164 Ala. 586, 51 South. 354, 27 L. R. A. (N. S.) 674, 137 Am. St. Rep. 69, 20 Ann. Cas. 951, though it may have been aside from the precise question there involved. The idea I find to be more clearly expressed in *Wagner v. Rock Island*, 146 Ill. 156, 34 N. E. 549, 21 L. R. A. 519, as follows:

"It is a rule of the common law that parties carrying on business which is public in its nature, or which is impressed with a public interest, cannot select their patrons arbitrarily, but must serve all who apply on equal terms, and at reasonable rates, but this is as far as the rules of the common law seem to have gone. They do not require absolute uniformity

of rates, nor forbid discrimination by performing the service for one at rates lower than those exacted of others. The most familiar illustration of pursuits of this character is that of a common carrier, and the well-recognized rule is, that while the carrier cannot select his patrons arbitrarily, and must furnish equal facilities to all and on equal terms, he is not forbidden to take one customer's goods at an unreasonably low rate, or to confer on that customer other practical advantages in the transportation to which competitors and the general public are not admitted. Schouler on Bailments and Carriers, § 380; Hutchinson on Carriers, § 447. The same rule doubtless, where no statutory restriction has intervened, is equally applicable to all other kinds of business which have become affected with a public interest, such as that ordinarily carried on by telegraph or gas companies, the construction and maintenance of public wharves, or the maintenance and operation of waterworks in cities."

This proposition is discussed and approved in Hutchinson on Carriers, *ubi supra*, and Schouler on Bailments and Carriers (2d Ed.) § 380, modern treatises both, where many cases, modern and ancient, American and English, are cited.

"This court can know nothing of public policy except from the Constitution and the laws, and the course of administration and decision." License Tax Cases, 5 Wall. 462, 469 [18 L. Ed. 497]. "When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations, and restrictions, the courts are bound to consider them as indicating a definite policy, and to yield obedience thereto." Baum v. Baum, 109 Wis. 47, 53, 85 N. W. 122, 123 (53 L. R. A. 650, 83 Am. St. Rep. 854). But here, as I have already noted, nothing is fixed by the ordinance contract except the maximum charge, and, I take it, this court would hardly hold absolutely void contracts establishing a uniform charge more favorable to the people of Birmingham. "The power to refuse to enforce a contract as against public policy is one of limits not clearly defined and the courts prefer, in cases not settled by recognized precedence, to use such power only in clear cases. The defense of public policy is so often interposed as a last resort that the courts have become suspicious of it. There may be said to be a strong tendency at modern law to restrict the operation of public policy as avoiding contracts to cases included under recognized legal principles, or under statutes." The foregoing sentences have been collated from 1 Page on Contracts, § 328, a modern and respectable authority, where many modern adjudicated cases are cited. Here plaintiff did no wrong, she could not be required to know what a reasonable rate would be, and defendant was giving the same rate to others. Nor, for that matter, does it appear that defendant in tendering the contract did any wrong or hurt to the public. The wrong, if any, may have been that all the citizens of Birmingham were not offered the same rate. So

far as anybody knows the reduced rate, rather than the higher rate which the court has imposed on plaintiff, was the reasonable rate, and should be made the uniform rate. So, in my judgment, the contract at the bottom of plaintiff's asserted right was not void, and defendant's appeal to public policy ought not to be entertained in a court of justice.

Response to Application for Rehearing.

DE GRAFFENRIED, J. On this application for a rehearing, it is argued that this court, in effect, has held that the water company may not voluntarily establish a uniform rate less than the maximum rate fixed by the ordinance contract referred to in the above opinion. It is also argued that this court has, in said opinion, held, in effect, that said ordinance contract cannot be altered by legislative action taken either directly by the state or by the state acting through the city.

In the above opinion we have confined ourselves to the questions presented by the record, and we have undertaken to decide no other question. The above points which it is claimed on this rehearing have been decided, in effect, by the above opinion, have not been before us for review, and they have not, of course, been decided by us. Those points, not being raised by this record, cannot in this case be passed upon by this court.

(2) In so far as the question which, in this case, we have determined, is concerned, we think that the true rule at common law on the subject was correctly stated by the Supreme Court of New Jersey in the following language:

"The business of the common carrier is for the public, and it is his duty to serve the public indifferently. He is entitled to a reasonable compensation, but on payment of that he is bound to carry for whoever will employ him, to the extent of his ability. A private carrier can make what contract he pleases. The public have no interest in that, but a service for the public necessarily implies equal treatment in its performance, when the right to the service is common. Because the institution, so to speak, is public, every member of the community stands on an equality as to the right to its benefit, and, therefore, the carrier cannot discriminate between individuals for whom he will render the service. In the very nature, then, of his duty and of the public right, his conduct should be equal and just to all. So, also, there is involved in the reasonableness of his compensation the same principle. A want of uniformity in price for the same kind of service under like circumstances is most unreasonable and unjust, when the right to demand it is common. It would be strange if, when the object of the employment is the public benefit, and the law allows no discrimination as to individual customers, but requires all to be accommodated alike as individuals, and for a reasonable rate, by the indirect means of unequal prices some could lawfully get the advantage of the accommodation and others not." Messenger v. Penn. R. R. Co., 37 N. J. Law, 531, 18 Am. Rep. 754.

To the same effect is Fitzgerald et al. v. Grand Trunk R. Co., 63 Vt. 169, 22 Atl. 76, 13

L. R. A. 70. Indeed, we think that the great weight of modern authority sustains the conclusions which have been expressed by this court in the above opinion.

The application for a rehearing is overruled.

ANDERSON, C. J., and MCLELLAN, SOMERVILLE, and GARDNER, JJ., concur. SAYRE, J., dissents. MAYFIELD, J., not sitting.

(12 Ala. App. 33)

BOUIE v. STATE. (No. 808.)

(Court of Appeals of Alabama. Feb. 2, 1915.
Rehearing Denied Feb. 11, 1915.)

1. WITNESSES \S 317—WEIGHT OF TESTIMONY—DISREGARD OF EVIDENCE.

Before the jury can disregard the entire testimony of a witness on the ground that he falsely swore to a material fact, they must believe that he willfully falsified, and an instruction disregarding the element of willfulness is properly refused.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. \S 317.]

2. WITNESSES \S 270—IMPEACHMENT.

Where deceased's brother, who testified as to the killing, at no time swore that deceased was not drinking or that he was not ugly when drinking, he cannot be cross-examined as to whether he did not tell a third person that deceased was drinking, that when he was drinking he was rowdy, and that that was the reason he got killed, for such evidence did not tend to discredit the witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 926, 955-957; Dec. Dig. \S 270.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Peter Bouie was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The following charges were refused defendant:

(1) The court charges the jury that, if they believe that Mallie Willis swore falsely as to material facts on a former trial of this case, they may disregard his evidence in the present trial. (2, 3) Same as 1 as to other witnesses named.

Lee & Tompkins, of Dothan, for appellant. W. L. Martin, Atty. Gen., for the State.

THOMAS, J. [1] Written charges numbered 1, 2, and 3, requested by defendant, and the refusal of which by the court is suggested as error, were clearly faulty. Before the jury are authorized to disregard the entire testimony of a witness on the basis of a false swearing by him as to a material fact, they must believe that he willfully swore falsely as to such fact; whereas, these charges predicate such right upon a mere false swearing. "Falsus in uno, falsus in omnibus," is the maxim; but the falsity must be willful—an intentional lapse from what the witness knows to be the truth. When such corruptness of the witness has been proved as to his statement with respect to one material fact—since it furnishes an index to his

whole character—it may shatter his credibility in toto and justify a disbelief of all other statements made by him on the trial. But where the falsity of the statement proceeds from honest mistake or a misunderstanding, rather than from a willfulness to commit perjury, the rule is different and does not warrant the dethronement of the integrity of the entire testimony of the witness on this account. Gillespie v. Hester, 160 Ala. 445, 49 South. 580; Burton v. State, 115 Ala. 1, 22 South. 585; Seaboard Air Line v. Taylor, 9 Ala. App. 628, 64 South. 187. The charges mentioned ignored the question of willfulness, and were properly refused. Authorities supra.

[2] Defendant was charged with murder in the second degree, was convicted on a former trial of manslaughter in the first degree, and on this trial pleaded that conviction as an acquittal of murder in the second degree, which plea was confessed by the state. Consequently, the defendant was tried this time only on a charge of manslaughter. He pleaded self-defense and was found guilty of manslaughter in the first degree.

The only exception to the action of the court in its rulings on the evidence was to its sustaining of the solicitor's objection to the following question propounded by defendant's counsel on cross-examination to the state's witness Jonas Long, a brother of deceased, to wit:

"Did you not tell Jack Jackson, several months after the shooting, at Mr. Strong's plantation in this county, when no other persons were present but you and he, and in response to his inquiry as to how your brother [the deceased] came to get killed, that 'he [deceased] was drinking and that when he was drinking he was very rowdy and that is the very reason he got killed?'"

Assuming that the witness made this statement to Jack Jackson, there is nothing in it impeaching or contradicting any statement, material or even immaterial, as for that, made by the witness on this trial. The witness nowhere swore on this trial that deceased was not drinking; and nowhere swore that when deceased was drinking he was not rowdy; and nowhere swore—and could not legally have been permitted to swear to any such conclusion or the reverse—that because the deceased was drinking and was rowdy when drinking was not the reason he got killed.

We find no error in the record, and the judgment of conviction is affirmed.

Affirmed.

(12 Ala. App. 606)

HILL v. CITY OF PRATTVILLE. (No. 167.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

MUNICIPAL CORPORATIONS \S 642—VIOLATION OF ORDINANCES—PROSECUTION—REVIEW—WANT OF JURISDICTION OF LOWER COURT.

Where the record on appeal from a conviction in the circuit court for the violation of a

city ordinance, of which that court had jurisdiction only on appeal from the recorder, does not show a conviction before the recorder of the appeal therefrom, it must be presumed that the prosecution was instituted in the circuit court, and the judgment is a nullity for a want of jurisdiction, and an appeal therefrom will therefore be dismissed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1412-1415; Dec. Dig. ¶642.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

J. W. Hill was convicted in the circuit court of violating an ordinance of the City of Prattville, and he appeals. Appeal dismissed.

C. B. O. Timmerman, of Prattville, for appellant. Eugene Ballard, of Prattville, for appellee.

THOMAS, J. The circuit court of Autauga county, from whose judgment this appeal is taken, has no jurisdiction of an offense in violation of the ordinances of the town of Prattville, which is the charge here, except upon appeal from a conviction before the recorder of said town. There is nothing in the record before us showing such a conviction and appeal—no judgment of the recorder and no appeal bond. Therefore, for aught appearing in the record to the contrary, the prosecution was originally commenced in the said circuit court of Autauga county upon a statement in writing of the city attorney of Prattville. If so, which in the state of the record mentioned must for purposes here be presumed, the judgment of conviction in the circuit court, from which this appeal is prosecuted, is a nullity and will not support the appeal. *Roney v. Floral*, 10 Ala. App. 370, 65 South. 91. The appeal is consequently dismissed.

Appeal dismissed.

(12 Ala. App. 209, 659)

ARRINGTON v. STATE. (No. 351.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

CRIMINAL LAW ¶1086—**APPEAL**—**RECORD**—**SUFFICIENCY.**

Where there is nothing save the bill of exceptions to show that accused has ever been tried, and no judgment of conviction appears from the record, the appeal must be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2769, 2770, 2772, 2794; Dec. Dig. ¶1086.]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

James Arrington was convicted of crime, and he appeals. Appeal dismissed.

H. L. Martin, of Ozark, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. All the record in this case shows is the organization of the court, the indictment, writ of arrest, appeal bond, bill of exceptions, and appearance bond. There

is nothing except the bill of exceptions to show that the appellant has ever been tried. In short, the record does not show a judgment of conviction, which is necessary to support an appeal. *Allen v. State*, 141 Ala. 35, 37 South. 393.

The appeal must therefore be dismissed. Appeal dismissed.

(12 Ala. App. 39)

BENTLEY v. STATE. (No. 191.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. HOMICIDE ¶171—**EVIDENCE**—**ATTENDING CIRCUMSTANCES.**

In a prosecution for manslaughter in the second degree, where it appeared that decedent was killed by being struck by defendant's automobile as it was skidding after colliding with another car, so that the fault of the defendant in causing the collision was material, and a witness for the state had testified from his examination of the cars immediately after the accident that the defendant struck the other car on the right front wheel, it was error to exclude testimony of a witness for the defendant, properly qualified, who also examined the cars shortly after the collision, as to where the defendant's car was struck by the other.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 351-358; Dec. Dig. ¶171.]

2. CRIMINAL LAW ¶366—**EVIDENCE**—**RES GESTÆ**—**SECOND DEGREE MANSLAUGHTER.**

In a prosecution for second degree manslaughter, in which intent was not in issue, and where it was shown without conflict that the decedent was killed by being struck by defendant's automobile, it was error to admit in evidence as part of the res gestæ the cries and prayers of the injured man while still pinned beneath the car; since that evidence could shed no light on any fact in controversy, and only tended to arouse passion and prejudice in the minds of the jurors.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 811, 814, 819, 820; Dec. Dig. ¶366.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Louis Bentley was convicted of manslaughter in the second degree, and he appeals. Reversed and remanded.

L. A. Sanderson, of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PELHAM, P. J. The defendant was indicted for manslaughter in the second degree for killing one J. H. Moore by negligently running over or against him with an automobile.

[1] It appeared from the evidence on the trial without conflict that immediately preceding the occurrence which resulted in the automobile operated by the defendant "skidding" some 50 feet and running upon a pavement and crushing the said Moore, who was walking along the sidewalk, against a brick wall, and so injuring him that he died as a result of the injuries inflicted, there had been a collision at one of the street crossings in the city of Montgomery between the auto-

mobile operated by the defendant, known as the "Abraham" car, and another automobile, called the "Gay" car. It was a material inquiry in fixing criminal responsibility for the death of Moore on the defendant to show that the defendant was at fault in bringing about the collision. As having a tendency to prove this fact, different witnesses were allowed to testify for the state with respect to the condition and marks on the cars after the collision, and one witness, Doster by name, testified in behalf of the state that he examined the cars soon after the accident, and, after stating the condition of the Gay car, was allowed to give his judgment that "it was struck on the right front wheel." This witness was shown to have had eight years' experience with automobiles, but was not a mechanic. After the introduction of this evidence by the state, the defendant introduced one Fred Newell as a witness in his behalf, and, after showing on the preliminary examination that he was an automobile mechanic of ten years' experience, and that he had also examined the two cars within half an hour after the accident, the defendant's counsel asked the witness: "Where was the Abraham car hit?" The court was in error in sustaining the solicitor's objection to this question, for, aside from the fact that the evidence sought to be elicited by the question was otherwise competent, the ruling operated as a denial to the defendant, that concluded him from meeting with kind the evidence of an identical nature, tending to prove a material issue, that had been previously admitted in behalf of the state. *Pollack v. Gunter & Gunter*, 162 Ala. 317, 320, 50 South. 155.

[2] As the defendant was on trial charged with second degree manslaughter, there was no issue before the court of an intent, and, as the person's death who was alleged to have been killed as the result of being struck by the automobile operated by defendant was without conflict in the evidence shown to have been directly attributable to having been so struck, we think the court should not have permitted the solicitor to prove against the defendant's objection that after the pedestrian was struck, and before he died, and while still pinned between the car and the wall, "he kept on repeating, 'God have mercy on me!'" and using similar expressions, prayers, or outcries. While this may have been part of the *res gestæ*, as ruled by the trial court in admitting proof of these outcries over the objection of the defendant, yet it had no legitimate tendency to prove any issue or shed light on any matter in controversy before the court, and was calculated to be highly prejudicial to the defendant in arousing a feeling of sympathy, passion, or prejudice in the minds of the jury. The facts or circumstances of a transaction, to be admissible as forming part of the *res gestæ*,

should be evidentiary of the litigated fact. It is only those contemporaneous circumstances, facts, and declarations growing out of the main fact which serve to illustrate, elucidate, or explain the character or quality of the act, or show a motive for acting, that are properly admissible on the theory of being a part of the *res gestæ*.

Other matters presented by the record are without error requiring a reversal, but, for the errors pointed out, the judgment of conviction must be reversed, and the cause remanded.

Reversed and remanded.

(12 Ala. App. 347)

LOUISVILLE & N. R. CO. v. JONES.

(No. 110.)

(Court of Appeals of Alabama. Nov. 10, 1914.

Rehearing Denied Jan. 21, 1915.)

1. CARRIERS \S 158—CARRIERS OF GOODS—LIMITATION OF LIABILITY—SPECIAL CONTRACT.

A common carrier of goods may limit its liability, for injury or destruction of such goods not caused by its own negligence, by a contract establishing a reasonable proportion between the amount charged for carriage and the amount limited to be the extent of the carrier's liability.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. \S 158.]

2. CARRIERS \S 158—COMMON CARRIER OF GOODS—LIMIT OF LIABILITY FOR LOSS BY NEGLIGENCE.

In the absence of statute, a common carrier of goods cannot limit its liability for loss or destruction of goods by its own negligence, when such limitation is much below the real worth of the property; such a stipulation as to value being regarded as against public policy.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 663-667, 699-703½, 708-710, 718, 718½; Dec. Dig. \S 158.]

3. CARRIERS \S 158—COMMON CARRIER OF GOODS—LIMITATION OF LIABILITY FOR NEGLIGENCE—STATUTORY REGULATION OF RIGHTS—EFFECT.

The fact that the state now regulates the rate which railroads may charge for the carriage of freight, one being in force when the liability of the carrier for injury or destruction of the goods by its negligence is limited by a special contract, and another when no such limitation is agreed, and both being approved by the State Railroad Commission, is not a statutory validation of a contract between the shipper and carrier, fixing the maximum value of goods to be recovered of the carrier in case of their loss through its negligence at a sum greatly below their real worth.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 663-667, 699-703½, 708-710; Dec. Dig. \S 158.]

Appeal from City Court of Selma; J. W. Mabry, Judge.

Action by T. U. Jones against the Louisville & Nashville Railroad Company. Judgment for plaintiff for \$242.60, and defendant appeals. Affirmed.

The amount claimed in the complaint was \$1,100. There was verdict and judgment for \$242.60. Defendant set up the contract of

shipment limiting the value of the hogs shipped to \$5, together with the stipulation providing for a reduced rate of carriage because of the limitation in value. These facts were all agreed to be true, and it was further agreed that the market value or real value of the hogs at the time and place of shipment was \$100 each.

Geo. W. Jones, J. M. Foster, and S. L. Field, all of Montgomery, and Mallory & Mallory, of Selma, for appellant. Pettus, Fuller & Lapsley, of Selma, for appellee.

PER CURIAM. [1, 2] The effort of the defendant (the appellant here) was to give to the valuation of \$5 each, stated in the contract of shipment, of the two hogs, shipped from Montgomery to Bessemer, Ala., the death of which was due to the defendant's negligence, the effect of limiting the amount recoverable by the plaintiff to that stated in such valuation, with interest thereon, though it was admitted that the two hogs were really worth \$100 each. It is settled in this state that a common carrier may limit its common-law liability by a stipulation in the contract of carriage, assented to by the shipper, which discloses a purpose to secure a just and reasonable proportion between the amount charged for the carriage and the amount for which the carrier is to be liable in the event of loss or injury. But, in the absence of a statute governing the matter, it is an established rule applicable to such contracts for the carriage of property between points in this state that the carrier cannot limit its liability for the negligent loss or destruction of the thing carried to a valuation of it agreed upon in consideration of a reduced charge for its carriage when such valuation is greatly below the real worth of the property; such a stipulation as to value being regarded as unreasonable and the enforcement of it against public policy, where the reduction in the freight charge from that which would have been made in the absence of such agreement is greatly less in proportion than the unreasonable depreciation of the real value of the thing carried which is shown by the stipulated valuation of it. *Southern Ry. Co. v. Jones*, 132 Ala. 437, 31 South. 501; *Alabama Great Southern R. Co. v. Little*, 71 Ala. 611, *Mouton v. Louisville & Nashville R. Co.*, 128 Ala. 537, 29 South. 602; *Southern Express Co. v. Owens*, 146 Ala. 412, 41 South. 752; *Broadwood v. Southern Express Co.*, 148 Ala. 17, 41 South. 769.

[3] It is contended by the counsel for the appellant that, in consequence of the regulation of railroad freight rates which has been put into effect since the cases above cited were decided, the rules stated in the opinions rendered in those cases are no longer applicable, as now the rate chargeable when there is no stipulated valuation of the thing carried and no limitation of the carrier's common-law

liability, and that chargeable when the value of the subject of the carriage and a limitation of the common-law liability of the carrier are agreed upon, are not such as the carrier may choose to impose, but each of such rates is to be regarded as a reasonable and proper one because it has been fixed by statute or filed with and approved by the State Railroad Commission. And it is contended that a result of the state's control of the rate to be charged in the one case or the other is that the valuation stated in a contract of shipment, which provides for a duly authorized reduced rate of freight in consideration of a limitation of the carrier's common-law liability, is to be regarded as governing in the determination of the amount for which the carrier is liable in the event of an injury to or destruction of the property which is due to the carrier's negligence. We are of opinion that a consideration of these contentions by this court is foreclosed by the ruling made in the case of *A. G. S. Ry. Co. v. McCleskey*, 160 Ala. 630, 49 South. 433. We may say that we have not been referred to any statutory provision which seems to us to indicate the existence of a legislative purpose to enable a common carrier to fix the limit of its liability for the negligent destruction of or injury to property undertaken to be carried by a gross undervaluation of that property, whether such undervaluation is assented to by the shipper or not. The existence of such a provision hardly can be inferred from the fact that the shipper is given his choice between two legally established rates, the higher one prevailing when there is no stipulated limitation of the carrier's liability, and the reduced one applying when a legally authorized modification of that liability is agreed upon. There seems to be nothing in the allowing of such choice to be made to indicate the legalizing of a limitation of liability which was not permissible before the rates were legally fixed. The conclusion is that there was no error in the rulings which have been assigned as errors.

Affirmed.

NOTE.—The foregoing opinion was prepared by Presiding Judge WALKER before his retirement from the Court of Appeals, and has been adopted by the court.

(13 Ala. App. 603)

GLENN v. CITY OF PRATTVILLE.
(No. 159.)

(Court of Appeals of Alabama. Feb. 11, 1915.)
MUNICIPAL CORPORATIONS—§640—VIOLATION OF ORDINANCE—PROSECUTION—BURDEN OF PROOF.

In a prosecution for the violation of a municipal ordinance, the guilt of the defendant must be proved, beyond a reasonable doubt, the same as in a prosecution by a state for a crime.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1410; Dec. Dig. § 640.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

John Glenn was convicted in the circuit court on appeal from the recorder's court for the violation of an ordinance at the City of Prattville, and he appeals. Reversed and remanded.

Guy Rice and P. E. Alexander, both of Prattville, for appellant. Eugene Ballard, of Prattville, for appellee.

PELHAM, P. J. This was a prosecution for the violation of a municipal ordinance prohibiting the sale, etc., of prohibited liquors—an offense made punishable by imprisonment or hard labor. The trial was de novo on appeal from the recorder's court, and the trial court charged the jury in its oral charge on the measure of proof necessary to a conviction as follows:

"The burden of proof here is not as great as it is in criminal cases; that is, in cases in which the state prosecutes people for the violation of its laws. The burden here upon the city is simply to require that degree of proof which reasonably satisfies you of the truth of the averments of the complaint, and not to satisfy you beyond a reasonable doubt."

The rule has been differently declared by the Supreme Court in *Barron v. City of An-niston*, 157 Ala. 399, 48 South. 58, which case has been followed and cited approvingly on the rule there laid down, that to authorize a conviction the jury must believe the defendant guilty of the offense charged beyond a reasonable doubt, in the more recent case of *White v. City of Anniston*, 161 Ala. 662, 49 South. 1030.

The defendant reserved an exception to that portion of the trial court's oral charge erroneously instructing the jury on the measure of proof required to warrant a conviction, and it follows that a reversal must result.

Reversed and remanded.

(12 Ala. App. 168)

COPELAND v. STATE. (No. 299.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

1. **LEWDNESS** ⇐10—**EVIDENCE—SUFFICIENT.**

Evidence held insufficient to support a conviction for living in adultery.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. § 15; Dec. Dig. ⇐10.]

2. **LEWDNESS** ⇐10 — **EVIDENCE—SUFFICIENT.**

A conviction of living in a state of adultery cannot be had on mere suspicion.

[Ed. Note.—For other cases, see *Lewdness*, Cent. Dig. § 15; Dec. Dig. ⇐10.]

Appeal from Law Court, Pike County; T. L. Borum, Judge.

Olin Copeland was convicted of crime, and he appeals. Reversed and remanded.

Foster & Samford, of Troy, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The defendant, a man, was convicted, on an indictment charging

that offense, of living in a state of adultery or fornication with a woman. The case was tried before the court without a jury, and a special finding of facts was made by the court at the request of the defendant.

The members of this court have read the special finding of facts with a view of arriving at a conclusion as to their sufficiency to support a finding of guilt, and are of the opinion that the facts so found by the court do not support the finding of guilt of the offense charged.

[1] The special facts found by the court are as follows:

"That in the early part of the year 1913, while the defendant Olin Copeland and his wife were living together, the wife of the defendant being in bad health, and unable to look after her household affairs, the defendant Olin Copeland advertised for a white cook, and the defendant Ila Steadman answered said advertisement, and was engaged by defendant Olin Copeland to cook and assist his wife in looking after the household affairs. That during the month of March, 1913, there was some disturbance between the wife of defendant Olin Copeland and Ila Steadman, the wife of defendant Olin Copeland being jealous of Ila Steadman, and Ila Steadman left the home of said Olin Copeland on or about March 16, 1913, and in eight or ten days thereafter the wife of defendant Olin Copeland also left the home of her husband, Olin Copeland. That about the 18th or 20th of April, 1913, the said Ila Steadman returned to the home of defendant Olin Copeland, bringing with her a girl six or seven years of age, who she said was her niece. That some time during the spring of 1913, not long after said Ila Steadman had returned to the home of defendant Olin Copeland to live, the wife of said Olin Copeland returned to his house one night, but did not spend the night, remaining only a short while and returning the next morning, at which time the defendant Olin Copeland and his wife entered into a mutual contract of separation, and that the wife of defendant Olin Copeland has not lived with him since said separation. That from the time the defendant Ila Steadman returned to the home of defendant Olin Copeland on or about April 20, 1913, to the time of this trial, April 21, 1914, the defendants Olin Copeland and Ila Steadman have lived together in the same house, no one occupying the house with them, except said little girl, who is six or seven years of age. That the defendants Olin Copeland and Ila Steadman, and said little girl, were seen frequently riding together, sometimes in an automobile and sometimes in a buggy. That on the fourth Sunday in January, 1914, the defendant Olin Copeland was seen walking in his field with his arm around the defendant Ila Steadman, in company with said little girl. That the defendants, Olin Copeland and Ila Steadman, are strong and healthy, the defendant Ila Steadman being about the age of 35 years, and the defendant Olin Copeland being about the age of 45 years."

From this it will appear that the only improper act, or act of affection, shown to have taken place between the parties was that the defendant was on one occasion seen walking with the woman and her six year old niece, in an open field in plain view, with his arm around her waist. The other facts found show no more than the defendant's wife's feeling of jealousy on account of the woman,

but no conduct of the parties furnishing a foundation for the feeling, and the status of the parties, showing nothing more than that they were of such an age and so situated that the opportunity for illicit intercourse was afforded, but no facts having any tendency, as we view them, to show that improper relations did exist between the parties.

It might, for the purpose of a better understanding of this special finding, be well to state that it is shown to be based on the evidence introduced by the state, and ignores the defendant's evidence tending to show, by several neighbors and other servants, that the woman occupied the place of a servant, a cook, and that no improper word or act had been observed to take place between the parties having any tendency to show relations of illicit sexual intercourse.

[2] The offense for which the defendant was convicted has been referred to as a crime of darkness and secrecy difficult of direct proof, and on that account it is held that when acts of affection and complicating circumstances are proved, it becomes largely a question for the jury to determine whether the offense has been committed (*Bodiford v. State*, 86 Ala. 68, 5 South. 559, 11 Am. St. Rep. 20), but there must be facts proven that could be fairly interpreted as tending to show that the parties lived together in adultery or fornication, or their conduct must be of such a character as to indicate at least that improper sexual relations existed between them. We can see nothing in the finding of facts sufficiently strong and cogent to overcome that presumption of innocence of the offense charged which is guaranteed under our laws to every person prosecuted for violating the criminal laws.

Reversed and remanded.

(12 Ala. App. 503)

GRAHAM et al. v. STATE. (No. 181.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

1. BAIL §93—BONDS—LIABILITY OF SURETIES—AMOUNT.

A judgment on a forfeited bail bond rendered against the sureties for more than the face of the bond is erroneous.

[Ed. Note.—For other cases, see *Bail, Cent. Dig.* §§ 409, 410, 413-417; *Dec. Dig.* §93.]

2. BAIL §94 — DETERMINATION OF COSTS — BAIL BOND—CORRECTION OF JUDGMENT ON APPEAL.

Where a judgment on a forfeited bail bond is appealed from because rendered for more than the face of the bond, the judgment will be corrected at the expense of appellee and affirmed.

[Ed. Note.—For other cases, see *Bail, Cent. Dig.* §§ 413-423; *Dec. Dig.* §94.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Scire facias on a forfeited bail bond by the State against P. H. Graham and others. From a judgment for plaintiff, defendants appeal. Corrected and affirmed.

Gipson & Booth, of Prattville, for appellants. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. The appellants were sureties on a bail bond for \$200 of one Ben Davis, indicted for crime, and as such, were answerable for his appearance at the circuit court of Autauga county. He failed to appear, forfeiture of bail was duly entered, judgment nisi for \$200 was regularly rendered against him and appellants, as his sureties, and scire facias was duly issued and returned executed as to all except the defendant himself, requiring each to show cause at the next term of said court as to why said judgment nisi should not be made final for \$200. Code, § 6354 et seq. At the term to which the scire facias was so returnable, the court, as was proper, dismissed the proceedings as to the defendant himself, who had not, as said, been served with the scire facias, and then made the judgment nisi absolute as to the sureties, appellants here, who had been served. Code, § 6359; *Kilgrew v. State*, 76 Ala. 101; *Hunt v. State*, 63 Ala. 196.

The appeal is on the record proper, without a bill of exceptions, and we are not here asked to pass upon the sufficiency of the excuse offered for not having defendant at court in pursuance of the requirements of the bond. The chief and vital insistence is that the court erred, in that it made the judgment final for \$250, when the bail bond itself was for only \$200, as was so recited in the judgment nisi and in the scire facias served on appellants.

[1, 2] There is undoubtedly merit in this contention, as the court was without authority to render judgment final in excess of the amount of the bond. *State v. Hinson*, 4 Ala. 671; Code, § 6359. Entire justice will be done the appellants, however, if, after first correcting, at the expense of appellee, Autauga county, the judgment by reducing it to \$200, we then affirm it (*State, for Use of Fayette Co., v. Earnest*, 123 Ala. 631, 26 South. 948; *Hunt v. State*, 63 Ala. 196), which is accordingly done.

The judgment is corrected, and, as corrected, it is affirmed, and costs of appeal taxed against Autauga county.

Corrected and affirmed.

(12 Ala. App. 61)

DONALD v. STATE. (No. 817.)

(Court of Appeals of Alabama. Feb. 11, 1915.)

1. CRIMINAL LAW §413 — SELF-SERVING DECLARATIONS.

Evidence of peace proceedings and contents of the affidavit sworn out by defendant, accused of murder, against the deceased, is self-serving and inadmissible.

[Ed. Note.—For other cases, see *Criminal Law, Cent. Dig.* §§ 928-935; *Dec. Dig.* §413.]

2. HOMICIDE **⚡163—EVIDENCE—CHARACTER OF DECEASED.**

As it is only the general bad character of deceased as a turbulent or dangerous man that is competent proof in a prosecution for murder on the issue of self-defense, specific acts may not be shown.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 310-317; Dec. Dig. **⚡163.**]

3. CRIMINAL LAW **⚡448—EXAMINATION OF WITNESS.**

A question put to accused, in a prosecution for murder, whether, if he had not dodged, deceased would have cut him, was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. **⚡448.**]

4. CRIMINAL LAW **⚡811—INSTRUCTIONS—INVADING PROVINCE OF JURY.**

In a prosecution for murder, a requested instruction that the jury should consider whether or not deceased's character was that of a violent man as the defendant would be justified in taking more decisive means of defense if deceased was the assailant and was a man of a dangerous nature, is properly refused as invading the province of the jury by singling out the question of character and premitting the other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. **⚡811.**]

5. CRIMINAL LAW **⚡805 — REQUESTED INSTRUCTIONS—SUFFICIENCY.**

A requested instruction on good character of defendant, which interpolates the word "by," so as to make the instruction meaningless, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989; Dec. Dig. **⚡805.**]

6. CRIMINAL LAW **⚡763, 764, 782—INSTRUCTIONS—ARGUMENTATIVENESS.**

In a prosecution for murder, a requested instruction that if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to a party charged with crime, it is the duty to give that which is favorable, is properly refused, because argumentative and invading the province of the court and jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770, 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. **⚡763, 764, 782.**]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Joe Donald was convicted of murder in the second degree, and he appeals. Affirmed.

Defendant was charged with killing John Jones by shooting him with a pistol. Defendant introduced one G. H. McRitchie and asked him if the defendant ever came up there to take out peace proceedings against Jones after that. Objection was sustained on motion of solicitor. Defendant also asked same witness if he had not heard that John Jones had shot at Dr. Reynolds.

The following charges were refused to defendant:

(1) In considering whether Donald or Jones was the aggressor in bringing on the difficulty in which Jones was killed, the jury should consider whether or not Jones' character was that

of a violent, bloodthirsty man, for the law says that defendant was justified in taking more prompt and decisive measures of defense if Jones was the assailant and was a man of known dangerous and bloodthirsty nature.

(2) If defendant had proven good character, the law says that such good character should be considered by the jury along with all the other evidence in the case, and that it may be sufficient to generate a reasonable doubt as to the guilt of defendant, although no such doubt would have existed but for such good character.

(3) It is a well-settled rule of law that if there be two reasonable constructions which can be given to facts proven, one favorable and the other unfavorable to a party charged with crime, it is the duty of the jury to give that which is favorable rather than that which is unfavorable to the accused party.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. [1] Evidence of the "peace proceedings" and contents of the affidavit sworn out by the defendant against the deceased some weeks prior to the killing, before a person referred to as a "Mr. McRitchie," was not admissible, and the court committed no error in sustaining the solicitor's objections to questions calling for this testimony. Such evidence was not material to the issues before the court, except as proof of self-serving conduct that it was not permissible to show.

[2] The court properly refused to let the defendant prove particular acts of violence of the deceased entirely disconnected with the killing in question, for the purpose of showing the turbulent or bloodthirsty character of the deceased. It is only the general bad character of the deceased as a turbulent, bloodthirsty, revengeful, or dangerous man that is competent proof and proper evidence to explain, illustrate, or give meaning and point to the conduct of the deceased relative to the issue on the defendant's plea of self-defense. Dupree v. State, 33 Ala. 380, 73 Am. Dec. 422; Franklin v. State, 29 Ala. 14.

[3] It requires no discussion to show the correctness of the court's ruling in sustaining the solicitor's objection to the question asked the defendant, when being examined as a witness in his own behalf, "And if you hadn't dodged, he [deceased] would have cut you?"

[4] The court could not be put in error for refusing charge 1, for the reason that it invades the province of the jury and singles out for consideration a question of character, premitting a consideration of all the other evidence. Pate v. State, 150 Ala. 10, 43 South. 343.

[5] Charge No. 2 is rendered meaningless and unintelligible by the use of the word "by," as that word last appears in the charge as set out, and the court might well have refused it on this account (Steele v. State, 159 Ala. 9, 48 South. 673), although the charge is otherwise faulty.

[6] No duty rested on the court to give charge 3. It is argumentative, and invades

the province of the jury. *Medley v. State*, 156 Ala. 78, 47 South. 218.

An examination of the transcript discloses no error requiring a reversal, and an affirmance is ordered.

Affirmed.

(12 Ala. App. 172)

TARRANT v. STATE. (No. 102.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. SODOMY §6—ELEMENTS—CIRCUMSTANTIAL EVIDENCE.

In a prosecution for sodomy, the state must prove penetration, but it may be proved by circumstantial, as well as by direct, evidence.

[Ed. Note.—For other cases, see *Sodomy*, Cent. Dig. § 7; Dec. Dig. §6.]

2. INDICTMENT AND INFORMATION §190—OFFENSES INCLUDED IN CHARGE—ATTEMPT.

Under Code 1907, § 6311, authorizing a conviction for an attempt to commit the offense charged in the indictment if the evidence warrants it, without any special count charging the attempt, it was not error to refuse to give the affirmative charge in a prosecution for sodomy, where the evidence was insufficient to establish penetration, since the jury might nevertheless convict the defendant of an attempt.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 596-603; Dec. Dig. §190.]

3. CRIMINAL LAW §304—EVIDENCE—JUDICIAL NOTICE—MATTERS OF COMMON KNOWLEDGE.

In a prosecution for sodomy, the court cannot take judicial notice that a cow not in heat would not submit to intercourse with a man.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 700-717, 2951½; Dec. Dig. §304.]

4. CRIMINAL LAW §478—OPINION EVIDENCE—QUALIFICATION OF WITNESSES.

In a prosecution for sodomy, a witness for the defense who had observed the habits of cows with bulls was qualified to express an opinion that a cow not in heat would not submit to intercourse with a man.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1065, 1066; Dec. Dig. §478.]

5. CRIMINAL LAW §695—RECEPTION OF EVIDENCE—EXCLUSION—GROUNDS OF OBJECTION.

It is not error for a court to exclude a statement of the opinion of a witness for the defense who was not qualified to express such opinion, though the state made only the general objection, since the court cannot be put in error for sustaining a general objection when the question is objectionable on any ground, notwithstanding circuit and inferior court rule 33 (Civ. Code 1907, p. 1527), providing that the exception to the introduction of evidence not patently illegal or irrelevant will not be considered, unless the record shows that the grounds of objection were specified.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1633-1638; Dec. Dig. §695.]

Upon Resubmission.

6. CRIMINAL LAW §1133—APPEAL—DEFECTIVE RECORD—RESUBMISSION.

Where a conviction was affirmed on original submission, but thereafter a motion for rehearing was made on the grounds that the record did not show that the indictment had been signed by the foreman of the grand jury and indorsed a true bill, and the Court of Appeals,

on motion and showing by the Attorney General, had set aside the affirmance and submission, redocketed the case, and granted certiorari to bring up the original indictment, which showed that it was properly signed and indorsed, the Court of Appeals cannot thereafter set aside the orders theretofore made and grant the rehearing on the grounds specified, but must determine the case on resubmission on the record as corrected.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2984; Dec. Dig. §1133.]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Frank Tarrant was convicted of sodomy, and he appeals. Affirmed upon original submission and upon resubmission.

Keith & Wilkinson, of Selma, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

THOMAS, J. The defendant was charged with and convicted of the crime of sodomy or bestiality, the indictment alleging that he, "against the order of nature, carnally knew a certain beast, to wit, a cow." Code, § 6746.

[1] While it is not necessary to a conviction for such offense that there should be any proof of emission (Code, § 6747), yet proof of penetration is required. It must, as in rape, be shown that the res was in the re, but to no particular depth. This, however, may be done, as in other cases, by circumstantial evidence, when positive proof is wanting. *Cross v. State*, 17 Tex. App. 476; *Bishop on Statutory Crimes* (2d Ed.) § 488; *Brauer v. State*, 25 Wis. 413; *Com. v. Snow*, 111 Mass. 411.

[2] The defendant in the case at bar, at the conclusion of the evidence, requested the general affirmative charge. One insistence here is that it should have been granted because, it is urged, there was no evidence tending to show a penetration. As to whether there was or was not, it is unnecessary to the upholding of the action of the lower court, in its refusal of the charge mentioned, for us to determine (but see *Cross v. State*, 17 Tex. App. 476); since that charge, in the language as framed, was properly refused, even if there had been no evidence of penetration, as there was certainly evidence of an attempt to commit the offense. Section 6311 of the Code provides that:

"Upon the trial of an indictment for any offense, the jury may find the accused not guilty of the offense charged in the indictment, but, if the evidence warrants it, guilty of an attempt to commit such offense, without any special count in the indictment for such attempt." *Hutto v. State*, 169 Ala. 19, 53 South. 809; *Burton v. State*, 8 Ala. App. 295, 62 South. 394.

The charge mentioned, if given, would have prevented the jury from even convicting the defendant of an attempt to commit the offense, and was properly refused.

[3] If it was impossible, as insisted, for defendant to have executed the attempt, then it might be, which we need not consider, that

he could not even be convicted of an attempt. *State v. Clarissa*, 11 Ala. 57; *Burton v. State*, 8 Ala. App. 295, 62 South. 394; *Smith v. State*, 8 Ala. App. 206, 62 South. 575. But there is nothing in the record here which discloses that it was impossible, unless we are willing to say as a matter of law or judicial knowledge, which we are not, that, as urged by appellant's counsel, it is impossible in the nature of things for a man to have intercourse with a cow that is not in a state of heat, and when the only physical restraint upon her at the time is a rope with which she is tied to the garden fence, and which is 20 or 30 feet long between her and the fence, and which, as a consequence, affords her ample slack for moving out of the way. We do not judicially know that she would move out of the way, or that she would not. We do know, however, that two witnesses swore that she did not, but that she stood while the defendant was at her tail, with his front against her and his male parts out, indulging, or attempting to indulge, in the indecent and revolting act of intercourse with her; and, by the insistence of counsel here, we are asked in effect to say, as a matter of law, that their statements are untrue because, it is urged in effect, we should judicially know that a cow not in heat would not stand for a man to have intercourse with her, and we should know it as an inference from the fact, proved without dispute, that a cow not in heat or not "bulling" would not submit to being covered by the male of her kind. While the existence vel non of a state of heat in the animal is a circumstance permissible to be proved as of some probative value, to be considered by the jury along with the other facts and circumstances in the case in determining the guilt or innocence of the accused (*Mullins v. State*, 45 Tex. Cr. R. 485, 78 S. W. 560), yet we are no more willing to say that the absence of such heat is conclusive of defendant's innocence than we would be willing to say that its existence would be conclusive of his guilt; and we are no more willing to say that no cow, when not in heat, would submit to intercourse with a man, because, as proved, no cow, when not in heat, would submit to being covered by a bull, than we would be willing to say that any cow in a state of heat that would submit to being covered by a bull would also submit to intercourse with a man. As to whether a cow, either in a state of heat or not in such state, would stand and submit to intercourse from a man would, we would guess, depend more largely upon the nature and disposition of the particular cow—her gentleness or not and her accustomedness to the dominion and control of man—than upon her condition as to heat. However, whether true or not, and even assuming the existence of the rule, as contended for by appellant's counsel, that cows in general, when not in heat, will not stand and

submit to intercourse from a man, yet we know that nature everywhere furnishes us exceptions to all of its rules, both in the animate and in the inanimate universe; and it certainly cannot be rationally said, in the light of the testimony of the two witnesses for the state as mentioned, that there is no evidence in this case of an exception to the general rule. The affirmative charge should always be refused where the evidence is sufficient to overcome, *prima facie*, the presumption of innocence. *Jones v. State*, 90 Ala. 630, 8 South. 383, 24 Am. St. Rep. 850. We are clear that the court did not err in refusing such charge here. There was at least evidence of an attempt to commit the offense.

[4] Nor was there error in sustaining the state's objection to the question propounded by defendant to his witness Henderson Goldsby, to wit:

"From your observation of and experience with cows would you say that a cow not bulling would stand for a man to cover her?"

While otherwise objectionable, nothing more need be said in condemnation of the question than that the knowledge of the witness with respect to cows, as previously testified to by him, did not appear to be such as to qualify him to give an expert opinion on the subject mentioned. The observation and experience that had been testified to by him related only to the habits and disposition of cows, when bulling and when not bulling, with respect to the male of their kind, and not with respect to mankind; and such knowledge consequently did not render him capable of giving an expert opinion of their habits and disposition towards man, when in and out of such condition, because man's relationship with, his superiority to, and his dominion and power over, the rest of animal creation, and each kind thereof, is known to be so different from that of any other animal that the habits and disposition of other animals with respect to their kind, or with respect to other kinds than man, as a rule, afford no just analogy and furnish no fair or adequate basis for measuring their habits and disposition, when domesticated, towards man. He was created such and is king over them all, and the extent of his sway over a particular animal in particular respects certainly has not, as a general proposition, the same limitations as that of the brute. Whether so or not in the particular here under consideration, if a witness had observed many instances and found in each the rule to be the same, he might have been capable of forming and giving an opinion in this case; but the witness here is not shown to have had such observation in even a single case.

[5] The fact that the objection interposed by the state to the question was only a general one is immaterial; since the rule—too well established to require the citation of authority—is that the trial court will not be

put in error for sustaining a general objection when the question objected to is objectionable on any ground. This in no wise conflicts with the other rule, mentioned by appellant, and as declared in rule 33 of circuit and inferior courts (Civil Code, p. 1527).

We have, as we felt in duty bound, seriously discussed, however unpleasant the subject and the task, every point seriously insisted upon in brief. No error being found, the judgment of conviction is affirmed.

Affirmed.

Upon Resubmission.

PELHAM, P. J. [8] After the judgment of conviction of the trial court had been affirmed by this court (see opinion in this case on the original submission), and while the case was pending here on an application for a rehearing on the sole ground that the transcript presented no data that the indictment was a valid indictment, in that it failed to show that it was signed by the foreman of a grand jury or indorsed "a true bill," the Attorney General made a motion to set aside the judgment of affirmation and submission of the case, restore the case to the docket, and grant a certiorari to bring up a true copy of the original indictment. On the hearing of this motion, it was made known to the court that the original indictment would show that it was in fact signed by the foreman of the grand jury and indorsed "a true bill." The court granted the motion and ordered the certiorari to issue. In response to that order, the return to the certiorari, bringing before us a true copy of the original indictment, shows that the failure of the transcript to show that the indictment was signed by the foreman and indorsed "a true bill" was due to a clerical omission, and that in truth and in fact the indictment did contain the proper indorsements to make it a valid indictment.

The case has been resubmitted on the transcript as corrected by the return to the certiorari, showing the indictment upon which the defendant was convicted to be a valid indictment. The defendant has moved the court, and earnestly and urgently insists on the resubmission, that we set aside the former orders for certiorari, etc., above referred to, and grant his application for a rehearing on the ground that the transcript fails to show a valid indictment for the reasons given that we have heretofore referred to.

The court having heretofore, on proper showing made on the motion of the Attorney General, exercised its discretion and set aside the former submission, restored the case to the docket, and granted an order for a certiorari, and the return to that certiorari showing a valid indictment, this court could not now, in the proper and orderly administration of justice, shut its eyes to the fact that the record before us as thus completed, correcting a mere clerical omission, shows that the

defendant was convicted on an indictment in every respect valid. The record on this submission having been brought before us in its completed form, the case must be adjudicated on that record. *Ind. Pub. Co. v. Am. Press Ass'n*, 102 Ala. 475, 15 South. 947.

The motion of the defendant to set aside the former orders of the court and grant the application for a rehearing and enter an order of reversal is denied. No reversible error being shown by the transcript (see opinion on original submission) as completed by the return to the certiorari, the judgment appealed from is affirmed.

Affirmed.

(12 Ala. App. 351)

ILLINOIS CENT R. CO. v. BROTHERS. (No. 653.)

(Court of Appeals of Alabama. Nov. 12, 1914.
Rehearing Denied Jan. 21, 1915.)

1. DAMAGES \S 117 — MEASURE — BREACH OF CONTRACT.

The measure of damages for a breach of contract is those damages which are the natural consequences of the breach, and which may be reasonably deemed to have been in the contemplation of the parties, but damages which cannot be supposed to have been contemplated by the parties, or loss of profits in a business where the data are uncertain, cannot be recovered.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. \S 285, 286, 288; Dec. Dig. \S 117.]

2. CARRIERS \S 98 — CARRIAGE OF PROPERTY — DAMAGES.

Notice to a carrier which may be implied from the shipment to plaintiff, residing in the cotton country, of a cotton gin at about the time the ginning season would begin, is not notice that plaintiff would engage in the ginning business, so as to entitle him to recover for loss of business offered during the time between when the gin should have been delivered and the time it actually was.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. \S 396-426; Dec. Dig. \S 98.]

Appeal from City Court of Birmingham; John H. Miller, Judge.

Action by I. S. Brothers against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Percy, Benner & Burr, of Birmingham, for appellant. Horace C. Wilkinson and Harsh & Fitts, all of Birmingham, for appellee.

ORUM, J. The Illinois Central Railroad Company received from the Gullett Gin Company, at Gullett, La., a cotton-gin outfit consigned to I. S. Brothers, Tumlin Gap, Ala. The car containing this shipment, after an unreasonable delay, was delivered to the Louisville & Nashville Railroad Company, a connecting carrier, at New Orleans, La., agreeably to the bill of lading. The complaint alleges, and the evidence tends to show, that during the time intervening between the delivery of the gin to the initial carrier and

the time it reached its destination, 300 bales of cotton had been tendered to consignee by the public to be ginned, which, on account of the unreasonable delay in the delivery of the gin, he was prevented from accepting, and that he thereby lost the profit, estimated at \$1.40 per bale, which he would have derived from the service. It was not alleged, nor does the evidence tend to show, except as will be presently considered, that the carrier at the time it made the contract of carriage had any notice of the purpose for which the gin was to be used by the consignee.

The several assignments of error present but one question, *i. e.*: Can the consignee, under such circumstances, recover of the carrier the loss of profits which the consignee might have earned in ginning the cotton actually tendered during the unreasonable delay?

[1] All collateral or minor questions relating to the measure of damages for breaches of contracts are subordinate to, and must be determined in the light of, that cardinal rule now so well settled by judicial decision in this state, *viz.*: That "(1) those damages that are the natural and proximate consequence of the breach must always be considered; (2) such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into; (3) damages which fairly may be supposed not to have been the necessary and natural sequence of the breach shall not be recovered, unless by the terms of the agreement or by direct notice they are brought within the expectation of the parties"; and "(4) losses of profit in a business cannot be allowed unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance"; and this rule is applicable as well to contracts of carriage as to contracts generally. 3 *Hutchinson on Carriers*, § 1369, and cases cited; *Hadley v. Baxendale*, L. R. 9 Exch. 341; *Daughtery v. Am. Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435; *Pilcher v. C. of Ga. Ry. Co.*, 155 Ala. 316, 46 South. 765; *Western Union Tel. Co. v. Albertville Canning Co.*, 6 Ala. App. 344, 59 South. 755; *W. U. Tel. Co. v. Way*, 83 Ala. 542, 4 South. 844; *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 South. 333; *Cassells Mill, etc., v. Strater, etc.*, 166 Ala. 274, 51 South. 969; *Moulthrop, etc., v. Hyett, etc.*, 105 Ala. 493, 17 South. 32, 53 Am. St. Rep. 139; *Dickerson v. Finley*, 158 Ala. 149, 48 South. 548; *Bixby-Theisen Lumber Co. v. Evans*, 174 Ala. 571, 57 South. 39; *Southern Ry. Co. v. Coleman*, 153 Ala. 266, 44 South. 837; *Ala. Chemical Co. v. Geiss*, 143 Ala. 591, 39 South. 255;

Traylick v. Sou. Ry. Co., 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; *Harvey v. Connecticut, etc.*, 124 Mass. 421, 26 Am. Rep. 673.

[2] It seems to be conceded by counsel, as indeed it must be, that notice to the carrier, at the time of entering into the contract of carriage, of the particular use to which the gin was to be put by the consignee is essential to the right of recovery, and it is not contended that any recovery for special damages can be had, except for the profit which might have arisen from the ginning of the cotton actually tendered during the period of delay. It is not contended by appellee that any direct notice was given to the carrier, but it is insisted that the fact that a carrier receives for transportation a cotton-gin outfit in the month of September—the eve, it is said, of the cotton-ginning season—consigned to an individual in the cotton-growing section, is sufficient to carry the case to the jury on the question of *implied notice* to the carrier that the consignee expected to immediately or presently set up and operate the gin at or in the vicinity of the destination for the public, for profit, and that it was within the province of the jury to assess damages for the loss of profit on the cotton actually tendered. It is not insisted that the carrier had any notice in fact of the purpose to which the gin was to be put, or that the consignee, or the nature of his business, was known to it; nor was it contended that any contract obligation, agreement, or understanding existed between the consignee and the persons, or any of them, who brought the cotton to his gin after the contract of carriage had been entered into. Unless the circumstances recited are sufficient to charge the carrier with such notice as the law requires, then confessedly there can be no recovery.

It is of the utmost importance, and is simple fairness, that every one entering into a contract obligation should know the extent of the risk he thereby assumes other than liability for the damages which may naturally and proximately flow from its breach; and he is entitled to have this information in such sort that it may fairly be said that such risk, in the event of a breach, was within the contemplation of both parties at the time the contract was entered into. Were it otherwise, the burden upon freedom of contract might become intolerable, for by the simplest form of contract a party might be made to suffer ruinous consequences. The rule imposes no hardship upon the opposite party, for he has but simply to give notice of the special circumstances when the obligation is assumed.

In the case of *British Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499, it was said:

"The knowledge must be brought home to the party sought to be charged, under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. * * * Knowledge on the part

of the carrier is only important if it forms part of the contract. It may be that the knowledge is acquired casually from a stranger; the person to whom the goods belong not knowing or caring whether he had such knowledge or not. Knowledge, in effect, can only be evidence of fraud, or of an understanding by both parties that the contract is based upon the circumstances which are communicated."

"Proof that the carrier had knowledge of the general use to which the article was to be put will not be sufficient to charge him with liability for loss of its use, or the profits which would thereby have been made. The special circumstances of the case requiring care and expedition must have been brought to his attention in such way that his acceptance of the article under the circumstances could fairly be said to amount to an assumption of the risks which naturally and proximately would flow from his default." 3 Hutchinson on Carriers, § 1369; authorities *supra*.

Manifestly, there were many uses to which the gin might have been put by the consignee other than its operation for profit. He may have bought it to resell, or to operate for his individual benefit, or to operate for the public at some future time, or he may have ordered for a customer or for accommodation, or to be used for demonstration, or to lease it, and the like. The intended use must be made known to the carrier, and not left to conjecture. In *Trayick v. Southern Ry. Co.*, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563, the carrier had negligently delayed the delivery of a rice huller, depriving the plaintiff of "its use during nearly all the rice-milling season, and causing a number of persons who had engaged plaintiff to hull their rice to take it elsewhere," whereby plaintiff lost the profit. The Supreme Court of South Carolina, touching this subject, said:

"We proceed to apply these principles to the facts of the case under consideration. A rice huller may be purchased for various purposes. For instance, it might be bought for private use, or for sale, or for making profit by hulling rice for the public. The case of *Hays v. Tel. Co.*, 70 S. C. 16, 48 S. E. 608 [67 L. R. A. 481, 106 Am. St. Rep. 731, 3 Ann. Cas. 424], decided that, when the object is to make profit, the party committing the act of wrong must, in some manner, have notice of this fact." 3 Hutchinson on Carriers, § 1369; *W. U. Tel. Co. v. Albertville Canning Co.*, *supra*; *Harvey v. Connecticut*, etc., *supra*.

Notice is said to be "a crucial fact, which must be both *alleged* and *proven*." *Pilcher v. C. of Ga. Ry. Co.*, *supra*; *Baxley v. Tallassee, etc., R. Co.*, 128 Ala. 183, 29 South. 451; *Reed Lumber Co. v. Lewis*, *supra*.

We are clear to the point that the mere fact that the carrier knew the article which it had agreed to transport was a gin, consigned by a manufacturer of gins to an individual in a cotton-growing section in the ginning season, was wholly insufficient to charge the carrier with notice of the facts so essential to the right of recovery. Even if the carrier had actually known that the consignee expected to operate the gin for profit, which he might expect from the public generally in his community, it may be seriously

doubted that this fact alone was sufficient to authorize a recovery of the profits. At the time the contract was entered into, when the status of the parties was fixed, the consignee had no assurance that 300, or any other definite number of bales of cotton, would be tendered to him. What he may have anticipated was then certainly indefinite and uncertain, dependent upon many "incalculable contingencies." In *Bixby-Thelsen Lumber Co. v. Evans*, *supra*, it was said: "Profits such as the plaintiff may have expected to realize from the operation of the mill in its improved form," and which the parties doubtless contemplated as one result of the contract, were nevertheless speculative, "remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages." See, also, the cases therein cited, and *Bixby, etc., v. Evans*, *supra*; *Dickerson v. Finley*, *supra*; *Cassells Mills v. Strater, etc.*, *supra*; *Harvey v. Connecticut, etc.*, *supra*. A decision of this question, however, is not essential in this case.

The question presented must be answered in the negative. The rulings of the trial court were not in accord with the conclusion we have reached, and the judgment must be reversed and the cause remanded.

Reversed and remanded.

(12 Ala. App. 611)

FEAGIN v. CITY OF ANDALUSIA.

(No. 278.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. MUNICIPAL CORPORATIONS—§643—ORDINANCES—PUNISHMENT.

One convicted on appeal from a judgment of conviction in the recorder's court of a city for violation of an ordinance may, under Code 1907, § 1217, be punished at hard labor without the imposition of a fine.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1416; Dec. Dig. § 643.]

2. MUNICIPAL CORPORATIONS—§106—ORDINANCES—ENACTMENT—VALIDITY.

It is not necessary to the validity of a city ordinance that the mayor should vote for it.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 221-223, 225-228; Dec. Dig. § 106.]

3. CRIMINAL LAW—§459—EVIDENCE—OPINION EVIDENCE.

A witness may testify that he smelled and tasted liquor and that it was alcohol.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1048-1050; Dec. Dig. § 459.]

4. MUNICIPAL CORPORATIONS—§640—ORDINANCES—VIOLATIONS—EVIDENCE.

Where an affidavit charging a violation of an ordinance was dated April 21, 1913, on which date there was a trial and conviction in the recorder's court, and the trial *de novo* on appeal was had in 1914, the testimony of a state's witness that the offense was committed "during last year" showed the commission of the offense within a year before the filing of the affidavit.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1410; Dec. Dig. § 640.]

5. INTOXICATING LIQUORS \Leftrightarrow 134—PROHIBITION—SALE OF ALCOHOL.

An ordinance prohibiting the sale of enumerated intoxicating liquors, including alcohol, is violated by a sale of alcohol as a beverage, however diluted or disguised.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 142-144; Dec. Dig. \Leftrightarrow 134.]

Appeal from City Court of Andalusia; Ed T. Albritton, Judge.

Tim Feagin was convicted in the city court for a violation of an ordinance of the City of Andalusia, on a trial on appeal from a conviction in the recorder's court of the city, and he appeals. Affirmed.

A. L. Rankin, of Andalusia, for appellant.

PELHAM, P. J. [1] The defendant was subject to the punishment authorized by law or as provided by ordinance, upon his conviction on appeal from the recorder's court in a trial de novo in the law and equity court. Code, § 1217. Punishment by fine or imprisonment, or hard labor on the streets of the city, is authorized to be imposed upon conviction on a trial de novo by the section of the Code cited (Cooper v. Gadsden, 10 Ala. App. 609, 65 South. 715; Clark v. Uniontown, 4 Ala. App. 264, 58 South. 725), and there is no merit in the contention that fixing a fine on the defendant was a necessary prerequisite to a valid judgment imposing a sentence of hard labor in conformity with the verdict of the jury.

[2] The ordinance was properly allowed in evidence. It is not necessary to the validity of the ordinance that the mayor should vote on it. Clark v. City of Uniontown, 4 Ala. App. 264, 58 South. 725.

[3] There was no error in permitting the state's witness to testify that he smelled and tasted the beverage and that it was alcohol. It is a matter commonly known as a physical fact that by the use of the senses of smell and taste one can acquire the knowledge that the limpid, mobile, colorless liquid with a hot and pungent taste and a slight, though distinctive, spirituous scent, is the liquid known as alcohol. Chemical analysis, or a knowledge of the science of chemistry, is not necessary to enable one to distinguish alcohol by the senses of smell and taste.

[4] The contention of the defendant's counsel that it is not shown that the sale of the prohibited beverage took place within 12 months before the affidavit charging the defendant with having committed the offense is not well founded. The affidavit bears date of April 21, 1913, on which date there was a trial and conviction in the recorder's court, and, on the trial de novo had in the year 1914, the state's witness testified that the sale took place "during last year" (the year of 1913).

[5] The defendant was charged with the violation of an ordinance of the city of Andalusia prohibiting the sale, giving away, etc., of certain named intoxicating liquors, including alcohol. A state's witness testified to a sale by the defendant of a liquor that he knew to be alcohol from its smell and taste. The ordinance provided that alcohol should be included and embraced under the terms of the ordinance as one of the intoxicating liquors prohibited. It is therefore "immaterial, in a statutory sense, what effect alcohol may have on the human system; it is an intoxicating liquor. However much it may be diluted, it must remain an intoxicant when and however it is used as a beverage, and no matter how it may be diluted or disguised, it so remains, simply because the statute [ordinance] so declares." 1 Woollen & Thornton on Intoxicating Liquors, § 4.

The evidence was without conflict, and there were no circumstances affording an inference upon which the jury could have arrived at any other conclusion than that of the guilt of the defendant of the offense charged, and the court was not in error in giving the general charge, with hypothesis, for the city. Affirmed.

(12 Ala. App. 216)

FLETCHER v. STATE. (No. 305.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

1. INTOXICATING LIQUORS \Leftrightarrow 236—OFFENSES—EVIDENCE.

Evidence of the consignment to plaintiff of large quantities of intoxicants held to sustain a conviction of the unlawful keeping of intoxicants for sale.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. \Leftrightarrow 236.]

2. WITNESSES \Leftrightarrow 255 — EXAMINATION — REFRESHING OF MEMORY.

The recollection of the express agent, who made entries of his delivery of intoxicants to accused, may, in a prosecution for the unlawful keeping of intoxicants for sale, be refreshed by reference to the entries.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. \Leftrightarrow 255.]

3. WITNESSES \Leftrightarrow 272—EXAMINATION.

Where the memory of a witness was refreshed from entries in a book which he had kept, he may be cross-examined as to the entries, and the adverse party may, for the purpose of testing his recollection, introduce in evidence the book itself.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 961; Dec. Dig. \Leftrightarrow 272.]

4. CRIMINAL LAW \Leftrightarrow 678 — ELECTION BETWEEN OFFENSES.

Where the state, in a prosecution for illegal keeping of intoxicants for sale, introduced evidence of a number of large shipments of intoxicants to accused, it cannot be required to elect as to which shipment it would rely on for conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. \Leftrightarrow 678.]

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

Ed Fletcher was convicted of the unlawful

keeping of intoxicants for sale, and he appeals. Reversed and remanded.

Parks & Prestwood, of Andalusia, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. [1] The only evidence offered was that in behalf of the state and consisting of the testimony of two witnesses. The first, Thigpen, who was the railroad and express agent at River Falls, testified to delivering to the defendant from the depot at that place, on the following dates, the quantities of liquor hereafter stated: On March 2d, five boxes and one package of whisky, weighing 304 pounds; on March 26th, two boxes and one package of whisky, weighing 200 pounds; on March 30th, two boxes of whisky, weighing 119 pounds; on April 4th, one cask of beer, weighing 230 pounds; on April 10th, one cask of beer, weighing 233 pounds; on May 15th, two casks of beer, weighing 470 pounds. The evidence showed without dispute that these different shipments of liquor were all consigned to the defendant under the name of E. C. Fletcher, and that they were delivered to him in person by the witness Thigpen. The other witness only testified to the fact that the defendant, whose name is Ed Fletcher, signed his name E. C. Fletcher.

In the absence of proof that the defendant is not a normal human being, or that he possesses an unusually abnormal capacity for consuming alcoholic beverages, it is safe to say that this evidence is sufficient to afford an inference that he was keeping these liquors for sale, and therefore it was sufficient to sustain a conviction. *Brigman v. State*, 8 Ala. App. 400, 62 South. 980; *Coates v. State*, 5 Ala. App. 182, 59 South. 323; *Freeney v. City of Jasper*, 8 Ala. App. 469, 62 South. 385.

[2] The entries in the book from which the witness Thigpen refreshed his recollection as to the dates the several packages were delivered were made by the witness at the time of the delivery, and it was proper to allow the witness to refresh his memory from these entries. *Davie v. Roland*, 3 Ala. App. 567, 57 South. 1034; *B. R. L. & P. Co. v. Seaborn*, 168 Ala. 658, 53 South. 241.

[3] While the entries in the book, from which the witness Thigpen had refreshed his recollection as to the dates he delivered shipments of liquors to defendant, were not offered in evidence, yet these entries were a legitimate subject of cross-examination, and the defendant had the right to inquire fully as to these and other entries purporting to have been made at or about the same time, for the purpose of testing the recollection of the witness, and, if he desired, to offer the book itself in evidence. *B. R. L. & P. Co. v. Seaborn*, supra; *Acklen v. Hickman*, 63

Ala. 498, 35 Am. Rep. 54; *Councill v. Mayhew*, 172 Ala. 295, 55 South. 317. The court, therefore, erred, to defendant's prejudice, in curtailing his right of cross-examination as to these entries and in not allowing the defendant to introduce in evidence the pages of the book containing the entries referred to by the witness to refresh his recollection.

[4] The court was right in overruling the defendant's motion to require the state to elect as to which of the shipments it would rely on for conviction. *Allison v. State*, 1 Ala. App. 206, 55 South. 453. There was no error in refusing the affirmative charge. Authorities supra.

For the error pointed out, the judgment must be reversed, and the cause remanded.

Reversed and remanded.

(12 Ala. App. 419)

ATLANTIC COAST LINE R. CO. v. JONES. (No. 86.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

COMMERCE—§8—INJURY TO SERVANT—STATE AND FEDERAL STATUTES.

Where plaintiff had been injured while engaged in interstate commerce, and his complaint sought a recovery under Code 1907, § 8910 (the state Employers' Liability Act), it was reversible error for the court to refuse a general charge requested by defendant as to recovery on that count, since the federal Employers' Liability Act of April 22, 1908 (35 Stat. 65, c. 149 [U. S. Comp. St. 1913, §§ 8657-8665]), has superseded all state statutes as to the liability of employers to their employes engaged in interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. §8.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Action by Will Jones against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

John R. Tyson and A. H. Arrington, both of Montgomery, for appellant. William H. & J. R. Thomas, of Montgomery, for appellee.

PELHAM, P. J. After the original opinion in this case was rendered (*Atlantic Coast Line R. Co. v. Jones*, 9 Ala. App. 499, 63 South. 693), and while the case was before the Supreme Court on writ of certiorari, the Supreme Court of the United States rendered an opinion in the case of *Seaboard Air Line R. Co. v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, finally and conclusively holding that the federal Employers' Liability Act of 1908 takes possession of the field of the employers' liability to employes engaged in interstate matters, to the exclusion of all state laws covering the same field. Following that holding, and applying the rule there laid down to this case when before it, our Supreme Court naturally held that

there could be no recovery based on the state statute in cases arising under and governed exclusively by the federal statute (Ex parte Atlantic Coast Line R. R. Co., 67 South. 256), and that, as count 3½ of the plaintiff's complaint was drawn and sought a recovery under the state statute (Code, § 3910), it was error, requiring a reversal, to refuse the general charge requested by the defendant as to a recovery on that count. It follows from what we have said that, because of the error of the trial court in refusing the defendant's general charge on count 3½ of the complaint, the judgment of that court must be reversed. Reversed and remanded.

(12 Ala. App. 123)

FARRIOR v. STATE. (No. 188.)

(Court of Appeals of Alabama. Jan. 14, 1915.)

1. WITNESSES ⇨266½—CROSS-EXAMINATION—RESPONSIVE ANSWERS.

It is not error to refuse to exclude an answer of a state's witness responsive to a question on cross-examination, merely because accused is surprised thereby, and is against his interest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 921, 922; Dec. Dig. ⇨266½.]

2. CRIMINAL LAW ⇨1120—APPEAL—QUESTIONS REVIEWABLE—RECORD.

A ruling of the trial court excluding from evidence a paper, not set out in the bill of exceptions, which merely recites that the paper was offered by accused and an exception reserved to its exclusion, is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. ⇨1120.]

3. CRIMINAL LAW ⇨696—EVIDENCE—OPINION EVIDENCE.

It is not error to refuse to strike out the "testimony of a witness as to the handwriting of accused" that he was not familiar enough with the handwriting to say whether a signature was accused's signature, that he would not testify whether the signature looked like the signature of accused, where accused moved to exclude all of the testimony of the witness as to opinion on accused's handwriting, there being none.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. ⇨696.]

4. CRIMINAL LAW ⇨1043—APPEAL—RULINGS ON EVIDENCE.

Admission of answer responsive to an objectionable question not objected to until after answer is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. ⇨1043.]

5. CRIMINAL LAW ⇨432—EVIDENCE—CHECKS—IDENTIFICATION.

Where, on a trial for the theft of an animal sold by accused to a third person, a check given by the third person in payment to accused, who indorsed and cashed it at a bank, was identified, and witnesses testified with respect to it without objection, the check was properly received in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1021; Dec. Dig. ⇨432.]

6. CRIMINAL LAW ⇨1141—APPEAL—QUESTIONS REVIEWABLE—PRESUMPTIONS.

The court on appeal will indulge in favor of the ruling of the trial court all legitimate and fair presumptions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3015, 3020, 3022, 3023; Dec. Dig. ⇨1141.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

R. E. Farrior was convicted of grand larceny of a cow sold by him to one W. Clark, and appeals. Affirmed.

Mark D. Brainard, of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] The answer of the state's witness Johnson, "Yes, I hoped killed the cow," seems to be directly responsive to a question propounded to the witness by defendant's counsel on cross-examination, and the court cannot be put in error for refusing to exclude the evidence thus elicited in response to the defendant's cross-examination of the witness, although the answer is a surprise and against the defendant's interest. If the answer was responsive but unsatisfactory, it would be permitting the defendant to speculate, to exclude it because it was not what he expected or desired as an answer.

[2] The paper received by the witness Price Johnson as a notice, or as having some connection with his working the public road on some particular day, is not set out in the bill of exceptions. Consequently, we are afforded no data to review the correctness of the ruling of the trial court in excluding this paper, which the bill of exceptions recites was offered in evidence by the defendant, and an exception reserved to the action of the trial court in excluding it. The witness is shown to have been permitted to testify fully as to the particular day, time of day, etc., when he was summoned to work the road.

[3] The state's witness J. N. Norris is not shown to have answered the questions of the solicitor as to his (Norris') knowledge and comparison of the defendant's signature with the paper shown him, by making any statement prejudicial to the defendant's interest. The substance of his answers was: "I am not familiar with his signature. * * * I am not familiar enough with it to say." Then, upon being further asked to give his "best impression" if the signature shown him looked like the defendant's signature, the witness stated that he had frequently seen the defendant's signature, "but would not testify" whether the signature shown him looked like that of the defendant. The defendant's motion to "exclude all of the testimony of this witness in regard to the opinion of the witness about that (the check) be-

ing the defendant's handwriting" was properly overruled by the court, and the expression of the trial judge in refusing the motion, "You cannot exclude what he did not testify," was not inapt, and is illustrative of there being no evidence prejudicial to the defendant on this matter before the court as coming from the mouth of this witness.

[4] The bill of exceptions affirmatively shows that the evidence elicited from the state's witness W. Clark in making a comparison of the signatures purporting to be those of the defendant on the different checks shown him was directly responsive to a question asked the witness to which no objection was made. The bill of exceptions recites, in this connection, that "the defendant objected after the witness had answered the question." The admission of an answer responsive to an objectionable question not objected to is not presented for review. *Shaw et al. v. Cleveland*, 5 Ala. App. 333, 59 South. 534. For the same reason, that part of the evidence of George Clark and his father, W. Clark, with respect to the purchase by them of another animal from the defendant previous to the transaction for which the defendant was being prosecuted, cannot be reviewed; no objection being shown to have been made to the questions before they were answered by the witnesses. See *Kirk v. State*, 10 Ala. App. 216, 65 South. 195; *Allen v. State*, 8 Ala. App. 228, 62 South. 971, and authorities there cited.

[5, 6] It is not shown what check was offered and admitted in evidence against the objection of the defendant, in connection with the witness Clark's testimony. Whether it was the check that had been properly identified as the check given to the defendant by the witness in payment for the animal alleged to have been stolen, and which the bank cashier testified had been indorsed and cashed by the defendant, or some other, is not made to appear. The check shown by the state's evidence to have been given by the witness Clark in payment for the animal in question to the defendant and indorsed and cashed at the bank by the defendant, had been properly identified and several witnesses had testified with respect to it without objection. On such a state of the evidence, the check was relevant and material, and the preliminary proof necessary to its admission had been made. It is not shown by anything contained in the bill of exceptions to have been offered in evidence at any other stage of the proceedings. The witness, it appears, was shown two checks. The check offered and admitted is not set out or described in any way to inform us what check it was that the court admitted. In such a condition of the record, it is not to be presumed as against the correctness of the trial court's ruling that error was committed. On appeal in criminal cases all legitimate

and fair presumptions will be indulged in favor of the ruling of the lower court. *Green's Case*, 73 Ala. 26; *Ryan's Case*, 100 Ala. 105, 14 South. 766; *Garrett's Case*, 97 Ala. 18, 14 South. 327. In this connection, it may be mentioned inferentially that the bill of exceptions does not purport to set out all, or substantially all, of the evidence or its tendencies.

We have examined the entire transcript and find no other matter presented, or sought to be presented, meriting discussion, and nothing authorizing a reversal of the judgment.

Affirmed.

(12 Ala. App. 139)

BRANNON v. STATE. (No. 676.)

(Court of Appeals of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 12, 1915.)

1. CRIMINAL LAW — 5 — POWER TO DEFINE CRIME — KEEPER OF GAMBLING HOUSE.

It is within the power of the Legislature to make guilty of vagrancy persons engaged in unlawful callings, such as keeping a gambling house.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 4; Dec. Dig. — 5.]

2. INDICTMENT AND INFORMATION — 127 — JOINDER OF COUNTS — VAGRANCY STATUTE.

Under Code 1907, § 7843, defining certain specific offenses as vagrancy, an indictment was good which joined charges under different subdivisions of the statute in separate counts.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 401, 402; Dec. Dig. — 127.]

3. INDICTMENT AND INFORMATION — 110 — JOINDER OF COUNTS — VALIDITY OF COUNTS.

Under Code 1907, § 7843, subd. 11, defining as a vagrant one who is a keeper, etc., of a gambling house, where a count of an indictment charged the offense created by such statute in its words, and would not have been affected had there been a *nol. pros.* as to other counts, the count was good.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. — 110.]

4. CRIMINAL LAW — 1137 — INVITED ERROR — REQUEST FOR INSTRUCTIONS.

Where defendant requested the general charge as to one count of an indictment charging vagrancy, which was given, he could not thereafter assign such action of the court as reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. — 1137.]

5. VAGRANCY — 3 — KEEPER OF GAMBLING HOUSE — SUFFICIENCY OF EVIDENCE.

In a prosecution for vagrancy by keeping a gaming house, evidence held sufficient to justify a finding by jury that defendant had been a keeper of a such a house.

[Ed. Note.—For other cases, see Vagrancy, Cent. Dig. § 3; Dec. Dig. — 3.]

Appeal from Criminal Court, Jefferson County; S. E. Greene, Judge.

Jim Brannon was convicted of crime, and he appeals. **Affirmed.**

ANem, Bell & Sadler, of Birmingham, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. The fourth count of the indictment upon which the defendant was convicted is in the following language:

"The grand jury of said county further charge that, before the finding of this indictment, Jim Brannon was a keeper, proprietor, or employé of a gambling house, against the peace and dignity of the state of Alabama."

It will be seen that this count was framed as coming within the eleventh of the 13 classes of persons enumerated by the statute in its classification or description of persons who shall be deemed to be vagrants. Code, § 7843, subd. 11.

[1] If the Legislature can make an act of abandonment and failure and inability to contribute to the support of the family vagrancy (*Boulo v. State*, 49 Ala. 22), or the keeping of a house of ill fame or a common prostitute without honest means of maintenance (*Ex parte Birchfield*, 52 Ala. 377), there would seem to be no good reason for holding that it could not define kindred acts leading to similar nuisances and evils, such as keeping a gambling house or professional gambling or begging, as vagrancy. It is within the power of the Legislature to define and deem those classes of persons who engage in an unlawful calling, as gambling, to be vagrants. *Shreveport v. Bowen*, 116 La. 522, 40 South. 859; *Johnson v. State*, 28 Tex. App. 562, 13 S. W. 1005. Statutes which have classed professional gamblers and others of that class as vagrants have always been upheld. 39 Cyc. 1111, and authorities cited in note 19.

[2-4] It did not vitiate the indictment that in separate counts it joined charges under different subdivisions of the section defining vagrancy. The sufficiency of the count upon which the conviction was had was not attacked by demurrer, or otherwise, in the trial court. Issue was taken on it without objection. It was a good count, charging the offense created by the statute in the words of the statute defining it (*Traylor v. State*, 100 Ala. 142, 14 South. 634; *Jordan v. State*, 5 Ala. App. 229, 59 South. 710, and cases there cited), and would not have been affected had there been a *nol. pros.* as to the other counts (*Wooster v. State*, 55 Ala. 217), or if, as in this case, the court gave the general charge as to certain of the other counts. It is true one of the counts on which the court gave the general charge is in the general form for vagrancy prescribed by the Code, but that would not affect the fourth count, which was a good count more specifically designating and particularizing the charge against the defendant and informing him of the exact subdivision of the statute enumerating the classes of persons described as vagrants, under which he was being prosecuted.

Of course the defendant could have been prosecuted and convicted of vagrancy under the count charging the defendant with vagrancy in the general form laid down in the statute, and it could even be said that the court assumed an inconsistent attitude in giving the general charge as to this count and submitting the fourth count to the jury. But this action of the court was invited at the instance of the defendant by a request in writing, and he cannot thus invite action of the court favorable to himself, though erroneous, and then complain of it as prejudicial and take advantage of the ruling of the court in the defendant's favor, made at the defendant's request, and make it a basis for a contention that the court's ruling constitutes reversible error as against the defendant. A defendant cannot be heard to complain at the action of the court which was superinduced by him. *Lucas v. State*, 144 Ala. 63, 39 South. 821, 3 L. R. A. (N. S.) 412. The action, though erroneous, is not available to the party invoking it. *W. U. Tel. Co. v. Griffith*, 161 Ala. 241, 50 South. 91.

[5] As we read the evidence set out in the bill of exceptions, counsel for appellant are mistaken in the assertion contained in brief and argument that "there was not the slightest evidence of proprietorship or employment in any of the gambling houses referred to." The state's witness Dailey testified that he "understood" that the defendant, Brannon, was interested in the Saratoga Hotel "while the same was in operation," and was one of the proprietors of the hotel. There is ample evidence to support a finding that this hotel, "while in operation," was being operated as, and in connection with, a gambling house. The state's witness Eagan testified on cross-examination by defendant's counsel that he (witness) knew that the defendant was "interested in" the Saratoga Hotel and in the Burton Hotel. The defendant himself testified that he was at one time one of the proprietors of the Saratoga Hotel, and also had "acquired an interest in the Burton Hotel Company," and that on one occasion he had been arrested for gaming in the Saratoga Hotel. There was abundant evidence affording an inference that these hotels were run as gambling houses, frequented by men known as gamblers, and that the defendant was a frequenter of these and other resorts reputed to be gambling places. There was no evidence introduced having a tendency to show to the contrary, or that these resorts or hotels were operated in the interests of a legitimate hotel or other business. It seems to us that the evidence afforded a basis for an inference, as found by the jury, that the defendant was a keeper, proprietor, or employé of a gambling house.

No reversible error is shown by the record. Affirmed.

(69 Fla. 33)

VANCE v. JACKSONVILLE REALTY & MORTGAGE CO.

(Supreme Court of Florida. Jan. 21, 1915.)

*(Syllabus by the Court.)***1. HUSBAND AND WIFE \Leftrightarrow 80—CONTRACT BY MARRIED WOMAN—RETURN OF MONEY PAID—ENFORCEMENT.**

Although a contract made by a married woman may not be specifically enforced against her by reason of the fact that such contract was not executed or acknowledged by her in accordance with the statutory requirements, such fact does not make the contract void, but upon a sufficient showing, in proper proceedings instituted for that purpose, the money paid to such married woman upon such contract may be required to be returned or decreed to be a lien upon her property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 327-330; Dec. Dig. \Leftrightarrow 80.]

2. EQUITY \Leftrightarrow 232—BILL—DEMURRER.

A demurrer to the whole bill should be overruled, if the bill makes any case for equitable relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 508; Dec. Dig. \Leftrightarrow 232.]

Appeal from Circuit Court, Duval County; Daniel A. Simmons, Judge.

Suit by the Jacksonville Realty & Mortgage Company, a corporation, against Mary B. Vance. From decree for complainant, defendant appeals. Affirmed.

On the 12th day of March, 1913, Jacksonville Development Company, a corporation, as complainant, filed its bill in chancery against Mary B. Vance and her husband, S. C. Vance, and Mrs. H. C. Merritt, as defendants, which bill, omitting the caption, is as follows:

"Your orator, Jacksonville Development Company, a corporation organized and existing under the laws of the state of Florida, complainant, brings this its bill of complaint against Mary B. Vance and her husband, S. C. Vance, of Duval county, Florida, and Mrs. H. C. Merritt, of Duval county, Florida, defendants, and thereupon your orator complains and says:

"(1) That the defendant Mary B. Vance was, on the 30th day of April, 1912, and still is, a married woman, the wife of the defendant S. C. Vance; that on said date, and at all times since then, the said defendant Mary B. Vance was the owner, as her separate property and estate, of the following described real estate, to wit, lots 2, 3, and 8 in block 10, Riverside, a suburb of the city of Jacksonville, Duval county, Florida; that on said date the said Mary B. Vance and her husband, S. C. Vance, executed unto your orator a written agreement for the purchase of said real estate, copy of said agreement being hereto attached, marked 'Exhibit A,' and made a part hereof; that upon the execution of said agreement (Exhibit A) your orator paid to the said Mary B. Vance the sum of \$500 on account of the purchase price of said property, as provided in and by said agreement (Exhibit A); that, by the payment to and receipt by the said Mary B. Vance of the said \$500 as aforesaid, the separate property and estate of the said Mary B. Vance was thereby benefited and enhanced and augmented to the extent of the said \$500.

"(2) And your orator would further show that thereafter the said Mary B. Vance declined to carry out said agreement (Exhibit A), although your orator was ready, willing, and at divers

times offered to perform all things on its part to be done and performed under said agreement; that the said Mary B. Vance declined to execute unto your orator a deed for said property, in accordance with said agreement (Exhibit A), and also retained the said \$500 and refused to pay the same back to your orator; that your orator filed a bill for specific performance in the circuit court of Duval county, Florida, against the said Mary B. Vance and husband, seeking the specific performance of said agreement, and seeking to compel said Mary B. Vance and husband to execute to your orator a deed to said property in accordance with terms of said agreement (Exhibit A); that said defendant Mary B. Vance, through her attorney, filed a demurrer to said bill of complaint and insisted thereby that the relief sought by said bill could not be obtained because said bill and copy of said agreement (Exhibit A) did not show that execution of said agreement was acknowledged by the said Mary B. Vance with separate examination; that, on account of there having been no separate examination of the said Mary B. Vance as to the execution of said agreement (Exhibit A), your orator was unable to enforce specific performance of the same.

"(3) And your orator would further show that the defendant Mrs. H. C. Merritt is a widow and holds two mortgages upon the property described as aforesaid—one mortgage for the sum of \$10,000, dated August 28th, 1911, recorded in Mortgage Book 42, page 398, records of Duval county; also a mortgage in the sum of \$2,500, dated February 28th, 1912, recorded in Mortgage Book 57, page 95, Public Records Duval county, Florida; that the liens created by said mortgages and held by the defendant Mrs. H. C. Merritt are superior in dignity to the claim of your orator against the said separate estate of the defendant Mary B. Vance.

"Forasmuch, therefore, as your orator is without remedy, save in a court of equity, where such things are remedied, your orator prays that said defendants may be required to answer this bill of complaint, but not under oath, answer under oath being hereby waived as particularly as if interrogated thereto, and your orator further prays that an account be taken under the direction of this court, to answer the amount due from the defendants Mary B. Vance and husband, to your orator, and that the said Mary B. Vance be directed to pay such amount within a day short, and in default thereof that the said property, to wit, lots 2, 3, and 8 in block 10, Riverside, a part of the city of Jacksonville, Duval county, Florida, may be sold under the order and direction of this court, subject to the mortgages hereinbefore described, to satisfy such sum as may be found to be due to your orator upon the taking of an account aforesaid.

"And that your honor will grant unto your orator such other and further general relief as equity may require and to your honor may seem meet.

"And may your honor grant unto your orator the state's most gracious writ of subpoena directed to the defendants, Mary B. Vance and S. C. Vance, her husband, of Duval county, Florida, and Mrs. H. C. Merritt, of Duval county, Florida, returnable according to law and the course of this honorable court and your orator will ever pray."

Exhibit A, referred to in the bill, attached thereto and made a part thereof, is as follows:

"Jacksonville, Florida, Apr. 30th, 1912.

"Received of the Jacksonville Development Company, \$500 part payment on lots 2, 3, and 8, in block 10, Riverside. Total purchase price to be \$25,000 and the purchaser to move the present house of the seller, now located on lot 2 to

lot 7 in the same block. Balance of purchase price to be paid in cash as soon as the title papers been passed on and approved by the buyer's attorney, except the existing mortgage of \$12,500 and accrued interest to date, which mortgage the purchaser agrees to assume and pay. Taxes for 1912 to be paid by purchaser. The seller to settle all other incumbrances and liens with the exception of the Riverside avenue paving bill.

Mary B. Vance.
S. C. Vance.

"Subscribed and sworn to before me this 30th day of April, 1912. Richard W. Lyman,

"Notary Public, State of Florida, at Large.

"My commission expires Aug. 29th, 1914."

To this bill Mary B. Vance and her husband, S. C. Vance, interposed the following demurrer:

"These defendants jointly and severally demur to the said bill of complaint and for causes of demurrer show:

"(1) That the complainant has not in and by its bill made or stated such a cause as entitled it in a court of equity to any discovery or relief from or against these defendants or either of them, touching the matters contained in said bill or any such matters.

"(2) The bill of complaint does not show that the five hundred dollars (\$500), the subject-matter of said bill, inured to the benefit of the separate estate of Mrs. Mary B. Vance, or in any way gave her separate estate any benefit or advantage.

"(3) The allegations of the bill do not show in what way the separate estate of Mrs. Mary B. Vance was benefited, enhanced and augmented."

"(4) The contract, being unenforceable for specific performance, is unenforceable for all purposes.

"(5) The bill of complaint does not present such an obligation of a married woman as the Constitution authorizes a court of equity to deal with and enforce.

"Wherefore these defendants demur to the said bill and all the matters and things therein contained, and pray the judgment of this honorable court whether they or either of them shall be compelled to make any further or other answer thereto, and pray to be dismissed, with their reasonable costs in behalf sustained."

This demurrer was overruled, and subsequently such two defendants filed the following answer:

"These defendants reserving to themselves all right of exception to the said bill of complaint, for answer thereunto say:

"(1) That they admit the first paragraph of the bill of complaint to be true as therein stated, except wherein it is alleged that by the payment of and receipt by the said Mary B. Vance of said five hundred dollars, the separate property and estate of Mary B. Vance was thereby benefited, enhanced, and augmented to the extent of the said five hundred dollars, and specifically deny that the payment of said money in any way benefited or enhanced or augmented the separate estate of the said Mary B. Vance.

"(2) As to the second paragraph of said bill of complaint the defendants deny that Mary B. Vance declined to carry out said agreement (Exhibit A) to the bill of complaint, and to execute a deed to said property in accordance with said agreement (Exhibit A), and deny that the complainant was ready and willing and at divers times offered to perform all things on its part to be performed under said agreement, but admits that Mary B. Vance retained the five hundred dollars and refused to pay the same back, and avers that the facts in regard thereto are as hereinafter set forth, and admits that a bill for specific performance was filed by the complainant against the defendants, and that a de-

murrer was interposed to said bill of complaint, as alleged in said second paragraph of the bill of complaint.

"(3) As to the third paragraph of complainant's bill of complaint, these defendants admit same to be true, as therein stated.

"And for a further answer upon the part of the defendants thereto these defendants say that Mary B. Vance never at any time refused or declined to carry out said contract as set forth in said Exhibit A, attached to the bill of complaint, and avers that, as a part of said contract, it was provided that the Jacksonville Development Company was to move the house of these defendants located on lot two (2) to lot seven (7) in the same block, and the balance of the price, other than the five hundred dollars in cash, was to be paid as soon as the papers had been passed upon and approved by the attorney for the complainant, and that although a reasonable time has elapsed for the complainant to have the papers passed upon by the attorneys, and to remove the house provided in said contract, the complainant wholly failed to perform its part of the contract to be kept and performed, in that complainant never at any time made any effort to or take any step towards the looking to the removal of the house of these defendants from lot two to lot seven in the same block, or to make any removal thereof at all, and never at any time prepared or took any steps towards preparing or making any foundation on defendant's lot seven for the removal of the house of these defendants from lot two; and these defendants did not offer any objection to or do anything of any kind or character whatsoever to prevent said complainants from removing said house, as was provided for complainant to do, and which was a condition precedent to be performed by the complainant before a deed could be demanded of these defendants or before the defendants were obliged or called upon under the contract to execute a deed; and these defendants further aver that complainant never at any time tendered to these defendants the \$12,500 provided to be paid by the complainant to these defendants before defendants were to be called upon to execute a deed, nor did any one in behalf of the complainant offer to pay by tendering said money or any part thereof, and that the payment thereof or a tender of said \$12,500 was a condition precedent to be performed by the complainant before the complainant would be entitled to demand a deed or the repayment of the said \$500 by the defendants.

"And these defendants, further answering, say that they have never been called upon by the complainant with the money in hand or without the money in hand, or with check in hand, to pay the balance of the purchase money, \$12,500, and a deed demanded.

"And these defendants, further answering, say that, the complainant never having placed itself in a position to demand or receive a deed by a performance of the contract made a basis of the bill of complaint herein, it has no equity to insist upon the repayment of the \$500 so paid on account of the purchase of said property, and no right to require the repayment by the said Mary B. Vance of said \$500, and is not entitled to a lien upon lots two, three, and eight in block seven for said money or any part thereof or to an order that same may be sold as prayed in the bill.

"And these defendants, further answering, deny that complainant is entitled to the relief, or any part thereof, prayed in said bill of complaint demanded, and pray the same advantage of this answer as if they had pleaded or demurred to said bill of complaint, and pray to be dismissed with their reasonable costs in this behalf most wrongfully sustained."

A suggestion was filed as to the change of the corporate name of the complainant from

Jacksonville Development Company to Jacksonville Realty & Mortgage Company, and also of the death of S. C. Vance, and an order was made that the cause proceed in the name of Jacksonville Realty & Mortgage Company as complainant and against Mary B. Vance and Mrs. H. C. Merritt as defendants.

A replication was filed to the answer of Mary B. Vance and S. C. Vance, her husband, and a special examiner was appointed to take the testimony in the cause. The cause came on for a final hearing, and the following decree was rendered:

"This cause came on this day for final hearing upon the pleadings and upon the evidence taken before the special examiner appointed in said cause; and the same having been duly submitted by counsel for said parties, and the court being fully advised in the premises, the court finds as follows:

"First. That the equities generally as set forth in the bill of complaint are with the complainant.

"Second. That on March 12, 1913, when said bill of complaint was filed, the defendant Mary B. Vance was a married woman, and owned as her separate property lots 2, 3, and 8 in block 10, Riverside, a suburb of the city of Jacksonville, Florida.

"Third. That on April 30, 1912, the said Mary B. Vance and her husband then living executed a contract for the sale of said property to the complainant, and on said date the said Mary B. Vance received from the complainant the sum of five hundred dollars on account of the purchase price of said property.

"Fourth. That afterwards the said Mary B. Vance repudiated said agreement and refused to make conveyance of said property as therein provided, but that she has retained the said sum of money, and that the same has been of benefit to her separate estate, and that the same is a proper charge on behalf of the complainant against the above-described property.

"Fifth. That the amount due by the said Mary B. Vance to the complainant is the said sum of five hundred dollars, with eight per cent. interest thereon since April 30, 1912, making a total to this date of \$595.25.

"It is therefore considered, ordered, and decreed that the defendant Mary B. Vance pay to the complainant, within ten days from the date of this decree, the said sum of five hundred ninety-five ²⁵/₁₀₀ dollars and also the costs of this suit, to be computed and taxed by the clerk of this court.

"And it is further ordered, adjudged, and decreed that, in default of payment as aforesaid, then and in that case the said premises, to wit, lots 2, 3, and 8 in block 10, Riverside, a suburb of the city of Jacksonville, Duval county, Florida, be sold at public outcry for cash in hand paid to the highest bidder at the courthouse door in Jacksonville, Duval county, Florida, during legal hours of sale; that, should it become necessary to make sale of such property as aforesaid, a special master in chancery may, upon application of the complainant, be appointed to make public sale thereof upon such terms as the court may direct.

"And it is further ordered and decreed that in the event of failure on the part of said defendant to pay the sums of money hereinbefore set forth, and upon sale of said premises as herein decreed, then the said defendant Mary B. Vance, and all persons claiming through or under her since the commencement of this suit, be and they are hereby forever barred and foreclosed from all equity of redemption and claim of, in, and to said charged premises or any part thereof.

"Done and ordered at chambers in Jacksonville, Florida, this the 19th day of September, 1914.
Daniel A. Simmons, Judge."

From this decree Mary B. Vance has entered her appeal.

J. E. & Julian Hartridge, of Jacksonville, for appellant. Thomas B. Adams, of Jacksonville, for appellee.

SHACKLEFORD, J. (after stating the facts as above). [1, 2] The first assignment which is mainly relied upon for a reversal of the decree questions the correctness of the order overruling the demurrer interposed to the bill. It is strenuously contended that, as it plainly appears from the bill, the contract could not be specifically enforced against Mrs. Vance, by reason of her coverture, therefore the bill is without equity. In other words, as the appellant contends, "the contract, being unenforceable for specific performance, is unenforceable for all purposes." We had occasion to touch upon this principle in *Shields v. Ensign*, 67 South. 140, decided here at the last term, wherein we held:

"That the statute does not make the written agreements of a married woman, otherwise executed, absolutely void and nonchargeable upon her estate, but merely that they shall not be specifically enforced—a much higher equity than the mere charging for a breach of contract."

See our discussion in that opinion.

We would also refer to the following cases as holding in effect that, although a contract made by a married woman may not be specifically enforced against her by reason of the fact that such contract was not executed or acknowledged in accordance with the statutory requirements, such fact does not make the contract void, but upon a sufficient showing in proper proceedings instituted for that purpose the money paid to such married woman upon such contract may be required to be returned or decreed to be a lien upon her property. *Pierson v. Lum*, 25 N. J. Eq. 390; *Moore v. Ligon*, 22 W. Va. 292; *Burns v. McGregor*, 90 N. C. 222. As was well said in the last-cited case on page 225 of 90 N. C.:

"The wife may, under an engagement not legally binding upon her, refuse to pay her debt, but, if she does so, she cannot keep the property for which the debt was contracted. It would contravene the plainest principles of justice to allow a married woman to get possession of property under an engagement not binding upon her, and let her repudiate her contract and keep the property. She must observe and keep her engagement, or else return the property; if she will not, the creditor may pursue and recover it by proper action in her hands."

This is in line with the intimation in *Shields v. Ensign*, supra, as also in *Goss v. Furman*, 21 Fla. 406. See, also, the discussion in *Equitable Building & Loan Association v. King*, 48 Fla. 252, 37 South. 181.

We do not think that there is any merit in the contention of the appellant that the bill fails to show that the \$500 paid by the appellee to Mrs. Vance as part of the purchase price for the land described inured to the

benefit of her separate estate. The bill directly alleges the payment of such amount to Mrs. Vance for such purpose, and the demurrer admits that such allegation is true. We are clear that the bill has equity in it; therefore the demurrer interposed thereto was properly overruled. See *Boyd v. Gosser*, 67 South. 89, decided here at the last term.

The other assignments are based upon the final decree and call for no extended discussion. We think that the proofs adduced by the complainant sustained the allegations of the bill and warranted the circuit judge in finding that the equities were with the complainant.

The decree will be affirmed.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 182)

CAMPBELL v. MAULL

(Supreme Court of Florida. Feb. 3, 1915.)

(*Syllabus by the Court.*)

INJUNCTION §59—BREACH OF CONTRACT.

Even though the terms of a contract for the sale of patent rights may be regarded as reasonable and proper for the protection of the purchaser and not violative of public policy, yet if no breach warranting an injunction and accounting is shown, such equitable relief is properly denied.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 114-116, 128; Dec. Dig. §59.]

Appeal from Circuit Court, Duval County; Geo. Cauper Gibbs, Judge.

Bill by J. P. Campbell against Edwin N. Maull. From decree for defendant, complainant appeals. Affirmed.

Marks, Marks & Holt, of Jacksonville, for appellant. F. M. Durrance, of Jacksonville, for appellee.

WHITFIELD, J. On a bill of complaint alleging the breach of a contract not to manufacture, sell, deal in, or handle fruit packing house equipment or machinery for a period of five years, a temporary restraining order was granted. Subsequently the order was dissolved, and a demurrer to the bill of complaint was sustained. The complainant appealed.

The contract provides for the sale to J. P. Campbell, a manufacturer, for stated considerations, certain machinery, certain patents and "patentable ideas," relating to certain "packing house machinery and equipment." The contract also provided that Maull "will not directly, indirectly, solely, or jointly as principal, agent, manager, or otherwise, be concerned or interested in the manufacture, sale or otherwise dealing in or handling of fruit packing house equipment or machinery nor permit my name to be used in connection with such business for a period of five (5)

years." It is alleged that Maull has violated the contract "by building, constructing, repairing or otherwise working upon a drier and sizer in" a stated packing house; and "by building * * * certain other fruit packing house equipment or machinery" at a stated packing house, " * * * and in furnishing or supplying, for the operation of said machinery, a certain gasoline engine," and by disposing of a "fruit packing house equipment or machinery or part thereof," in violation of a provision of the contract under which the same was sold to Maull by Campbell.

Assuming that the terms of the contract made by Maull in connection with the sale of patent rights and machinery are reasonable and proper for the protection of the purchaser and are not violative of public rights so as to be contrary to state policy, the allegations do not show such breaches of the contract as to justify relief in equity by injunction and accounting. Should the contract be so construed as to make the alleged breaches in fact violations of the contract, public policy may be contravened, since the acts alleged refer to personal labor and have no necessary relation to violations of the contract that is taken to be designed merely for proper protection of the use of patent rights and "patentable ideas" covered by the contract of sale to J. P. Campbell, the manufacturer. The alleged breach in the sale of machinery that was sold to Maull by Campbell does not call for equitable relief.

Decree affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 183)

ATLANTIC COAST LINE R. CO. v. PERRY.

(Supreme Court of Florida. Feb. 9, 1915.)

(*Syllabus by the Court.*)

1. RAILROADS §446 — FENCES — INJURY TO ANIMALS—QUESTION FOR JURY.

The statute requiring railroad companies to fence their right of way making no exception for way stations, and it appearing that at the place where the animal was killed is the open country, without building, platform, or side track, but that the trains stopped near the point when flagged, and that the track was unfenced in that vicinity, an exception to the statute *ex necessitate* did not exist as matter of law, and a finding by the jury against such theory will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. §446.]

2. RAILROADS §452—KILLING OF ANIMALS—ATTORNEY'S FEE—RIGHT TO RECOVER.

When a railroad company denies liability, and the owner of an animal killed in violation of a statute requiring such company to fence its right of way is compelled to bring his action to recover any damages, he is entitled to a reasonable attorney's fee, even though the jury fix the value of the animal at a reduction from

the value claimed both in the preliminary demand and in the declaration.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 1653; Dec. Dig. ¶452.]

Error to Circuit Court, Columbia County; M. F. Horne, Judge.

Action by J. W. Perry against the Atlantic Coast Line Railroad Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

J. L. Doggett, of Jacksonville, and J. B. Hodges, of Lake City, for plaintiff in error. A. J. Henry, of Lake City, for defendant in error.

COCKRELL, J. B. H. Johnson recovered judgment against the railroad company for the value of a mule killed, together with an attorney's fee of \$50. He died soon after the entry of the judgment, and the cause was revived in the name of the sheriff of Columbia county, who was appointed administrator ex officio.

[1] We shall not undertake to follow the various ramifications of the pleadings. Johnson declared upon the statute giving damages for the killing of live stock when the railroad company has failed to fence its tracks. Outside the constitutional question hereafter discussed, the defense relied upon was and is that the killing took place within the station grounds, an exception to the operation of the statute alleged to exist ex necessitate.

It appears that the mule got upon the railroad tracks at a place called Cornell, and that this was a way station where trains stopped if flagged. There were no buildings used by the public, nor even a platform, and no side tracks or spurs. A public road crossed the railroad tracks near where the accident occurred, and the trains when flagged stopped near there. Exactly how near we are not definitely advised, though one witness for the defendant company testified that the distance where he was told the train usually stopped, and where he was told the accident occurred, was 70 feet. It does not appear that the fencing was left open at this particular point by reason of this supposed necessity, but rather that the railroad company had wholly ignored the statute and had no fence at all in this locality. Upon this evidence, we do not hold the court in error for submitting the question of the necessity to the jury, nor the jury in error in finding against the contention. See the interesting note to *Willmot v. Oregon Railroad & Navigation Co.*, 7 L. R. A. (N. S.) 202.

We may note here that the plat used in evidence is not before us.

[2] The constitutional point presented is based upon the allowance of an attorney's fee, admitted to be reasonable in amount, in a case where the jury fixed the value of the

animal killed at less than that named in the claim presented. In this connection it is to be observed that this statute is founded strictly upon the police power of the state, being designed to protect the traveling public from the danger incident to collisions with cattle upon the tracks of the railroad companies, and the statute makes the failure to fence negligence per se.

Secondly, the extra recovery going directly to the individual benefit of the injured party is allowed only when he proves the value of the animal to be at least equal to that named in his preliminary claim.

Thirdly, in this particular case, the necessity for the action was produced, in part at least, if not wholly, by the denial of liability by the railroad company, and was not occasioned by an honest difference in the valuation of the animal.

Under these circumstances, we have no hesitation in upholding the judgment for the attorney's fee. In the case of *Seaboard Air Line Ry. v. Robinson*, 67 So. 139, decided November 25, 1914, we had occasion to examine all the late cases by the Supreme Court of the United States bearing upon the validity of somewhat similar statutes from other states, and we see no necessity for reviewing them here.

The judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 125)

BORLAND et al. v. TOWLES et al.

(Supreme Court of Florida. Feb. 9, 1915.)

(Syllabus by the Court.)

1. COUNTIES ¶192—TAX LEVY—NOTICE—PUBLIC BUILDINGS.

No notice is required to be given of the levy of a tax by the county commissioners to build a courthouse under chapter 5698 of Laws 1907 (Comp. Laws 1914, § 808).

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 300-302; Dec. Dig. ¶192.]

2. COUNTIES ¶105—COUNTY COMMISSIONERS—CONTRACT FOR PUBLIC BUILDING—CONTROL BY COURT.

The court will not control the discretion of county commissioners in making a contract for the building of a courthouse, when acting in good faith and within their statutory powers, and fraud or illegality is not clearly shown.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 165, 166; Dec. Dig. ¶105.]

3. COUNTIES ¶111—ERECTION OF COURTHOUSE—CONTRACT—TAX LEVY.

Chapter 5698, Laws 1907 (Comp. Laws 1914, § 808), authorizing the county commissioners to "levy a building tax not exceeding five mills per annum for five consecutive years in lieu of all other county building tax," does not require an accumulation of the fund from the annual tax before a contract can be made for erecting a courthouse.

[Ed. Note.—For other cases, see *Counties*, Cent. Dig. §§ 174, 181; Dec. Dig. ¶111.]

Appeal from Circuit Court, Lee County; F. A. Whitney, Judge.

Injunction by D. S. Borland and others against W. H. Towles and others. From an order denying injunction, complainants appeal. Affirmed.

James F. Glen and Sparkman & Carter, all of Tampa, for appellants. O. W. Stevens, of Tampa, for appellees.

PER CURIAM. This appeal is from an order denying an injunction to prevent the carrying out of a contract made by the county commissioners of Lee county to demolish the present courthouse building, and to erect a new courthouse building in the county, and to enjoin the issue of warrants for payments under the contract.

It is contended: (1) That the county commissioners had no power to make the contract for the erection of a new courthouse in anticipation of funds to be derived from tax levies made to cover a period of five years; (2) that the warrants issued for the payments and made payable during future five years are illegal; (3) that the tax levy to meet the contract was illegally changed from two mills for two years to three mills for five years; (4) that the contract made is an abuse of discretion; (5) that the contract is illegal.

[1-3] Chapter 5698, Acts of 1907 (Comp. Laws 1914, § 808), provides that, if the county commissioners shall duly determine that it is necessary to erect a courthouse or jail, or both, "they may levy a building tax not exceeding five mills per annum, for five consecutive years in lieu of all other county building tax." Under this authority, the county commissioners could at an adjourned meeting and without giving notice levy a tax of three mills, for five consecutive years, even though they had previously levied only two mills for two years. No notice is required to be given for the tax levy to be valid. The statute does not require that the funds derived from successive tax levies shall be collected in whole or in part before the power to contract for the erection of a courthouse can be exercised, and the courts will not control the discretion of the county commissioners in making the contract when they act in good faith and within their statutory powers. A clear case of abuse of authority is not made to appear. See *Osban v. Cooper*, 63 Fla. 542, 58 South. 50. The statute does not prescribe the form and character of the warrants to be issued by the county commissioners in payment of county indebtedness; and the warrants to be issued in this case payable at future dates do not in effect loan the credit of the county to any one in violation of section 10 of article 9 of the Constitution. The matters complained of may indicate a lack of proper appreciation of official responsibility; but they do not clearly show

fraud or illegality in the contract or in the amount agreed to be paid, so as to justify a court of equity in annulling the proceedings that are authorized by statute.

Order affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

(136 La 724)

No. 20909.

QUEENSBOROUGH LAND CO. v.
CAZEAUX et al.

(Supreme Court of Louisiana. Jan. 25, 1915.)

(Syllabus by Editorial Staff.)

1. CONSTITUTIONAL LAW — 209 — DISCRIMINATION — CONDITIONS IN DEED — SALE TO NEGROES.

A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, does not violate Const. U. S. Amend. 14; since, so far as prohibiting discrimination against the negro race, it applies only to state legislation, and not to contracts of individuals.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. ¶ 209.]

2. CONTRACTS — 110 — LEGALITY — SALE TO NEGRO—PUBLIC POLICY.

A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, is not against the public policy of the state, as creating a tenure of property unknown to the law, in view of Rev. Civ. Code, arts. 490, 491, 709, 1764, and 2013, giving the fullest liberty to contract and dispose of one's property.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 506; Dec. Dig. ¶ 110.]

3. DEEDS — 158 — CONDITIONS — SALE OF LAND TO NEGRO—RUNNING WITH THE LAND.

A condition, in a deed for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, expressly declaring that it runs with the land, creates a real, as distinguished from a personal, obligation, and is valid under Rev. Civ. Code, art. 1901, giving the effect of laws to agreements legally entered into, and articles 11 and 12 prohibiting contracts against law and good morals.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 502-504; Dec. Dig. ¶ 158.]

4. DEEDS — 155 — CONDITIONS SUBSEQUENT—EFFECT—SALE TO NEGRO.

A condition in a deed, for the benefit of the grantor and its other grantees, that the grantee shall not sell to a negro, is a condition subsequent, or a resolutive condition, the accomplishment of which has the effect of restoring matters to the situation in which they were before the contract was entered into (Rev. Civ. Code art. 2045).

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. ¶ 155.]

5. DEEDS — 168 — CONDITION SUBSEQUENT—SALE TO NEGRO—RELIEF.

Where a condition subsequent in a deed for the benefit of the grantor and its other grantees that the grantee shall not sell to a negro is broken by a sale on consideration, the grantee under Rev. Civ. Code, arts. 2046, 2047, will be given time to cancel the sale to the negro before a rescission of the grantee's deed is had.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 526-533; Dec. Dig. ¶ 168.]

6. CONTRACTS \S 324—REMEDIES PROVIDED—EFFECT ON OTHER REMEDIES.

Where a contract provides certain specified remedies for its breach, other remedies are not excluded, in view of Rev. Civ. Code, art. 1962, providing that when a contract contains general obligations, and the parties in order to avoid a doubt whether a particular case comes within the scope of the agreement have made special provisions for such case, the general terms of the contract shall not be restricted to the single case provided for.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. \S 1549-1557; Dec. Dig. \S 324.]

7. EVIDENCE \S 419 — PAROL EVIDENCE OF CONSIDERATION.

Parol evidence is admissible to show the real consideration of a contract reciting a consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. \S 1912-1923; Dec. Dig. \S 419.]

O'Neill, J., dissenting.

Case Certified from Court of Appeal, Second Circuit.

Action by the Queensborough Land Company against Alfred Cazeaux and others. Certified questions from the Court of Appeal. Questions answered.

Blanchard & Smith, of Shreveport, for plaintiff. H. C. Fisher, of Shreveport, for defendant.

PROVOSTY, J. On submission by the judges of the Court of Appeal, Second Circuit, applying for instructions under article 101 of the Constitution.

The plaintiff company divided into lots, squares, and streets a certain tract of land within the limits of the city of Shreveport with a view to selling same for residential purposes. In order that the locality might be more attractive to white people, and, as a consequence, be sold to better advantage, it inserted in every act by which it sold one or more of the lots a stipulation to the effect that the sale was made "upon the following conditions, covenants and reservations of rights, which shall continue for twenty-five years from date hereof, to wit," that the vendee agreed that he, his heirs and assigns, should refrain from selling or leasing the lot or lots to a negro; and that, to insure the observance of this "covenant," the company, or any owner or occupant of any of the lots in the same block, should have the right to prevent the breach thereof by an injunction, mandatory or other, and to recover whatever damages might have been suffered from any such breach; and that this "covenant" should run with the land, and should be kept by all parties occupying or using said lot or lots.

One of the sales thus made was to the defendant Cazeaux, in 1907, for a price recited in the act of sale to be \$350, but which was in reality \$150. Cazeaux sold the lot, in 1908, to his codefendant, a negro, and the plaintiff company at once brought this suit.

Plaintiff alleges that said clause not to sell

or lease to a negro is a resolutory condition, and that this condition has been accomplished by the sale to a negro, and that plaintiff is in consequence entitled to have the said sale to Cazeaux rescinded; and plaintiff tenders back the \$150 received as the price of the sale to Cazeaux.

Defendants refuse to accept the tenders, deny that said condition is resolutory in character or that it runs with the land, aver that it creates merely a personal obligation on the part of the vendee, not binding the land, so that the land passed unburdened with it; that as an obligation running with the land it would be null, as creating a tenure of property unknown to our laws, and doubly so as being in restraint of commerce, and therefore against the public policy of the state; and, finally, that it is null as being against the public policy of the national government, in that it discriminates against the negro race.

Parol evidence was offered on the trial to prove that the real price was \$150, and not \$350, as recited in the act of sale. This evidence was objected to, on what ground we are not informed, but presumably on the ground that parol evidence is inadmissible for varying or contradicting the terms of a written contract. The objection was overruled.

The case has been certified to this court by the Court of Appeal of the Second Circuit, with the request that this court answer the following questions:

"(1) Does the stipulation in the deed with reference to the transfer of the property to a negro violate the Fourteenth Amendment of the Constitution of the United States for the reason set out in the exceptions filed by defendants?"

"(2) Is said provision contrary to the public policy of this state, and therefore null and void, as stated in article 7 of defendant's answer?"

"(3) Is the provision referred to a covenant or a condition subsequent a breach of which entitles the grantor to a rescission of the contract?"

"(4) Is the plaintiff company, in view of the fact that certain specified remedies for the breach of the provision are stipulated in the deed, injunction and damages, entitled to avail itself of the additional remedy of a suit to annul for violation of a condition subsequent?"

"(5) Was parol evidence admissible, as between the parties to the deed, to show that \$150 was the true consideration of the sale, instead of \$350, as stated in the deed, in the absence of allegations of fraud, error or ambiguity?"

Before proceeding to answer these questions specifically and analytically, we will observe, in a general way, that it would be unfortunate if our system of land tenure were so hidebound, or if the public policy of the general government or of the state were so narrow, as to render impracticable a scheme such as the one in question in this case, whereby an owner has sought to dispose of his property advantageously to himself and beneficially to the city wherein it lies. And we will observe, further, that if

the stipulation against selling to a negro constitutes neither a real right nor a resolutive condition or condition subsequent, following the property into the hands of third persons, its insertion in the act has not provided adequate means of maintaining the integrity of said scheme, for the two remedies of injunction and damages would not be adequate to that end. After a sale had been made, a preventive injunction would be too late, and a mandatory injunction could reach only Cazeaux; not his vendee, who—on the hypothesis of said stipulation not constituting a real right or a resolutive condition—would have acquired the property free of same. And the damage resulting from the integrity of the scheme being destroyed might be tenfold greater in amount than Cazeaux or his vendee might have the means of satisfying. And in the same way that Cazeaux might thus destroy said scheme, so might any one of the other vendees of the plaintiff company. Viewing therefore only in their general aspect the defendant's contentions as covered by the questions 1, 2, and 3, we should say that those questions would have to be answered adversely to defendant.

[1] The first, because the general government has not undertaken to interfere with private rights within the states in the interest of the negro race. The fourteenth amendment, in so far as prohibiting discrimination against the negro race, applies only to state legislation, not to the contracts of individuals. *Civil Rights Cases*, 109 U. S. 62, 3 Sup. Ct. 18, 27 L. Ed. 835. The matter is one purely of state, or local, interest, with which the general government has no concern, and upon which therefore it can have no policy. *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 630.

[2] To the second question we answer that, while the public policy of the state opposes the putting of property out of commerce, it at the same time favors the fullest liberty of contract (article 1764, C. C.), and the widest latitude possible in the right to dispose of one's property as one lists (article 491, C. C.), so long as no disposition is sought to be made contrary to good morals, public order, or express law. In *Female Orphan Society v. Young Men's Christian Ass'n*, 119 La. 287, 44 South. 15, 12 Ann. Cas. 811, a condition of perpetual and total inalienability was held to be void as putting property out of commerce, and therefore against public policy, but between total and perpetual inalienability and partial and temporary inalienability there is a very wide difference. The insertion of a condition of the latter character in contracts and donations is a matter of everyday occurrence, with challenge from no quarter. The question of how far such a condition will be sustained is one dependent very much upon the facts of each particular case. If the condition is founded upon no substantial reason but merely in caprice, and

is of a character to tie up property to the detriment of the public interest, it will not be sustained; otherwise, it will. In France, whose public policy in this regard, as, indeed, in the case of every enlightened nation, is the same as ours, it has been held that perpetual and total inalienability might be imposed upon the donation of a tract of land for use as a graveyard. *Carpentier et Du Saint Rep. de Droit Français*, Vo. Condition, No. 347. And under Nos. 343-349 of this same work, the general result of the decisions of the courts and of the opinions of the jurists is summed up, as follows:

"A condition frequently imposed is that which restrains the faculty on the part of the donee or legatee to dispose of the thing given or bequeathed, either directly or indirectly, by any act between living persons or by testament. The courts have been called upon frequently to solve difficulties relative to clauses of that kind. It is a matter of public interest, it concerns the public wealth, that the circulation of property should operate freely and without hindrances. Hence all are in accord in looking upon a condition of perpetual and absolute inalienability as being against public order and illegal.

"But if the condition not to alienate is prohibited when it is absolute and perpetual in character, the same is not the case when it is relative and temporary, and when, moreover, it is justified by some serious consideration."

At common law the rule against perpetuities is much less restrictive than that of France or ours. It allows property to be tied up for the lives in being plus 21 years. 30 Cyc. 1467. It allows perpetuity to be imposed upon a charitable gift or donation for pious use. 6 Cyc. 905. Otherwise, the rule with regard to restraints upon alienations is about the same as ours. 13 Cyc. 687.

We therefore answer this second question in the negative.

[3] Our answer to the third question is that the said stipulation against selling or leasing to a negro is not a mere covenant or personal obligation, but is a real obligation, or, in scientific language, is a real right—a dismemberment of the ownership—and that it is a condition subsequent, or resolutive condition, the accomplishment of which has the effect of restoring matters to the situation in which they were before the contract was entered into. C. C. art. 2045.

Our brethren of the Court of Appeal have inadvertently combined in this question No. 3 two questions which have no legal or scientific or analytical, connexity, or relation with each other, namely: First, whether the said stipulation creates a personal obligation or a real obligation; and, secondly, whether it imposes a resolutive condition. The solution of these questions involves different processes of reasoning. We first address ourselves to the former.

The contract expressly declares that the said stipulation is a condition and a reservation, and that it is to run with the land; and by codal provision "(article 1901) agreements legally entered into have the effect of

laws on those who have formed them," except that "(article 11) individuals cannot by their conventions, derogate from the force of laws made for the preservation of public order or good morals," and that "(article 12) whatever is done in contravention of a prohibitory law, is void." The inquiry therefore is as to whether there is in the said stipulation anything contrary to public order or good morals or in contravention of a prohibitory law. Defendants contend that it creates a tenure of property unknown, and therefore repugnant, to our laws.

In the hereinabove cited case of *Female Orphan Society v. Young Men's Christian Ass'n*, 119 La. 287, 44 South. 15, 12 Ann. Cas. 811, where a condition of perpetual inalienability was held to be void, as being contrary to the public policy which will not allow property to be taken out of commerce permanently, this court, for showing this public policy, quoted expressions of this court taken from the cases of *Harper v. Stanbrough*, 2 La. Ann. 381; *Suc. of McCann*, 48 La. Ann. 158, 19 South. 220; *Suc. of Franklin*, 7 La. Ann. 395; *Suc. of Kernan*, 52 La. Ann. 48, 28 South. 749; *McDonogh Will Case*, 8 La. Ann. 259; *Mathurin v. Livaudais*, 5 Mart. (N. S.) 302; *Heirs of Cole v. Cole's Ex'r*, 7 Mart. (N. S.) 416; *Arnaud v. Tarbe*, 4 La. 502; and *Henderson v. Rost*, 5 La. Ann. 441—on the point of the uncomplicated character, or simplicity, of our system of land tenure. All these expressions must be read in connection with the issue involved in the several cases in which they are to be found, and, when so read, amount to nothing more than that trusts and perpetuities are forbidden by article 1519 et seq. of our Code. And, in like manner, what the present writer said in his concurring opinion in *La. & Ark. R. R. Nav. Co. v. Winn Parish Lumber Co.*, at page 426 of 59 South., as to our law not having "opened the door to an unregulated brood of real rights," must be read in connection with the matter there at issue, which was as to whether our Code allows the creation of servitudes to do—in *faciendo*; and, when so read, will be found to mean nothing more than what is stated in the last line of page 422 that:

"These articles show that real obligations may be created, but not that personal servitudes, other than those expressly sanctioned by the Code, can be."

By whatever was said in those cases, the court did mean to express the idea that an owner in selling his property may not dismember the ownership and transfer part of it and retain the remainder. That, for instance, he cannot sell the use and retain the remainder of the ownership; or the usufruct, and retain the remainder; or that he cannot sell only part of the use, or part of the usufruct. Or that in the same manner in which he can thus separate and subdivide those elements of the ownership which are here mentioned, he may not separate and sub-

divide the other and remaining element—the right to dispose of.

Articles 490 and 491 of the Code declare that ownership is divided into the perfect and the imperfect. That ownership is imperfect "when it is to terminate at a certain time or on a condition; or if the thing, which is the object of it, is charged with any real right towards a third person"; and that "perfect ownership gives the right to use, to enjoy and to dispose of one's property in the most unlimited manner."

The manner in which one may dispose of one's property is here said to be "most unlimited." The expression in the corresponding article of the Code Napoleon (article 544) is "la manière la plus absolue;" "the most absolute manner." "Most unlimited," not in the sense merely of the completeness and thoroughness, or absoluteness, with which the owner may divest himself of the title; but "most unlimited" in the sense of the variety of the dispositions which he may make of, and concerning, the ownership. To this variety, declares this article 491, there is no limit. In other words, one may dismember the ownership *ad infinitum*; and dispose of each separate dismemberment as one pleases.

This freedom from restraint is confirmed at every step by the Code. For instance, article 1764 declares that:

"All things that are not forbidden by law may legally become the subject of contract."

And article 2013 that:

"The real obligation, created by condition annexed to the alienation of real property, is susceptible of all the modifications that the will of the parties can suggest, except such as are forbidden by law."

And article 709 that:

"Owners have the right to establish on their estates, or in favor of their estates, such servitudes as they deem proper; provided that the services be not imposed on the person or in favor of the person, but only on an estate or in favor of an estate; and provided, moreover, that such services imply nothing contrary to public order."

The declaration of article 491 that the owner may dispose of his property "in the most unlimited manner" is qualified by the addition, "provided it is not used in any way prohibited by laws or ordinances"; and, as a matter of course, it is further qualified by the fundamental principles that the disposition must have in it nothing contrary to public order or public policy or good morals. But, in the absence of any objection of that kind, nothing will be found in the letter or in the spirit of our law to prevent an owner from making what disposition he pleases of his property.

This question of the right to dismember the ownership otherwise than in the modes expressly recognized by the Code is a much discussed one in the jurisprudence of France. On that point, Demolombe, *Distinction des Biens*, vol. 9, p. 454, No. 513, expressing the prevailing view, in which, by the way, he himself does not concur, says:

"The general opinion is that the articles of the Code Napoleon which determine the rights that one can have on property are not limitative, and that individuals are at liberty to create (*encore et en outre*) over and beyond them all the dismemberments it may please them to adopt, and to make in their property every possible (*cisaillements*) shearing according to the expression of Boullier.

"Here, for example, is how Toullier expresses himself:

"If it is asked what rights may be separated from perfect ownership, in how many ways it may be dismembered, the principle must first be laid down that every one may dispose of his ownership in the most absolute manner (article 544); he may detach from it such rights as he deems proper, extend or restrict these rights as he pleases; in a word, dismember his ownership just as he deems proper, provided there be nothing contrary to good morals or public order. Hence, in this matter, the general principle is followed, that whatever is not prohibited is permitted."

"And this same principle is found to be formulated with the same generality of expression in the monuments of jurisprudence. Thus—

"Considering that, in law, articles 544, 546 and 552 of the Code Napoleon are declarative of common right relatively to the nature and effect of ownership, but are not prohibitive; and that neither these articles nor any other law exclude the various modifications and decompositions of which the ordinary right of ownership is susceptible." *Cassation*, 13 Feb. 1834, *Coquelard*, D., 1834, 1, 118.

"Considering that the transmission of the ownership is susceptible of all such stipulations and conditions as have nothing in them contrary to the laws, or to good morals or public order." *Amiens*, 2 Dec. 1835, *Bezanne*, D., 1835, 21, 198."

Demolombe, for his dissent from the views thus expressed, is criticized by Laurent, *Droits Réels et Personnels*, vol. 9, p. 110, No. 84, as follows:

"Mr. Demolombe takes advantage of the principle established by article 6" (article 11 of our Code) "and applied by article 686" (our article 709) "to maintain that real rights pertain to public order, and that consequently the creation of any other than those consecrated by the Code would be in derogation of public order. He bases this doctrine upon a very singular definition of the laws that concern public order. 'Evidently,' says he, 'there must be classed among these laws all those which concern third persons or the public, or the security of agreements, or the modes of transmitting property. Now, the law which determines and organizes the real rights of which property is susceptible, concerns, beyond any doubt, in the highest degree third persons, the public, the mode of transmitting property and the security of agreements. Therefore it is a law of public order; hence individuals cannot change it; hence, such a law must necessarily be considered as being limitative in the enumeration of the real rights which it recognizes.' To this reasoning only one thing is lacking, and that is the proof of the proposition upon which it rests. Where, either in our laws or in tradition, is it said that the words 'public order' signify what Mr. Demolombe makes them express? It is so evidently a definition invented for the needs of the argument that it is useless to refute it; do we refute mere fanciful notions? All that need be said is that the words 'public order' have a wider meaning than this in doctrine and in legislation; individuals have never been allowed to derogate from the laws which concern the public interest. The discussion resolves itself then into this: Does it concern the public interest that the owner should be limited in the

use which he wishes to make of his property, when he establishes some real right of whatever kind? The answer must be yes, if the real right trenches upon the liberty of person and property established by the *Assemblée Constituante*. The answer must be no, whenever the agreement of the parties has for its object only their private interest."

This question is precisely the same under the Code Napoleon as under ours, for the system of land tenure under the two codes is the same. Our Code adopted bodily that of the Code Napoleon. The discussions of this question under the Code Napoleon are therefore entirely apposite under our Code.

In *Heirs of Delogny v. Mercer*, 43 La. Ann. 205, 8 South. 903, where the owner sold a row of lots and bound himself to leave free to the common use of the purchasers a certain space upon which all the lots fronted, without any right on the part of these purchasers ever to enjoy or dispose of said open space, the title to this open space was held not to have passed to the public by destination, and not to have been transferred to the purchasers, and yet to have passed out of the vendor.

In *De Grilleau v. Frawley*, 48 La. Ann. 184, 19 South. 151, the owner retained the ownership of an alley in the city of New Orleans, while conveying the perpetual use of it to the owners of the contiguous property.

And in *Voinche v. Town of Marks ville*, 124 La. 712, 50 South. 662, where property had been donated affected to a particular use, and the lower court had held that "a donor, like a seller, cannot limit the uses of the property when he parts with the ownership," this court quoted and applied article 1527 of the Code, which reads:

"The donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals."

As stated by article 491 of the Code, ownership is composed of the rights to use, to enjoy, and to dispose of. These three constituent elements of the ownership bear in the civil law the designation given to them in the Roman law: The *usus*, the *fructus*, and the *abusus*. The two first of these elements, the use and the usufruct, are admittedly susceptible of separation from the other elements and of subdivision after having been segregated; why then is not the third, the *abusus*, or right to dispose of, susceptible of being dealt with in like manner? The fact of the matter is that such subdividing of the right to dispose of is exemplified by every contract by which a restriction of any kind is placed upon the right to dispose of property. A condition in a sale that the property sold shall be used only in a particular way, or shall not be used in some other particular way, is of everyday occurrence; and no one has ever doubted the validity of such a condition, if merely temporary. The right to alienate is but one of the constituent elements of the right to dispose of; and in the same way that the

ownership may be subdivided, and the *usus*, and the *fructus* and the *abusus* may be subdivided, so may this right to alienate, a subdivision of the *abusus*, be, in turn, subdivided. And that is what the said stipulation in question in this case amounts to in effect. By it the right to alienate is subdivided, and only a part of it is transferred to Cazeaux. There is withheld from him that part of the right to alienate by which, if he had acquired the full right to alienate, he would have been enabled to sell to a negro. This right thus withheld from him is part of the ownership; a dismemberment of it; just as the *usus* is, or a dismemberment of it would be; or the usufruct is, or a dismemberment of it would be; or the *abusus* is, or any other dismemberment of it would be. Hence, our answering that the said stipulation by which said right is reserved from the sale or, in other words, is withheld from the vendee, Cazeaux, does not create a mere personal obligation, or "covenant," as our brethren term it in their question, but creates a real obligation. Cazeaux, not having acquired this right, could not exercise it; one cannot exercise a right one has not; and his attempt to do so is productive of no legal result as against the plaintiff company and perhaps also as against the occupants of the other lots for whose benefit, by way of a sort of stipulation *pour autrui*, the reservation was made. We say "perhaps," because if these occupants of the other lots in the subdivision were the parties plaintiff in the suit, and were the sole plaintiffs, it would seem as if they might not have the right to rescind the sale to Cazeaux, that right not having been expressly reserved to them, or stipulated in their favor, in the sale to Cazeaux, and it not arising in their favor by implication, they not having been parties to the contract. Their remedy would seem to have to be restricted to injunction (mandatory and other) and damages, as stipulated in the contract. How far that remedy could be extended might present a difficult question.

[4] We pass now to the question whether the condition imposed by the said stipulation is resolutive in character. The question of when a condition is resolutive in character is not always easy of determination. The payment of the price in a contract of sale is admittedly so. Pothier, *de la Vente*, No. 476, after speaking of the nonpayment of the price, proceeds as follows:

"With regard to all the other obligations either of the seller or of the purchaser, it is by the circumstances that we must determine whether their inexecution gives rise to the rescission of the contract; it gives rise to the dissolution of the contract when the thing promised is such that I would not have been willing to contract without it."

See, also, Laurent, *Principes de Droit Civil*, *Obl. Con.* vol. 17, p. 142, No. 127.

In the present case, even the payment of the price might have been less important to

the plaintiff company than the observance of this condition, since the price of this lot might have amounted to less than the extent to which the value of all the other lots might have been diminished by the breach of this condition.

This stipulation was an essential feature in the scheme of the company; therefore, obviously, the company would not have been willing to enter into the contract without it, and, as a consequence, it constitutes a resolutive condition or condition subsequent in the contract.

[5] The defendant Cazeaux may be able, however, to obtain from his vendee a cancellation of the sale by which this condition has been breached, and may prefer to do so rather than have the sale by the company to himself dissolved. The property may, perhaps, have increased in value. The court is at liberty, in its discretion, to grant him time in which to do this, and thereby avoid a dissolution of the sale. C. C. art. 2046, 2047.

[6] The fourth question is answered by article 1962 of the Code, which provides:

"When a contract contains general obligations, and the parties, in order to avoid a doubt whether a particular case comes within the scope of the agreement, have made special provision for such case, the general terms of the contract shall not on this account be restricted to the single case that is provided for."

Defendant has submitted no brief, and cases of this kind are not orally argued in this court; but we assume that the contention that by providing in their contract these particular remedies of injunction and damages the parties intended that these remedies should be exclusive is sought to be sustained by the argument *inclusio unius est exclusio alterius*. We make this assumption, as our mind suggests no other reason that could be adduced in support of said contention. The argument is strong; so much so, indeed, that the article of the Code just quoted was adopted for the very purpose of defeating it. See Marcade on article 1164, C. N.

[7] On the question of the admissibility of parol evidence to show that the real price was \$150, and not \$350 as stated in the act, we answer in the affirmative. The purpose of the offer is not to defeat the contract. The defeat of the contract will result, if at all, not from the admission of this parol evidence, but from the breach of the condition of nonalienability. The purpose of the offer is simply to show what amount was received from Cazeaux and should be refunded to him. From that standpoint, the recital in the deed that the amount received was \$350 is in reality nothing more than a receipt, and has no greater legal effect (*Wigmore*, *Ev. par.* 2433); and a receipt is always open to oral explanation (*Id.* 1058).

O'NIELL, J., dissents from the opinion that the condition runs with the land.

(109 Miss. 1)

WESTERN UNION TELEGRAPH CO. et al.
v. MCKINNEY. (No. 16841.)(Supreme Court of Mississippi. March 15,
1915.)TELEGRAPHS AND TELEPHONES §75—DELAY
IN DELIVERY OF MESSAGES—JOINT LIABILITY—PUNITIVE DAMAGES.

Where two telegraph companies acted independently of each other in forwarding a message, neither was responsible for the acts of the other with reference thereto, and, if either so acted as to justify punitive damages because of delay, the other was not responsible therefor, and if both were subject to punitive damages for delay the damages must be awarded against each separately.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. §75.]

Appeal from Circuit Court, Neshoba County; C. L. Dobbs, Judge.

Action by Mrs. Etta McKinney against the Western Union Telegraph Company and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Appellee, who was plaintiff in the court below, filed suit against the Western Union Telegraph Company, Cumberland Telephone & Telegraph Company, and the Central Mississippi Telephone Company for damages for delay in delivering a telegram addressed to her at Philadelphia, Miss., sent to her by her son at Baskin, La., announcing the death of another son. The telegram is as follows:

"Baskin, La., 8-29, 1908.

"To Mrs. Etta McKinney Philadelphia, Miss.: Calvin dead are you coming let me know Rush answer. C. B. Coghlan."

"OK-S-RH. 12:00 p. m."

Appellee's proof shows that this telegram was delivered to the agent of the Western Union Telegraph Company at Baskin, La., at 8 o'clock a. m., August 29th, though it is marked as if received at noon of that day. The Western Union has no office at Philadelphia, Miss., and the telegram in question was sent by the Western Union to Meridian, Miss., there to be relayed by way of the Cumberland Telephone & Telegraph Company, which had a joint connection with the Central Mississippi Telephone Company, and thus enabling it to deliver its message at Philadelphia. The message was delivered to the Cumberland Telephone Company, at Meridian, Miss., about 3.30 p. m., August 29th, but was not delivered to appellee until about noon of August 31st. The Cumberland Telephone Company introduced evidence to show that its line by way of Union, Miss., where it connected with the line of the Central Mississippi Telephone Company, was down, and that it advised the Western Union operator at Baskin, La., about 4:40 in the afternoon of the day that the message was sent that it could not be delivered on that account. There is evidence showing that the telephone connection could have been made with Philadelphia via Java, Miss.,

where the Cumberland had an office which connected with the independent line into Philadelphia. It is also shown that the Postal Telegraph-Cable Company had an office at Philadelphia, and that the message could have been relayed at either Jackson or Vicksburg, and transmitted by the Postal to Philadelphia, and that this kind of service was frequently performed.

The Western Union Telegraph defends upon the ground that the message was transmitted promptly to Meridian, Miss., and there turned over to the Cumberland Telephone Company, and that the delay was not on the part of the Western Union.

The defense of the Cumberland Telephone Company, is that their line was down which connected them with Union, Miss., where the message had to be relayed by way of the Central Mississippi Telephone Company, and that it promptly advised the Western Union of that fact, and therefore it was not liable to plaintiff for any damage caused by the delay.

On the trial, a peremptory instruction was granted for the Central Mississippi Telephone Company, it being shown that this company had delivered the message to appellee promptly upon receipt of same by their agent on August 31st, and the case went to the jury on an instruction which permitted them to find punitive damages against the other two defendants. The jury returned a verdict as follows:

"We, the jury, find for the plaintiff in the sum of one thousand dollars punitive damages."

From which the appellants have appealed.

The appellants contend that there is no joint tort, and that each of the appellant companies acted independently of the other, and there could be no joint liability for punitive damages, since it is not shown that the delay was due to any joint action on their part.

Bowers & Griffith, of Gulfport, and Harris & Potter, of Jackson, for appellants. G. E. Wilson, of Philadelphia, and Adams & Dobbs, of Ackerman, for appellee.

SMITH, C. J. The court below erred in permitting the jury to render a verdict for punitive damages against appellants jointly. Each acted independently of the other in forwarding this telegram, and neither is responsible for the acts of the other with reference thereto; and if either of them acted in such manner as to justify the imposition of punitive damages against it, the other is not responsible therefor. So that if they are to be punished for the delay in delivering this telegram, each must be punished separately and for its own acts and omissions.

Since the record does not clearly disclose why this telegram was not delivered by the

Cumberland Telephone & Telegraph Company by way of Java, which it seems could have been done, and why the Western Union Telegraph Company delayed in delivering it to the Cumberland Telephone & Telegraph Company from 8 a. m. until 3:30 p. m., if it in fact did so delay to deliver it, we deem it best to decide no other question in the case.

Reversed and remanded.

(109 Miss. 12)

RUFFIN v. PAGE. (No. 17991.)

(Supreme Court of Mississippi. March 15, 1915.)

APPEAL AND ERROR \S 655—**RECORD—OMISSIONS—STRIKING FROM FILES.**

Under Laws 1910, c. 111, \S 1, subd. "d," providing relative to the transcript of the stenographer's notes that, when notice is given to the stenographer that a copy of the notes is desired, no transcript of such notes shall be stricken from the record by the Supreme Court for any reason, unless it is shown that such notes are incorrect in some material particular, a transcript will not be stricken from the record because of the omission of testimony introduced at the trial, unless it is shown that such testimony is material to the issues upon which the court will be called to pass on the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2823-2825; Dec. Dig. \S 655.]

Appeal from Circuit Court, Panola County; N. A. Taylor, Judge.

Action between James Ruffin and A. J. Page. Judgment for Page, and Ruffin appeals. On motion to strike the stenographer's transcript from the record. Case remanded to the docket.

L. F. Rainwater, of Sardis, for the motion. Shands & Montgomery, of Sardis, opposed.

SMITH, C. J. This is a motion to strike the stenographer's transcript from the record, on the ground that it was filed by the stenographer after the expiration of the time within which he was empowered so to do, has "never been signed by the trial judge nor been agreed on by the parties, nor become a part of the record by operation of law," and is incorrect in a material particular. In support of the allegation that the transcript is incorrect in a material particular, an affidavit has been filed setting forth the omission of certain testimony which was introduced on the trial. It does not appear from this testimony alone that it is material to the issues upon which we will be called to pass on this appeal, and unless it does so appear the transcript cannot, under the provisions of subdivision "d," \S 1, c. 111, Laws 1910, be stricken from the record.

The case will therefore be remanded to the docket so that counsel for appellee, if they so desire, may point out, by brief or otherwise, wherein this evidence is material; and, when this is done, the court will examine the record and determine whether or not it is in fact material.

(109 Miss. 9)

GULF & S. I. R. CO. v. MAGEE WAREHOUSE CO. (No. 16653.)

(Supreme Court of Mississippi. March 8, 1915.)

1. WORK AND LABOR \S 4—**PERFORMANCE OF SERVICES—IMPLIED CONTRACT.**

Where services rendered by plaintiff and accepted by defendant were rendered and accepted under such circumstances that no reasonable person could assume that they were rendered as a gratuity, the law would imply a promise to pay reasonable compensation therefor.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. \S 3-7; Dec. Dig. \S 4.]

2. WORK AND LABOR \S 4—**PERFORMANCE OF SERVICES—IMPLIED CONTRACT.**

The intention of the parties to an alleged implied contract is the essence of the transaction, and, where they did not intend that the party receiving benefits should pay therefor, there was no implied contract to pay.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. \S 3-7; Dec. Dig. \S 4.]

3. WORK AND LABOR \S 28—**PERFORMANCE OF SERVICES—IMPLIED CONTRACT.**

That a corporation, which took over the business of a firm which had rendered gratuitous services, continued to render services without any change in the course of business, must be considered in determining the existence of an implied contract to pay therefor.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. \S 17, 55; Dec. Dig. \S 28.]

4. WORK AND LABOR \S 30—**IMPLIED CONTRACT—QUESTION FOR JURY.**

Where the evidence on the question whether plaintiff rendered services with expectation to be paid therefor or whether defendant receiving the services understood that plaintiff rendered them with the intent of charging therefor was conflicting, the issue of implied contract is for the jury.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. \S 59-65; Dec. Dig. \S 30.]

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action by the Magee Warehouse Company against the Gulf & Ship Island Railroad Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Wells, May & Sanders, of Jackson, for appellant. Russell & Russell, of Magee, for appellee.

COOK, J. This suit was instituted by the Magee Warehouse Company against the Gulf & Ship Island Railroad Company upon an alleged implied contract for valuable services rendered to and accepted by the railroad company. The declaration demands judgment for loading 14,362 bales of cotton on the cars of defendant at the rate of two cents per bale, which sum it is alleged was the customary charge for like service. It is further averred that the cotton was loaded upon orders from the station agent of defendant; that the railroad company had no sufficient platform, or other place at the station for the reception of cotton, and from whence it could be loaded on the cars; that the railroad company, by its course of busi-

ness, extending over a number of years, had selected plaintiff's warehouse as the place at which cotton must be placed for transportation. The evidence for plaintiff supported the averments of the declaration.

[1] If the jury believed the witnesses for plaintiff, a verdict for plaintiff would not be disturbed, because the service was rendered and accepted by defendant under such circumstances that no reasonable person could assume that the benefits conferred were intended as a gratuity. Under the circumstances shown by plaintiff's evidence, the law will imply a promise to pay a fair and reasonable compensation for such services. Elliott on Contracts, § 1855 et seq.

On the other hand, defendant produced evidence which tended to show that the railroad company had built a spur track to the warehouse of plaintiff solely for the convenience and profit of plaintiff; that the loading of cotton was a service rendered in return for the valuable privilege conferred. There was testimony which justified the railroad in believing that the warehouse company did not expect any compensation for the work.

The station agent testified that, when she took charge of the station several years prior to the years for which plaintiff claims compensation, the then manager of the warehouse told her that the warehouse would load cotton on the cars without cost to the railroad company.

[2] It is argued that the manager was not such an agent as was authorized to make a contract of that character. Assuming, but not deciding, that this contention is sound, the intention of the parties to an alleged implied contract is the essence of the transaction. If the parties did not intend that the party receiving the benefits would pay for it, there could be no implied contract to pay.

[3] Again, it is said that the warehouse was being conducted by a partnership at the time the statement was made by the then manager, but it has been since run by a corporation organized for that purpose. It appears, however, that there has been no change in the course of the business between the parties, and it also appears that the corporation rendered the service for at least two years before demanding compensation.

[4] All of these and other circumstances were for the jury to solve. There was a clear conflict in the evidence as to whether the services were rendered with any expectation on the part of plaintiff that it would be paid for its labor; it is also debatable as to whether the railroad company understood that plaintiff was rendering any service with the intention of charging therefor.

We do not go into details for the obvious reason that this case is to be retried.

The court should have left the jury free to pass on the conflicting evidence, and, be-

cause the court took away from the jury this right, the case will be reversed and remanded.

Reversed and remanded.

(109 Miss. 14)

RICHMOND v. ENOCHS. (No. 16912.)
(Supreme Court of Mississippi. March 15, 1915.)

1. EXCEPTIONS, BILL OF \S 2—**COMPLIANCE WITH STATUTE.**

Bills of exceptions were unknown to the common law, are founded wholly upon statute, and can be made up only within the time and in the manner and place provided by statute.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. § 2; Dec. Dig. \S 2.]

2. APPEAL AND ERROR \S 655—**BILLS OF EXCEPTIONS—MOTION TO STRIKE STENOGRAPHER'S TRANSCRIPT.**

Under Laws 1910, c. 111, § 797, providing in subdivision "a" that, in all cases where the evidence is taken by the official stenographer, any person to appeal the case shall notify the stenographer, etc., within 30 days of the adjournment of court, of the fact that a copy of the notes is desired, etc., and providing in subdivision "d" that, if notice is given as above, no stenographer's transcript shall be stricken by the Supreme Court unless such notes are incorrect in some material particular, and then only in cases where such notes had never been signed by the trial judge, agreed on by the parties, or become part of the record by operation of law, where the term of the court at which the judgment appealed from was rendered ended March 29, 1913, and the stenographer received notice to transcribe his notes on May 27, 1913, the bill of exceptions is a nullity and must be stricken from the record, whether or not "incorrect in some material particular."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. \S 655.]

3. APPEAL AND ERROR \S 655—**INCORPORATION OF EXHIBIT IN STENOGRAPHER'S NOTES.**

Where the action was for libel, and a copy of the newspaper containing it was introduced in evidence, but was not marked as an exhibit and referred to by the stenographer in his notes, as required by Code 1906, § 4790, motion to strike from the record the bill of exceptions was sustained, although the alleged libel was made an exhibit to the pleadings, and so a part of the record; no cross-references being made thereto by the stenographer, as required by rule 2 of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2823-2825; Dec. Dig. \S 655.]

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between John L. Richmond and I. C. Enochs. Judgment for the latter, and the former appeals. Motion to strike the stenographer's transcript from the record sustained.

Robertson & Bratton, of Jackson, for appellant. Green & Green, of Jackson, for appellee.

SMITH, C. J. This is a motion by appellee to strike the stenographer's transcript from the record. The several grounds of the motion may be reduced to two: First, no notice

was given the stenographer to transcribe and file his notes of the evidence, as provided by paragraph "a" of section 797, c. 111, Laws 1910; second, that the transcript has "never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record by operation of law," and is incorrect in a material particular.

The term of the court at which the judgment appealed from was rendered ended on March 29, 1913. Notice to transcribe his notes of the evidence was given the stenographer on May 27th thereafter. On June 16th the stenographer delivered to counsel for appellant a transcript of the evidence, and he in turn immediately delivered it to counsel for appellee, with the request that they examine and correct it. This they declined to do, but returned it to counsel for appellant, who thereupon filed it with the circuit clerk. It was not approved by, and seems never to have been tendered to, the circuit judge.

Subdivision "a" of section 797, c. 111, Laws 1910, is as follows:

"In all cases in which the evidence is noted by the official stenographer, any person desiring to appeal the case shall notify the stenographer in writing within thirty days of the adjournment of court of the fact that a copy of the notes is desired. This notice must be handed to the stenographer personally, or mailed to him at his usual place of abode. In either case the attorney making the request shall file with the clerk of the court a copy of the notice with a statement as to how the notice was served. Upon receipt of such notice it shall be the duty of the stenographer to transcribe his notes within sixty days of the date of such notice."

And subdivision "d" thereof is as follows:

"Provided notice as above is given to the stenographer by the appellant or his counsel within thirty days after the conclusion of the term of court, no stenographer's transcript of his notes shall be stricken from the record by the Supreme Court, for any reason, unless it be shown that such notes are incorrect in some material particular, and then only in cases where such notes have never been signed by the trial judge, nor been agreed on by the parties, nor become a part of the record by operation of law."

[1] Bills of exceptions, by which matters occurring on the trial and not otherwise of record are preserved and made a part of the record, were unknown to the common law, are founded wholly upon statutes, and can be made up only within the time and in the manner and place provided in the statutes. The settling of a bill of exceptions is not a judicial but a ministerial act; and the power of the court below so to do, as well as the power of this court in determining whether or not a record which purports to be a bill of exceptions is such in fact, is measured by the statute providing therefor. *Van Buren v. State*, 24 Miss. 512; *Railroad Co. v. Ragsdale*, 51 Miss. 447; *Allen v. Levy*, 59 Miss. 613; *Albrecht v. State*, 62 Miss. 516; *Chenault v. Adams Machine Co.*, 97 Miss. 487, 52 South. 189.

[2] In the absence of subdivision "d" of section 797, c. 111, Laws of 1910, a bill of ex-

ceptions or stenographer's transcript of the evidence not made up and dealt with in the manner provided by that statute would be a nullity, and would be stricken from the record upon request of the opposing party. The only instance in which the statute provides that a bill of exceptions or transcript of the evidence not made up in the manner pointed out therein shall be treated as a part of the record is when it is made up pursuant to notice "given to the stenographer by the appellant or his counsel within thirty days after the conclusion of the term of court," and is not "incorrect in some material particular." Since this notice was not given in the case at bar, it necessarily follows that the bill of exceptions is a nullity, and must be stricken from the record, without reference to whether or not it is "incorrect in some material particular."

In *Railroad Co. v. Chambers*, 103 Miss. 400, 60 South. 562, we declined to strike a transcript of the evidence from the record, although no notice had been given the stenographer to transcribe and file his notes, and in the course of the opinion it was said that:

"Carrying out the spirit of this statute, we will not simply obey the strict letter thereof, but will refuse to strike such a transcript from the record for any reason, when it is not shown to be incorrect in some material particular, unless to refuse so to do would be manifestly unjust to a party affected thereby. If the transcript of the notes is correct, it is immaterial how the stenographer came to make it; and it is difficult to conceive how any party could have any just ground of complaint because it is, if correct, incorporated in the record."

This, counsel for appellee very properly say, substitutes the rule of justice for the rule provided by the statute, and so to do is not within the power which rightfully belongs to this court. We, of course, are supposed to administer justice, but only in accordance with law. In order that that case may no longer mislead, it is hereby expressly overruled.

[3] The motion must also be sustained upon the second ground. The suit was instituted in order to recover damages for the alleged publication by the defendant of a libel upon the plaintiff. At the close of the plaintiff's evidence it was excluded by the court, and a peremptory instruction given to find for the defendant. The alleged libel was published in the *Clarion-Ledger*, a newspaper published in the city of Jackson. A copy of this paper containing it was introduced in evidence, but was not marked as an exhibit by the stenographer and reference made to it in his notes, as required by section 4790 of the Code, so that it could be identified and copied by the clerk into the record, and therefore cannot now be made a part thereof.

It was stated at the bar by counsel for appellant that this alleged libel was made an exhibit to the pleadings, appears more than once in the record, and therefore it was unnecessary for the clerk to again copy it into the record in this connection. All of this

may be true, and under rule 2 an exhibit to the pleadings and evidence need not be copied into the record but once, when proper cross-references are made thereto by the clerk; but such cross-references do not appear here, and in fact cannot be made, in the absence of an identification by the stenographer of the paper containing the alleged libel.

Motion sustained.

(109 Miss. 22)

STATE v. PHILLIPS. (No. 17908.)

(Supreme Court of Mississippi. March 1, 1915.)

1. CONSTITUTIONAL LAW — 296—INTOXICATING LIQUORS — 17—DUE PROCESS OF LAW—LIQUORS IN CLUBS—"POLICE POWER."

Laws 1914, c. 127, § 4, prohibiting the carrying of intoxicating liquors into a social club for use therein, bears a reasonable relation to the preservation of the peace and order in such club and to the enforcement of the prohibition law, which is intended to curtail the consumption of intoxicating liquors, and therefore the statute does not unduly limit the use of property contrary to Const. 1890, § 14, and Const. U. S. Amend. 14, § 1, guaranteeing due process of law, but is a proper exercise of the "police power" which extends to whatever is held by the prevailing morality or strong and preponderant public opinion to be greatly and immediately necessary to the public welfare.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 825-838, 840-846; Dec. Dig. — 296; Intoxicating Liquors, Cent. Dig. §§ 21-23; Dec. Dig. — 17.]

For other definitions, see Words and Phrases, First and Second Series, Police Power.]

2. CONSTITUTIONAL LAW — 240—EQUAL PROTECTION OF THE LAWS—LIQUORS IN SOCIAL CLUBS.

Nor does that statute, though there is no similar prohibition against business, benevolent, or other organizations into which liquors are not ordinarily taken, deprive the members of social clubs of the equal protection of the laws, since the Legislature need not attempt to remedy a nonexistent evil, and besides the act is beneficial, rather than detrimental, to social clubs.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 688, 692, 697-699; Dec. Dig. — 240.]

3. STATUTES — 105—SUFFICIENCY OF TITLE—LEGISLATIVE QUESTION.

Under Const. 1890, § 71, providing that the title of a statute "ought" to indicate clearly its subject-matter, the sufficiency of the title of a statute is a matter for the Legislature solely.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 117, 118; Dec. Dig. — 105.]

Appeal from Circuit Court, Leflore County; F. E. Everett, Judge.

T. J. Phillips was convicted by a justice of the peace of unlawfully carrying intoxicating liquor into a social club, and on appeal to the circuit court a demurrer to the affidavit was sustained, and the State appeals. Reversed and remanded.

Geo. H. Ethridge, Asst. Atty. Gen., for the State. Wells, May & Sanders, of Jackson, and J. A. Tyson, of Greenwood, for appellee.

COOK, J. Appellee was convicted by a justice of the peace upon an affidavit charging that he—

"on or before the 23d day of November, 1914, unlawfully did then and there carry to the club of the Benevolent Protective Order of Elks, the same then and there being a social club and organization, for the use therein as a beverage, vinous, spirituous, malt, alcoholic, and intoxicating liquor, to wit, one bottle of whisky then and there containing more than one-half of 1 per cent. of alcohol."

Appellee appealed to the circuit court and there demurred to the affidavit, which demurrer was sustained. From the judgment of the circuit court sustaining appellant's demurrer, the state prosecuted this appeal.

This prosecution was founded upon section 4, c. 127, Laws Mississippi 1914, which read thus:

"That no intoxicating liquor within the meaning of this act shall be kept in any locker or other place in any social club or organization for use therein, and all persons carrying such liquor to such club or locker for use therein or keeping the same for such use, shall be guilty of a violation of this act."

The demurrer of defendant below was sustained upon the theory that said section is unconstitutional because it contravenes the fourteenth amendment to the Constitution of the United States, as well as article three, section 14, of our state Constitution.

It was also urged below, and here, that chapter 127, Laws 1914, is void because it violates section 71 of the state Constitution, referring to the title of bills introduced in the state Legislature.

[1] The position of appellant, briefly stated, is that the statute under review recognizes that intoxicating liquors are property, and that one may lawfully own, possess, and use the same, and that the limitation upon this right imposed by the statute bears no reasonable relation to the policy of the state to suppress the sale of intoxicants, and also that the statute is discriminatory and denies to the persons involved equal protection of the laws. For these reasons, it is claimed that the statute violates the fourteenth amendment of the Constitution of the United States and article 3, § 14, of our own state Constitution. To support his contention appellee cites the following cases, viz.: *Eldge v. City of Bessemer*, 164 Ala. 599, 51 South. 246, 26 L. R. A. (N. S.) 394; *State v. Gillman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847; *Ex parte Brown*, 38 Tex. Cr. R. 205, 42 S. W. 554, 70 Am. St. Rep. 743; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285, 6 L. R. A. 621, 25 Am. St. Rep. 863; *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, 14 Ann. Cas. 562; *Commonwealth v. Campbell*, 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Ann. Cas. 159; *Ex parte Mon Luck*, 29 Or. 421, 44 Pac. 693, 32 L. R. A. 738, 54 Am. St. Rep. 804; *Noble v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1064, Ann. Cas. 1912A, 487.

Eldge v. City of Bessemer, supra, decided by the Supreme Court of Alabama, it seems to us, is the strongest case decided by any

court in favor of appellee's view of the law. In other words, this case carries the sanctity of the right to possess and use property much further than has any other court of last resort. This case was decided by a divided court; and, with the utmost deference to the opinion of the majority, we think the dissenting opinions are more convincing than the opinion of the court. The court in that case had under consideration an ordinance of the city of Bessemer, the first section of which is in these words, viz:

"Be it ordained by the city council of Bessemer as follows: That it shall be unlawful and constitute a violation of this ordinance, if any person, firm, or corporation in the city of Bessemer, have or keep on storage or deposit, or have therein, any vinous, spirituous, or malt liquors, or intoxicating beverages, or any beverage which is a product of maltage or genecase as a substantial ingredient, in or at any place where any drinks or beverages are sold or kept for sale."

The second section of the ordinance provided that the above section should not apply to druggists of the class described thereby.

As we interpret the opinion of the court, the gist of the court's reasoning may be found in the following words of the opinion, viz:

"It can be justified only, if at all, on the ground that it sustains some reasonable relation to the prohibition law in the way of preventing evasions of that law by trick, artifice, or subterfuge, under guise of which that law itself is violated. But it has no such relation. It undertakes to prohibit the keeping, in any quantity and for any purpose however innocent, of intoxicating liquors and beverages in places which are innocent in themselves."

It seems clear to us that the court entirely underestimated the ability and cunning of the average illicit dealer in intoxicating beverages. The city council was much wiser, in our opinion, to the devious ways of this class of criminals. Given a "pop stand" or a soda fountain the blind tiger is practically immune from prosecution under any laws against the sale of intoxicating liquors. It would seem clear to us that violators of the law would have filed a dissenting opinion in that case, and could have pointed out with precision wherein the court erred, when it said that this ordinance sustains no reasonable relation to the prohibition law.

The dissenting opinion, by Judge McClellan, points out the reasonable relation of the ordinance to the prohibition law in a much clearer way than we can hope to do, and we refer to his opinion and adopt the same as our own.

In *State v. Gillman*, supra, the Supreme Court of West Virginia was passing upon the validity of a statute of that state which denounced as a misdemeanor the keeping in possession of spirituous liquors of another by any person not the owner who had not obtained a license therefor. The decision went off upon the court's interpretation of the state Constitution, which declared "laws may be passed regulating or prohibiting the sale

of intoxicating liquors." The court invoked the maxim "*Expressio unius est exclusio alterius*," holding that, the statute not having reference to the prohibition or sale of liquors, the Legislature was without power to pass the statute. The court also held that the statute could not be upheld as coming within the police power of the state. We do not consider this decision of much value in this case, because the statute there reviewed is radically and substantially different from the statute we are considering, and besides the question before that court was complicated by the Constitution of West Virginia.

Ex parte Brown, 38 Tex. Cr. R. 295, 42 S. W. 554, 70 Am. St. Rep. 743, a Texas case, does not seem to be pertinent to this case. In that case the Texas court was construing a statute in the light of the state Constitution, referring directly to the question of the prohibition of the sale of intoxicants in local option territory. Referring to the constitutional provision, the court said:

"It occurs to us that this expression of the will of the people on the subject is exclusive of any other method to be pursued by the Legislature. Whatever may be said as to the power of the Legislatures of other states, with no express provisions of their Constitutions on this subject, to legislate in regard to the liquor traffic under the general police power, the same does not apply with us. We have an express provision on the subject, and that provision was intended to prescribe a method of dealing with the question, and to exclude any other rule or method, at least so far as local option territory is concerned."

The court then quoted in full the opinion of the Supreme Court of West Virginia in *State v. Gillman*, supra, adopting and endorsing the same. The two courts were in accord, because of the similarity of their state Constitutions. It will be seen that the Texas case is expressly confined to provisions of the Constitution of Texas, and what would have been the decision of that court had there been no such constitutional provision it is, of course, impossible to conjecture.

State v. Goodwill, supra, we do not believe has any application here, except as a general statement of the principle requiring classification of persons or corporations to be affected by the statute to be reasonable and not discriminatory, which principle we will discuss later.

State v. Williams, supra, a North Carolina case, we here copy the syllabus, which indicates the question decided, viz:

"Spirituous, malt, or vinous liquors are property within the meaning of the Constitution, when its manufacture or sale is lawfully prohibited by statute; and when the Legislature makes it an indictable offense to carry more than a certain quantity into a specified county, within a limited time, prohibiting its sale and not prohibiting its use, but authorizing its use for certain purposes, it is unconstitutional, for that it is taking of property without due process of law, and not within the police power of a state."

This case was also decided by a divided court. We mention this fact for the purpose of showing that decisions along this line have usually found some judge of the court who dissents. We think the dissenting opinion in this case propounds a question hard to answer, and we quote the same, because, in our opinion it demonstrates the fallacy of the court's reasoning, viz.:

"In limiting each person to a half gallon per day for his own use (for the law permits no sale) the Legislature was not niggardly. Besides, if the manufacture, though exclusively for one's own use and out of one's own apples and peaches, in the county can be forbidden by statute without breaking the Constitution, why cannot the importation of the same article across the county line, in a greater quantity than a half gallon per day, even for one's own use, be prohibited by the same power? The truth is that, the Legislature having jurisdiction of the subject, the limitations upon its exercise rest in the wisdom and sound judgment of the Legislature, subject only to review by the people, not by the courts."

Commonwealth v. Campbell, supra, a Kentucky case, the charge against the defendant was bringing intoxicating liquors into a town, upon his person or as his personal baggage, exceeding a quart in quantity. This prosecution was based upon a town ordinance making it unlawful to bring into the town intoxicating liquors exceeding one quart in quantity. This case involved the construction of the state Constitution, and the court held that, inasmuch as the Constitution formulated a system by which the sale of intoxicating liquors throughout the state was to be regulated by general laws, it could not be contended, with any show of reason, that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of a majority of the voters, and yet leave it in the power of the Legislature upon its own motion to prohibit the possession of liquor by the citizen. True, the court said much more than this. The court discussed the natural and inalienable rights of man, but after they reached the conclusion that the legislation was in violation of the state Constitution, referring to the particular power under review, there was nothing more to be said.

It is claimed by all the cases wherein the precise point now before this court was involved the power to enact legislation of this character was denied. We have endeavored to analyze the cases relied on to sustain this claim, and we believe no court (except possibly the Alabama and North Carolina courts), has gone so far as to condemn the legislation challenged in the present case.

Justice Holmes in *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1064, Ann. Cas. 1912A, 487, thus defines police power:

"It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant

opinion to be greatly and immediately necessary to the public welfare."

The Supreme Court of the United States has uniformly held that the adoption of the fourteenth amendment of the Constitution did not have the effect of denying to the state power to prescribe "regulations to promote the peace, health, morals, education, and good order of the people."

It may be said that the presence and use of intoxicating liquors at a place where a number of people gather for the enjoyment of social intercourse would have a tendency to disturb the peace and quiet of the people there assembled. It is not a stretch of the imagination to assume that one intoxicated man may, and indeed frequently does, annoy, disgust, and offend the moral sense of a large number of other people engaged in the discussion of serious and important social questions. The affectionate, or the bellicose, inebriate can do much to arouse the ire and invite the active resentment of his victims. And so the Legislature deemed it wise to protect the members of social clubs, and thus promote the public peace by preventing the carrying of intoxicants into the clubrooms—to be kept or used there—to the discomfort of sober members and to the peril of the public peace. This thought was no doubt in the legislative mind, in so far at least as the statute might apply to the class of social clubs organized and conducted for the encouragement of social intercourse, and for the improvement and enjoyment of their fortunate members.

There was another thought which probably prompted the legislation in question. It is well known to those familiar with the enforcement of the laws against the sale of intoxicants that many schemes, artifices, and devices have been originated for the purpose of evading the law. Clubs and lodges have been organized for no other purpose than to sell intoxicating liquors. The conscienceless promoters often select names for their club or lodge which suggest to the uninitiated that these organizations have no purpose other than to assist the moral and religious element of the community in every movement having for its purpose the moral welfare of the community.

To check the pernicious and cunning activities of the professional criminal—the man who once a blind tiger is always a blind tiger—the Legislature adopted a broad classification to cover any and all social clubs. This was necessary to make the statute at all efficient. In this statute the limitation upon the use of liquor is confined to social clubs. The owner may carry it anywhere else and use it to any extent. There is no attempt to destroy the personal liberty of the owner to enjoy the seductive influence of liquor, or even to get drunk. So far as this statute is concerned one may own any amount of liquor, use it as he sees fit, and

even carry it anywhere except to a social club or organization. Therefore it is said the statute denies the owner, as a club member, the equal protection of the laws.

There was a time, not long ago, when many intelligent and virtuous citizens of this state resented any interference by the Legislature whereby it undertook to prohibit the sale of intoxicating liquors. Even laws submitting to the people of towns or counties the option of prohibiting the sale in any given town or county was indignantly denounced as efforts to deprive the dissenters of their natural and inalienable rights. There was a time, perhaps, when this sentiment represented the "prevailing morality" of many communities. We have traveled far since, until now it may be safely said that the "preponderant opinion," as well as "the prevailing morality" is willing and anxious to prohibit even the possession of alcoholic liquors as a crime against peace, morality, and good government. We do not think we yield to a clamorous and unreasoning mob, when we indorse a law as within the police power of the state, when the Supreme Court of the United States says this power exists whenever the "preponderant opinion and prevailing morality" believes this law necessary to the public welfare.

We quote the words of an unknown writer as fairly representative of the present "prevailing morality" of the people of this state:

"Whisky is a good thing in its place. There is nothing like it for preserving a man when he is dead. If you want to keep a dead man put him in whisky; if you want to kill a live man put whisky in him."

Is the writer a wag or a philosopher? This question will be answered by "dyed in the wool 'individualists'" but one way, but we apprehend that their answer would not be approved in a state-wide primary.

There is abundant authority, we think, for our view. We will now cite some of the cases which are in line with our ideas of the law. These cases are collated by the annotator of *Eidge v. Bessemer*, reported in 26 L. R. A. (N. S.) 395 et seq.:

"Thus, in *Selma v. Brewer*, 9 Cal. App. 70, 98 Pac. 61, the court said that it was of opinion that a municipal ordinance, declaring it unlawful for any person, firm, or corporation, company, club, or association to 'have, keep, possess, provide, or store' any spirituous, etc., liquors within a town, but permitting a licensed pharmacist to sell the same, taken as a whole, is consistent with the provisions of the Constitution authorizing any city to make and enforce police regulations not in conflict with general laws, and represents only a proper exercise of the power expressly vested by that instrument in cities, counties, towns, and townships.

"An ordinance prohibiting the owner or keeper of a retail grocery store, where meat, grain, fruit, provisions, or other articles are exposed for sale, from keeping therein, or in any inner room adjacent thereto, or on the premises connected therewith, any spirituous, etc., liquors, unless licensed by the city to retail the same, is warranted by charter authority to pass any by-law or requirement that shall appear requisite for the city, or for preserving peace, order, and

good government. *Charleston v. Heisebrittle*, 2 McM. 233. The court said that there could be no question that the restraints imposed by such ordinance were within the ordinary powers of legislation, there being nothing in the restrictions imposed by the Constitution of the state or United States restraining the Legislature from passing a general law like that under consideration, or from granting power to do so to municipal corporations.

"So an ordinance providing that no intoxicating liquors shall be used or kept in any refreshment saloon or restaurant for any purpose whatever is valid, notwithstanding such liquors are not kept for sale, and the keeping thereof elsewhere is not restricted. *State v. Clark*, 28 N. H. 176, 61 Am. Dec. 611. See the quotation from this case in the dissenting opinion of McClellan, J., in *Eidge v. Bessemer*.

"And it was held in *Cohen v. State* [7 Ga. App. 5] 65 S. E. 1096 (one justice, however, dissenting), that on a prosecution for the violation of a law declaring it unlawful for any one to keep on hand at his place of business any intoxicating liquor, evidence as to the respondent's purpose in keeping it was properly excluded as irrelevant and immaterial.

"Thus it was held in *Easley v. Pegg*, 63 S. C. 98, 41 S. E. 18, that a municipal ordinance enacted under the general welfare clause of a municipal charter, prohibiting the storing or keeping possession of spirituous, etc., liquors, except as provided by the state dispensary law, was valid, it not being necessary that such liquor should be kept for an unlawful purpose; the offense being complete if there is a storing or keeping of liquor, which is contraband under the dispensary law.

"And in *Wright v. Macon*, 5 Ga. App. 750, 64 S. E. 807, where a municipal ordinance, declaring it unlawful for any club, corporation, or association of persons, or number of persons, whether incorporated or otherwise, to keep, or permit to be kept, in any room or place, or in any place connected directly or indirectly therewith, in which members of such club, corporation, association of persons, or number of persons, assembled, any alcoholic, spirituous, etc., liquors, under which it was sought to prosecute one who kept liquor owned by him and intended for his own personal use, in a locker of a club connected with lodgerooms of a fraternal society to which he belonged, was held void, solely on the ground that the state had already regulated and licensed such clubs, the court said that 'but for the passage of the license tax by the state, there could be no question in our minds that * * * (such ordinance could have been adopted under the general welfare clause of its charter). It is evident that the general policy of the state in the passage of the general prohibition act of 1907 was to stop, or at least to decrease, the drinking of intoxicating liquor, and, the ordinance * * * now before us being in aid of that general policy, we think it could be extended to preventing the assembling of liquors at a place where drinking, instead of being decreased, would be increased, although the possession and property right in such liquors was legal, and the place at which such liquors were assembled was not a public place; and, although it is always to be borne in mind that delegated powers are to be strictly construed and reasonably exercised, we think the passage of the ordinance in question * * * is not an unreasonable exercise of police power, and is fully warranted by the general welfare clause.'"

[2] We do not think that this act deprives members of social organizations of the equal protection of the law. It seems to us that the classification of the organizations which would come under the regulations adopted by the Legislature is entirely reasonable. 11

may be said that business, benevolent, and other organizations which might be mentioned were not put under the statutory regulations, for the reason that ordinarily liquors are not carried into the places where such organizations assemble. There being no public necessity for prohibiting members of the organizations not mentioned in the statutes from carrying liquors to the meeting places, the Legislature did not attempt to remedy a nonexistent evil.

Before leaving this subject, we venture to say that "social clubs," by this statute, are selected as the special favorites rather than as the victims of the law. While primarily the statute was enacted in the interest of the public welfare and to effectuate the purpose of the Legislature to make the sale of intoxicating liquors more difficult, yet it is conceivable that the immediate and direct result of the enforcement of the statute will be of special benefit to social clubs.

[3] Lastly, it is contended that the act in question is unconstitutional, because it contravenes section 71 of our Constitution. All questions of this kind are foreclosed by the decision in *City of Jackson v. State*, 102 Miss. 663, 59 South. 873. If the object of prohibition of the sale of intoxicating liquors is not to prevent, as far as may be, the drinking of such liquors, then it is difficult to justify the laws prohibiting the sale. Of course the typical public saloon is demoralizing, but there would be no practical difficulties in the way of so regulating the saloon as to minimize all of the evils which flow from the saloon, except the evils which flow from the drinking of intoxicating beverages. If it is not a menace to the health, morals, welfare, and peace of the public for men and women to drink alcoholic liquors, it would seem that the public could have no interest in prohibiting the sale. The ultimate purpose and end of prohibition is to prevent the use of liquor as a beverage. This ultimate end is approached step by step, and when the preponderant and prevailing morality of the nation believes that the public welfare demands the final step, the way will be found to accomplish the end.

The judgment of the trial court sustaining the demurrer to the affidavit is reversed, and the cause remanded for trial on its merits.
Reversed and remanded.

FITZGERALD, Sheriff, v. PHILLIPS.
(No. 17501.)

(Supreme Court of Mississippi. March 1, 1915.)

Appeal from Circuit Court, Coahoma County; M. E. Denton, Judge.

Habeas corpus by E. B. Phillips against W. H. Fitzgerald, Sheriff. From a judgment dis-

charging the petitioner from custody, the defendant appeals. Reversed, and petitioner remanded to custody.

D. A. Scott and E. M. Yerger, both of Clarksdale, and Wells, May & Sanders, of Jackson, for appellee.

COOK, J. Appellee was convicted by a justice of the peace upon an affidavit charging him with violating section 4 of chapter 127, Laws of Mississippi of 1914. He refused to pay the fine and sued out a writ of habeas corpus, and upon hearing the chancellor held the law in question was unconstitutional, and discharged appellee. From this judgment, the sheriff, who had appellee in custody, appeals.

This case is controlled by *State of Mississippi v. T. J. Phillips*, 67 South. 651, this day decided.

The judgment is reversed, and appellee is remanded to the custody of the sheriff.

PETERSON v. FIRST NAT. BANK OF GULFPORT. (No. 16607.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between L. O. Peterson and the First National Bank of Gulfport. From the judgment, Peterson appeals. Affirmed.

Neville & Morse and Mize & Mize, all of Gulfport, and Chas. Rosen and M. M. Boatner, both of New Orleans, La., for appellant. H. Gardner, E. J. Bowers, and V. A. Griffith, all of Gulfport, for appellee.

PER CURIAM. Affirmed.

CITY OF LEXINGTON v. CRABTREE.
(No. 16860.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action between the City of Lexington and Dallas Crabtree. From the judgment, the city appeals. Affirmed.

Noel, Boothe & Pepper, of Lexington, for appellant. H. H. Elmore and P. P. Lindholm, both of Lexington, for appellee.

PER CURIAM. Affirmed.

SOUTHERN RY. & LIGHT CO. v. MURPHEE. (No. 16617.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Adams County; E. E. Brown, Judge.

Action between the Southern Railway & Light Company and Mrs. Catherine Murphee. From the judgment, the company appeals. Affirmed.

Truly, Ratliff & Truly, of Natchez, for appellant. L. P. Conner and M. W. Reilly, both of Natchez, for appellee.

PER CURIAM. Affirmed.

UNION NAVAL STORES CO. v. STEWART.
(No. 16622.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Chancery Court, Pearl River County; R. E. Sheehy, Chancellor.

Action between the Union Naval Stores Company and H. L. Stewart. From the judgment, the company appeals. Affirmed.

Ford & White, of Gulfport, for appellant. H. H. Parker, of Poplarville, for appellee.

PER CURIAM. Affirmed.

SIMPSON v. ROLF SEEBERG SHIP CHANDLERY CO. (No. 16618.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between C. A. Simpson and the Rolf Seeberg Ship Chandlery Company. From the judgment, Simpson appeals. Affirmed.

Mize & Mize, B. E. Eaton, Neville & Brogan, and J. A. Leathers, all of Gulfport, for appellant. Webb & McAlpine, of Mobile, and Geo. P. Money, of Gulfport, for appellee.

PER CURIAM. Affirmed.

GULF & S. I. R. CO. v. GIBSON. (No. 16641.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action between the Gulf & Ship Island Railroad Company and Jim Gibson. From the judgment, the railroad company appeals. Affirmed.

Wells, May & Sanders, of Jackson, and B. E. Eaton, of Gulfport, for appellant. Hirst, Dent & Landau, of Vicksburg, A. W. Dent, of Mendenhall, and E. L. Dent, of Collins, for appellee.

PER CURIAM. Affirmed.

BELZONI HARDWOOD LUMBER CO. v. COSGROVE. (No. 16868.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Washington County; Monroe McClurg, Judge.

Action between the Belzoni Hardwood Lum-

ber Company and M. J. Cosgrove. From the judgment, the Lumber Company appeals. Affirmed.

Wynn, Wasson & Wynn, of Greenville, for appellant. Jere Horne, of Memphis, Tenn., and Boddie & Farish, of Greenville, for appellee.

PER CURIAM. Affirmed.

GEO. E. KEITH & CO. v. BYRD.

(No. 16614.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between Geo. E. Keith & Company and L. D. Byrd. From the judgment, the company appeals. Affirmed.

Rushing & Guice, of Gulfport, for appellant. John J. Curtis, of Biloxi, for appellee.

PER CURIAM. Affirmed.

COOPER et al. v. BLOOMFIELD & FRIED et al. (No. 18111.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Chancery Court, Winston County.

Action between Alex Cooper and others and Bloomfield & Fried and others. From the judgment, the parties first mentioned appeal. Motion to docket and dismiss sustained.

W. W. Magruder, of Starkville, for the motion. P. G. Cooper, of Jackson, opposed.

PER CURIAM. Sustained.

CUEVAS v. INGRAM-DAY LUMBER CO.
(No. 16627.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action between Leonard Cuevas, by next friend, and the Ingram-Day Lumber Company. From the judgment, Cuevas appeals. Affirmed.

Mize & Mize, of Gulfport, and McDonald & Marshall, of Bay St. Louis, for appellant. Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

(109 Miss. 43)

YAZOO & M. V. R. CO. v. CONSUMERS' ICE & POWER CO. (No. 16342.)

(Supreme Court of Mississippi. March 15, 1915.)

1. DAMAGES \S 40—LOSS OF PROFITS—WHEN RECOVERABLE.

Unless the profits of a business are so definite and certain that they can be ascertained reasonably by calculation, their losses cannot be allowed as damages at large.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. \S 40.]

2. DAMAGES \S 190—PROFITS—CALCULATION—EVIDENCE.

Evidence held insufficient to show that the profits of an ice manufacturing company were so definite and subject to calculation as to be recoverable in a suit of law against a railroad for closing such company's spur track to shipments.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 513; Dec. Dig. \S 190.]

3. DAMAGES \S 71—ATTORNEY'S FEE.

The general rule is that attorney's fees are not to be recovered as damages unless the injury was connected with circumstances of aggravation.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 146, 153; Dec. Dig. \S 71.]

4. DAMAGES \S 71—ATTORNEY'S FEE.

The Mississippi rule is that an attorney's fee can be awarded as damages where exemplary damages are proper.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 146, 153; Dec. Dig. \S 71.]

5. DAMAGES \S 191—LOSS OF TIME OF PRESIDENT OF PLAINTIFF COMPANY.

Evidence held insufficient to justify allowance of claim for value of services of president of plaintiff ice company as an element of damage for discontinuance of a switch track.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 504, 510; Dec. Dig. \S 191.]

Appeal from Circuit Court, Coahoma County; Sam C. Cook, Judge.

Action by the Consumers' Ice & Power Company against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Mayes & Mayes, of Jackson, and Chas. N. Burch, of Memphis, for appellant. Cutrer & Johnston, of Clarksdale, for appellee.

REED, J. This is an action brought by appellee to recover from appellant damages which it was alleged appellee sustained when appellant spiked down and closed for use a spur track that served appellee in its business of shipping ice. The case was tried before the circuit judge, jury being waived. He rendered judgment in favor of appellee in the sum of \$700, and appellant appealed.

The proof is sufficient to sustain the finding of the trial judge as to liability.

The track was closed for six days in the latter part of September, 1907. In its declaration appellees claimed damages from: (1) Loss of gains and profits, \$750; (2) loss of services of its president, \$100; and (3) amounts paid for services of attorney and for

traveling, hotel, telegraph, and other expenses of its attorney and president, \$350.

Now as to the proof of damage. We find in the correspondence between the parties that appellee promptly made claim for payment of loss sustained. A few days after the occurrence, in a letter dated September 30, 1907, appellee sent appellant a statement of account, of which the following is a copy:

For loss on account of cutting out siding and failure to place cars for shipment of ice, Sept. 22 to Sept. 27, inclusive:

Six days' loss at factory, at \$30.00 per day.....	\$180 00
Six days' time of W. A. Crawley, at \$15.00 per day.....	90 00
R. R. fare, hotel, telegraph and other incidentals	50 00
Attorney's fees, including hotel, traveling, telegraph, and other incidental expenses paid J. W. Cutrer.....	150 00
	<hr/> \$470 00

Mr. Crawley, president and manager of appellee company, testified that his company was put out of business as far as freight shipments were concerned, and that it would be difficult to arrive at exact figures as to amount of loss. He said the plant sustained a loss of \$100 per day. When asked what expenses were incurred in his effort to have the obstruction removed, he answered:

"Well, I gave it six days of my time; attended to nothing else absolutely; my time, I estimate, was worth at least \$15 a day—\$90. I paid out for railroad fare, hotel, telegraph, and other incidentals \$50; then there is an attorney's fee, including hotel, travel, and stenographer and other incidental expenses; paid J. W. Cutrer \$150; those three items make \$290 expenses."

It seems from the evidence that the loss claimed was from the inability to ship bulk ice in cars which were brought to the factory over the spur track. No effort was made to take the ice to the railroad depot and there ship it. Nothing was done towards shipping except to ask that cars be placed on the track at the factory.

Mr. Crawley said that he arrived at the amount of loss of \$100 per day by a mental calculation. He said this is what the company ought to have earned on its shipments. This estimate included his expenses. He did not know that the company's books would show a clear profit of \$100 per day on any six days in September, 1907. Some ice was manufactured during the time. He could not say the amount. The books would show. The company's books covering the term were not introduced; they could not be found. He could not mention any particular order that he had, about that time, to be filled, but says the factory was selling its capacity during September. When asked if business was not lighter because the weather was getting cooler in the last of September, he answered, "No, sir; September we regard as one of our best ice months; everybody is having chills and fever, and then it is hot."

Mr. Steve Castleman testified for plaintiff. He said that he could not swear positively what the actual loss to the business from the closing of the spur track was, but that he had had several years' experience with the business, and from his knowledge of it it would be anywhere from \$100 to \$150 a day.

Mr. Bradley, a witness for appellant, and railroad agent at Belzoni where the ice factory was located, testified that appellee's shipments of bulk ice would not average a small car a day, such car containing about 6,000 pounds. There was no other evidence as to this.

Mr. Crawley testified that the prices for ice during September, 1907, varied from \$5 to \$8 per ton. He could not tell what sales he had on which the factory could not fill during the six days the track was closed.

It is evident that only compensatory damages were awarded in this case. In truth, the proof does not present a case for punitive damages.

[1] The rule regarding the recovery of gains and profits lost through breach of contract was announced in the case of Railroad Company v. Ragsdale, 46 Miss. 483, and reannounced in the recent case of Crystal Ice Co. v. Holliday, 64 South. 658, and is:

"Losses of profits in a business cannot be allowed, unless the data of estimation are so definite and certain that they can be ascertained reasonably by calculation."

[2] The amount of the loss in gains and profits cannot be definitely ascertained from the evidence in this case. The proof is insufficient to establish with certainty the amount of such loss by appellee on account of the failure by appellant to operate and use the spur track. In the proof appellee claimed that the loss arising from the closing of the ice plant for six days amounted to \$100 per day. It will be seen that this was only an estimate; that it was not shown from the company's books; the president said it was his mental calculation. He also said that the estimate included his expenses, though he testified that his expenses during the time were included in another item of damages. He could not mention any particular order that his company was unable to fill. In short, the testimony lacks necessary information from which a calculation could be made of the amount of loss sustained.

The only witness who testified on the subject of the amount of the company's shipments said that the company's shipments would not average one small car of bulk ice a day, such car containing about 6,000 pounds, and it is shown in the president's testimony that the company was selling ice at prices from \$5 to \$8 per ton. It is not shown

what the profits would be on the sale of ice shipped. Work in the ice plant was not suspended entirely during the six days, but its work and business continued, and the loss claimed was from the inability to ship ice in bulk in cars placed at the plant over the spur track.

We note, too, that in the declaration the loss of gains and profits was placed at \$750 for the six days; that in the account rendered on September 30, 1907, the loss was shown to be \$30 per day, or a total of \$180, and in the testimony by the president it was estimated at \$100 a day, and still another estimate was given in the testimony of Mr. Castleman, when he placed the loss at from \$100 to \$150 a day. We do not see how the loss could be ascertained reasonably by calculation from the uncertain and indefinite testimony on the subject and the conflicting estimates given.

[3] In its claim for damages appellee includes an amount paid for services and advice of an attorney in its negotiations with appellant for reopening the spur track. It is the general rule that attorney's fees should not be recovered as part of damages unless the wrong or injury complained of is connected with some circumstance of aggravation or malice. 13 Cyc. 80.

[4] It is the rule in Mississippi that attorney's fees can be awarded in cases in which exemplary damages are given. This is supported by the decision in the case of New Orleans J. & G. N. R. R. Co. v. Albritton, 38 Miss. 243, 75 Am. Dec. 98:

"In cases, proper for the infliction of exemplary damages, the jury in estimating those damages have a right to take into consideration the probable expense of the litigation, to which the plaintiff has been subjected, in order to obtain redress for the wrongful act of the defendant; and it is therefore competent for the plaintiff to prove, before the jury in such a case, the reasonable and proper charges of his counsel."

The case at bar is not one for exemplary damages, and we, therefore, conclude that the amount paid the attorney for advice and services was not a proper item of damages.

[5] From the proof in this case we do not see that the claim for services of the president for six days at \$15 per day should have been allowed. It is not shown that the services he rendered in adjusting with appellant the matter in regard to the closing of the spur track were outside the scope of his official duties and were an extra or additional expense to the company.

It follows, therefore, from our holding that the trial court was in error in fixing damages in this case.

Reversed and remanded.

COOK, J., took no part in this case.

(109 Miss. 49)

JARRELL v. NEW ORLEANS & N. E. R. CO.
(No. 16569.)

(Supreme Court of Mississippi. March 15, 1915.)

1. RAILROADS ⇐304—INJURIES TO PERSONS ON TRACK—BLOCKING CROSSING.

It was negligence per se for a railroad company habitually to park cars so as to block a road crossing in violation of a statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 964; Dec. Dig. ⇐304.]

2. RAILROADS ⇐339—INJURIES TO PERSONS ON TRACK—PROXIMATE CAUSE.

A boy attempted to cross a railroad track about 100 yards from a public crossing by crawling under standing cars, and was killed when a locomotive without signal or warning ran into the cars. The string of standing cars extended over the crossing and for a considerable distance beyond, and it was the habit of the railroad company to habitually block the crossing in that manner. *Held*, that the negligent blocking of the crossing in violation of the statute directly contributed to the boy's death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1319-1323; Dec. Dig. ⇐389.]

3. RAILROADS ⇐387—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE.

The negligence of the boy, if any, did not bar an action for his death.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1296, 1314-1316; Dec. Dig. ⇐387.]

Appeal from Circuit Court, Pearl River County; A. El. Weathersby, Judge.

Action by Geo. W. Jarrell against the New Orleans & Northeastern Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Sullivan & Conner, of Hattiesburg, and Bilbo & Smith, of Poplarville, for appellant. R. H. & J. H. Thompson, of Jackson, and A. S. Bozeman, of Meridian, for appellee.

COOK, J. Appellant sued appellees in the circuit court of Pearl River county for negligently causing the death of his son.

The record shows that appellant and his son, desiring to go from one part of the town of Picayune to another part of the town, were confronted with the choice of walking about a quarter of a mile beyond one crossing and there cross the railroad track, or walking a half mile in another direction to an unblocked crossing, or climbing over or crawling under cars parked along the railroad track for about three-quarters of a mile. When they approached the track they looked up and down the track, and discovered that there was an unbroken string of cars extending a half mile in one direction and a quarter of a mile in the other direction. The nearest public crossing was about 100 yards from the place where they reached the track, but the string of cars extended over this crossing, and beyond, for a quarter of a mile. They did not see or hear any locomotive, and, believing it would be safe to crawl under the cars, they proceeded to make the attempt.

Before they got across, a locomotive, without signal or warning, butted into the string of cars south of the road crossing, and about a quarter of a mile away from the point where they were attempting to cross the track. The string of cars being all connected and a solid mass, the locomotive, when it moved against one end of the string, caused a movement of the whole, including the car under which plaintiff and his son were attempting to cross the track. Thus it was that the son of plaintiff was struck by the wheels of the car, with the result that he was fatally injured, dying within a few hours. In addition to the facts just stated, it appears from the record that it was the habit of the railroad company to park its cars on this stretch of track, and to habitually disregard the rights of the public by blocking the road crossing just south of the scene of this tragedy. At the close of the evidence of plaintiff which developed the facts just detailed, the court, at defendant's request, directed the jury to return a verdict in favor of the defendant, which was accordingly done.

[1, 2] The blocking of the crossing was a violation of the statute and constituted negligence per se. It seems to us that this negligence directly contributed to the death of this boy. The agents of defendant, consciously violating the law, should have taken every precaution to prevent any injury to others. The record shows that no warning was given—the whistle was not sounded and the bell was not rung. What the employes of defendant in charge of the locomotive were doing does not appear. The jury would have been warranted in believing that the boy would have safely passed over the track, if the public crossing had been left open as the law required.

[3] The defendant's employes were negligent, and the negligence of the injured boy, if any, does not bar the action.

Reversed and remanded.

(109 Miss. 52)

J. A. BROOM & SON v. S. S. DALE & SONS.
(No. 16553.)

(Supreme Court of Mississippi. March 15, 1915.)

1. BAILMENT ⇐18—LABORERS' LIENS—PRIORITY.

Under Code 1900, § 3075, providing not only that a mechanic may retain in his possession any article which he repairs until the price of his labor and material furnished shall be paid, but for the enforcement of the lien, which is merely declaratory of the common law that gave mechanics liens upon property repaired, a mechanic who repaired an automobile has a lien for his labor which takes precedence over the rights of the vendor of the machine, who sold it transferring possession, but reserving title to secure payment; the repairs being ordered by a person in possession apparently authorized.

[Ed. Note.—For other cases, see Bailment, Cent. Dig. §§ 77-79, 81-84; Dec. Dig. ⇐18.]

2. SALES — 303 — CONDITIONAL SALES — RIGHTS OF SELLER.

Where the sellers of an automobile took purchase-money notes in which title to the machine was reserved, although possession was delivered to the buyer, they have a lien, and occupy a position like that of chattel mortgagees. [Ed. Note.—For other cases, see Sales, Cent. Dig. § 859; Dec. Dig. — 303.]

Appeal from Circuit Court, Jefferson Davis County; A. E. Weathersby, Judge.

Petition by J. A. Broom & Son against F. R. Polk, in which S. S. Dale & Sons intervened. From a judgment for interveners, petitioners appeal. Reversed, and judgment rendered for petitioners.

J. C. Oakes, of Monticello, for appellants.
J. E. Parker, of Prentiss, for appellees.

REED, J. Appellants filed a petition against F. R. Polk to recover a balance owing on an account for repairs on an automobile in his possession and for materials used in such repairs. Appellants alleged that the work was done and the materials used for repairing and keeping in order the automobile, and they prayed the court to establish a mechanic's lien thereon and order a sale for the satisfaction of the indebtedness.

Appellees interpleaded, and alleged that they had sold the automobile to Mr. Polk; that notes were given to evidence deferred payments on the purchase price, in which notes title in the property was retained in appellees. They prayed that the automobile be sold, and that the balance owing them as shown by the notes be paid first out of the proceeds of sale and before payment of appellants' claim for repairs.

The case was tried in the circuit court before the judge, jury being waived, upon an agreed statement of facts. The court gave judgment in favor of appellees deciding that their claim upon the automobile based on the title retained in the notes, was superior to that of appellants for labor and material used in making repairs thereon.

We quote the agreed statement of facts as follows:

"(1) That on the 20th day of June, 1911, S. S. Dale & Sons sold the automobile in controversy to F. R. Polk for the agreed price of \$775, and retained title in themselves to the aforesaid automobile as security for the purchase price thereof; that there is now due and unpaid on account of said purchase price the sum of \$465, with interest thereon at 10 per cent. per annum from the 20th day of June, 1911; that J. A. Broom & Sons have known at all times that the said automobile had not been fully paid for by F. R. Polk as aforesaid; that said J. A. Broom & Sons do not question or deny the amount that S. S. Dale & Sons say that F. R. Polk is due them on account of this automobile, and the said automobile is of less value than the unpaid part of the purchase price for which title is retained; that S. S. Dale & Sons admit that the amount of \$95.25 claimed by J. A. Broom & Sons is just and correct against F. R. Polk for material furnished and repairs made to the automobile involved in this litigation; that S. S. Dale & Sons have been aware and were fully advised during such time as such repairs

were being made and material furnished as aforesaid were being made and furnished as aforesaid; that S. S. Dale & Sons at no time ever objected to repairs being made, or material furnished for such repairs to the said automobile.

"Whereas, it is agreed by and between the attorneys for both parties that S. S. Dale & Sons retained a title in themselves for security for the purchase money of said automobile, and that they therefore have an equitable lien upon the said automobile for said purchase money to the amount now unpaid, and that the said J. A. Broom & Sons have a mechanic's lien upon the said automobile for the amount due them as aforesaid for repairs made to and material furnished for the said automobile:

"Wherefore the question submitted to the court for decision is as to whose lien takes priority; and both parties pray the court for an appropriate judgment defining their rights in the premises."

[1, 2] In this state, by statute (section 3075 of the Code of 1906) a mechanic is given the right to retain in his possession any article which he repairs until the price of his labor and material furnished in making such repairs shall be paid. The statute states that any article repaired shall be liable for the price of the labor and material employed in repairing the same. Provision is made in the statute for the enforcement of the mechanic's right, including a special order of sale of the property retained in his possession for the payment of the amount due.

A mechanic, at common law, has a lien on all personal property for repairs. "Persons have by common law the right to retain goods on which they have bestowed labor, until the reasonable charges therefor are paid." 2 Kent's Commentaries, 635. "In the absence of specific agreement, if a party has bestowed labor and skill on a chattel bailed to him for such purpose and thereby improved it, he has by general law a lien on it for the reasonable value of his labor or the right to retain it until paid for such skill and labor." *Drummond Carriage Co. v. Mills*, 54 Neb. 417, 74 N. W. 966, 40 L. R. A. 761, 69 Am. St. Rep. 719; *Grinnell v. Cook*, 3 Hill (N. Y.) 491, 38 Am. Dec. 663. It was said by Mr. Kent in his Commentaries that "this right rests on principles of natural equity and commercial necessity."

The statute (section 3075) does not create a new right or lien for the mechanic's benefit, but only declares the right and lien which he has at common law, and then provides a method for the enforcement thereof.

In this case the automobile was intrusted by the party who had the lawful possession of it to the appellants to be repaired. By virtue of the labor done by appellants and the material used by them in making the repairs, they had the right under the common law, as well as under the statute, to retain possession thereof until they were paid their charges, and by the statute were given the right to subject the article by proper proceedings and through sale to the payment of the amount owing.

Appellees, by retaining title to the notes

given to evidence the purchase price, were placed in the position of a person holding a lien or mortgage on the property. Mr. Polk occupied the position of mortgagor in possession. It is the general rule that the employment of the mechanic making the repairs should be by the owner of the property to be affected by the lien, or by his consent, express or implied.

It has been held that the common-law lien of a mechanic for repairs under special circumstances may be superior to prior existing liens on property. 8 R. C. L. § 56, page —; *Drummond Carriage Co. v. Mills*, supra. We quote as follows from 8 R. C. L. § 56:

"Thus where property which is liable to need repairs is to be retained and used by a mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage that it is to be kept in repair; and when the property is machinery, or is of such a character that it must be intrusted to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made; and as such necessary repairs are for the betterment of the property, and increase its value to the gain of the mortgagee, the common-law lien in favor of the bailee for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed, in such case, to have contracted with a knowledge of the law giving to a mechanic a lien."

In the case of *Drummond Carriage Co. v. Mills*, supra, a physician had executed a chattel mortgage on a buggy used by him in his practice. He had repairs made on the vehicle in the shop of the carriage company. The party holding the mortgage knew that the physician used the buggy, and knew that he had left it in the shop for repairs. The court held that the carriage company making the repairs was entitled to its lien superior to the lien of the chattel mortgage. The court said that in cases where the mortgagor can be said to have express or implied authority from the mortgagee to procure repairs to be made on the mortgaged property that the lien of the mechanic should be superior to the chattel mortgage.

In the case of *Watts v. Sweeney*, 127 Ind. 116, 26 N. E. 680, 22 Am. St. Rep. 615, it was held that a mechanic who made repairs on a locomotive and tender had a lien which took precedence of that of the mortgagee where the property was permitted to remain in the possession and use of the mortgagor, and through such use it became necessary to repair it. We quote from the opinion in this case as follows:

"When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee, as well as the mortgagor.

"Where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is properly liable to such repairs, that it is to be kept in repair; and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made; and as such necessary repairs are for the betterment of the property, and add to its value to the gain of the mortgagee, the common-law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed, in such case, to have contracted with a knowledge of the law giving to a mechanic a lien."

In the leading case on this subject (*Williams v. Allsup*, 10 C. B. [N. S.] 417) a shipwright was permitted to detain a vessel for his charges for repairs as against a mortgagee under a prior mortgage. These repairs were made by the mortgagor's directions without the knowledge of the mortgagee. Opinions were delivered in the case by several judges. We quote as follows from that delivered by Byles, J.:

"As it is obvious that every ship will, from time to time, require repairs, it seems but reasonable, under circumstances like these, to infer that the mortgagor had authority from the mortgagee to cause such repairs as should become necessary to be done, upon the usual and ordinary terms. Now, what are the usual and ordinary terms? Why, that the person by whom the repairs are ordered should alone be liable personally, but that the shipwright should have a lien upon the ship for the work and labor he has expended on her. Nor are the mortgagees at all prejudicially affected thereby. They have a property augmented in value by the amount of the repairs."

In the case at bar the automobile was in the possession of Mr. Polk, and being used by him with the knowledge and consent of appellees, which use continued for a long period of time. Appellees not only knew and consented to the general use of the automobile by Mr. Polk, but also had knowledge that, in the course of his use of the property, he was having it repaired. Appellees, with this knowledge, made no objection to the repairs being made.

From the agreed facts in the case we understand that the repairs were such as were necessary to preserve the automobile and keep it in proper condition for its use. Repair means to restore, renovate, or mend an article; to keep it in good or sound condition. Repairs, in the ordinary sense, are made to prevent deterioration in an article, and to keep it up in its value and preserve it for the use intended. It was clearly the intention of the parties that Mr. Polk, the mortgagor, should continue in the ordinary use of the automobile. While being so used it was necessary to keep it in a sufficient state of repair. This would be not only to the benefit of the user, Mr. Polk, but by preserving the value of the property was also for the benefit of appellees as mortgagees.

From the sole possession, control, and use of the automobile by Mr. Polk by agreement with appellees, from the manner of its use and the necessity of repairing it to preserve it and keep it in running order and prevent its deterioration, and from the making of such repairs with the knowledge of appellees, we conclude that there was an implied authority and permission from appellees, as mortgagees, to Mr. Polk, as mortgagor, to have such repairs made, and that appellants have a paramount and superior lien to that of appellees on the property for the payment of the labor they performed and materials furnished in repairing it.

Reversed, and judgment here in favor of appellants.

(109 Miss. 64)

BERRY v. BROWN. (No. 18005.)
(Supreme Court of Mississippi. March 15, 1915.)

COURTS ⇐204—APPELLATE COURT—JURISDICTION OVER STENOGRAPHER TRANSCRIBING TESTIMONY IN CHANCERY COURT BELOW.

Under Laws 1908, c. 130, providing for the appointment of stenographers to take evidence in chancery cases, and that stenographers so appointed for any neglect of duty shall be subject to the same penalties provided by Laws 1910, c. 111, for stenographers in the circuit court, the appellate court has no power to extend the time in which such stenographer may file in the chancery court below a transcript of the testimony, or to grant a rule requiring him so to do; the appellate court having no control over such matters except by statute when an appeal has been taken from a decision of a judge imposing or refusing to impose the punishment denounced by statute for neglect of the stenographer to perform his duty.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 504, 619, 758½, 791; Dec. Dig. ⇐204.]

Cook, J., dissenting.

Appeal from Chancery Court, Simpson County; D. M. Russell, Chancellor.

Action by Mrs. D. B. Berry against Mrs. J. F. Brown. Motion that a stenographer be required to file a transcript of the evidence taken before a court of chancery, and that an extension of the time for filing be granted. Overruled.

J. B. Sullivan, of Mendenhall, for the motion.

SMITH, C. J. This is a motion for an extension of the time within which the stenographer in the court below may, and for a rule requiring him to, file a transcript of the evidence introduced on the trial. This stenographer was appointed to take down the evidence in this case under the provisions of chapter 130 of the Laws of 1908, and the motion alleges that, though he has received his compensation therefor and has been requested to transcribe and file his notes, he refuses so to do; and that the chancellor refuses to interfere in the matter on the ground that he has no authority for so doing.

Stenographers appointed under this chapter are charged with the same duties to be performed, under the same penalties for neglect thereof, as is provided by chapter 111, Laws 1910, for stenographers in the circuit court. Section 3, c. 130, Laws 1908. The punishment to be inflicted upon a stenographer for refusing or neglecting to perform any duty imposed upon him by law is provided for in subdivision "c," c. 111, Laws 1910, and would seem to be ample to meet the demands of this situation. This court has been given no power to interfere in such matters, except when an appeal has been taken from a decision of a judge imposing or refusing to impose the punishment prescribed for the neglect of the stenographer to perform his duty, which appeal is expressly provided for by this statute.

The fact that the duties of a stenographer in the courts below mainly relate to the preparation of bills of exceptions for use in this court does not alter the situation. Bills of exceptions are purely statutory, and this court has been given no power by the statute to supervise the making or settling thereof; but, on the contrary, all such power has been confided to the court below, or rather to the judges thereof. Neither has this court any duty whatever to discharge with reference to the making of the record in the court below, its work beginning only when the record in that court has been completed.

Overruled.

COOK, J., dissents.

DAVIS v. STATE. (No. 17723.)
(Supreme Court of Mississippi. Feb. 8, 1915.
Suggestion of Error Overruled March 15, 1915.)

1. CRIMINAL LAW ⇐1178—APPEAL—BRIEFS—ASSIGNMENTS OF ERROR.

Under its rules the Supreme Court is not called on to notice or consider an assignment of error not mentioned in the brief filed by appellant.

[Ed. Note.—For other cases, see Criminal Laws, Cent. Dig. §§ 3011-3013; Dec. Dig. ⇐1178.]

2. CRIMINAL LAW ⇐1170½—APPEAL—HARMLESS ERROR—CROSS-EXAMINATION OF WITNESS.

The court's action in restricting the cross-examination of a witness for the state so as to prevent counsel for defendant from asking questions tending to elicit answers which would discredit the state's chief witness was not reversible error, where neither the questions nor the record disclosed what facts defendant was trying to get before the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3120-3125; Dec. Dig. ⇐1170½.]

On suggestion of error. Overruled.

For former opinion, see 67 South. 178.

E. E. Brown and Chas. F. Engle, both of Natchez, for appellant. Ross A. Collins, Atty. Gen., for the State.

COOK, J. The suggestion of error presents a single point to this court. It is said that the court erred in not considering one of the assignments of error, which, if considered, would have required a reversal of this case. The assignment of error referred to is in these words, viz.:

"The court erred during the cross-examination of the witness Ross, a witness for the state, in restricting the scope of the cross-examination, and in admonishing counsel for the defendant not to further pursue his line of inquiry nor ask any more questions along the line counsel was interrogating the witness, by which questions counsel was attempting to develop answers which would authorize the jury to discredit the chief witness for the state; this action of the court having been condemned in the late case of *Perry v. State*, decided March 2, 1914, and reported in 64 South. 466."

[1] Under the rules of this court, and by the opinion in *Pope v. State*, 67 South. 177, it is only necessary to say that, inasmuch as this assignment of error was not mentioned in the brief filed by appellant, this court was not called on to notice or consider same.

[2] However, we have given careful consideration to the alleged error, and, should we be of opinion that the court erred in restricting the cross-examination to the extent mentioned, we would not for this reason alone be warranted in reversing this case.

We are satisfied that the questions propounded to the witness do not disclose what facts defendant was seeking to discover. The record does not show that the trial court was advised what defendant was attempting to get before the jury, and it is not apparent to us how the matter inquired about would discredit the witness, no matter what answer he may have given to the questions.

It is not a proper function of this court to conjecture what may have developed if defendant's counsel had been permitted to ask more questions. This court is not authorized to indulge in speculations, nor is the trial court required to take judicial knowledge that counsel, if given free rein, might draw from the witness some admissions or denial which would possibly discredit the witness.

Suggestion of error overruled.

(191 Ala. 450)

AMERICAN OAK LEATHER CO. v. ATWOOD. (No. 753.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. MASTER AND SERVANT §332 — INJURIES BY EMPLOYE—RELATIONSHIP—QUESTION FOR JURY.

Where, in an action against a railroad company for negligently running a steamboat against and damaging plaintiff's yacht, there was evidence that the company, when called on for reparation shortly after the accident, denied any negligence in the operation of the steamboat, and a third person, who operated the steamboat, testified that he operated it under a lease from the company under his own account, the question of the company's liability on the theory

that the third person operated it as an employee was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1274-1277; Dec. Dig. §332.]

2. COLLISION §121 — PLEADING — ISSUES, PROOF, AND VARIANCE.

A plea in an action for damages to a yacht negligently run into by a steamboat is not sustained by evidence that plaintiff's agent in charge of the yacht requested the operator of the steamboat to have the steamboat move a barge lying between the steamboat and railroad cars on a track inclining toward the water, and that plaintiff was responsible for negligent execution of the request, and the evidence was not available to defendant.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. § 256; Dec. Dig. §121.]

3. COLLISION §124—EVIDENCE—DAMAGES.

In an action for damages to a yacht negligently run into by a steamboat, evidence of the value of the yacht before and after the accident was competent on the measure of damages.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 262-265; Dec. Dig. §124.]

4. COLLISION §124—EVIDENCE—DAMAGES—ADMISSIBILITY.

Where, in an action for damages to a yacht negligently run into by a steamboat, plaintiff did not testify what repairs had cost him, nor what they were reasonably worth, but stated the value of the yacht before and after the accident, a question asked him as to what repairs were necessary was not incompetent, and did not call for inadmissible evidence.

[Ed. Note.—For other cases, see *Collision*, Cent. Dig. §§ 262-265; Dec. Dig. §124.]

5. APPEAL AND ERROR §1050 — HARMLESS ERROR—EVIDENCE.

The error, if any, in allowing the question, was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. §1050.]

6. EVIDENCE §474 — OPINION EVIDENCE — ADMISSIBILITY.

Where plaintiff showed defendant's negligence in loading cars on a wet and inclined track without tightening the brakes, it was proper to permit witnesses having seen such operations to say that to load cars in such a situation had a tendency to loosen or release the brakes and permit the cars to run down the incline.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2196-2219; Dec. Dig. §474.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by A. L. Atwood against the American Oak Leather Company. There was a judgment for plaintiff, and defendant appealed to the Court of Appeals, and it transferred the case to the Supreme Court. Affirmed.

O. Kyle, of Decatur, for appellant. John B. Tally, of Scottsboro, for appellee.

SAYRE, J. Plaintiff in the court below, appellee here, declared against defendant in most general terms, alleging that defendant through its servants or agents negligently ran a barge against and caused damage to plaintiff's gasoline boat. The main question

is whether defendant was entitled to the general affirmative charge which it requested.

[1] One Rike was the captain in charge of a steamboat known as "Decatur No. 1," and the operation of that steamboat, according to plaintiff's contention, was responsible for the damage to plaintiff's boat, or yacht, as it is called by some of the witnesses. There was dispute as to whether Rike was at the time operating the steamboat for defendant, or whether, as Rike testified, he was operating it under a lease from defendant and on his own account. Defendant, when called upon by plaintiff for reparation shortly after the accident, and when, if Rike's testimony were true, it would likely have denied responsibility for Rike's conduct in any event, responded, not in the way of such denial, but denying, in substance and on the authority of information received from Rike, that there had been any negligence in the operation of the steamboat. From this the jury may have logically inferred, as against defendant, that Rike was at the time in charge of the steamboat as defendant's agent. Defendant argues that there is no office for inference where facts appear, citing authorities which lay down the proposition in effect that presumptions are only indulged to supply the absence of evidence, and are never allowed against established facts. A presumption of that sort is a maxim of law which must be observed in reasoning from the known to the unknown. But in the case of an inference the triers of fact are at liberty to find the ultimate fact in dispute one way or the other as they may be impressed by the evidence. *Cogdell v. Railroad Co.*, 132 N. C. 852, 44 S. E. 618. Defendant's argument assumes the uncontroverted truth of Rike's testimony; but that testimony was contradicted by inference of fact deducible from defendant's response to the claim for damages. The question at issue was a question of fact, and it was for the jury to resolve the conflict.

[2] Defendant insists that it should have had the general charge on another ground: That there was undisputed proof of contributory negligence on the part of plaintiff's agent in charge of his boat or yacht. The plea on which this contention is based was insufficient as a plea of contributory negligence. It did, however, deny defendant's negligence, and its sufficiency as a defense in some sort was not questioned by demurrer. It seems to be conceded that the defense as pleaded, to wit, that plaintiff was negligent in leaving his boat where it lay before the accident, was not proved; but the defense now offered in argument seems to proceed upon the ground that plaintiff's agent, Mayo, who had the keeping of plaintiff's boat, requested Rike to have his steamboat move the barge, also in his charge, which lay between plaintiff's boat and some railroad cars upon a

track that inclined toward the water, and that plaintiff was responsible for Rike's negligent execution of the request. Other considerations aside, neither the argument nor the evidence follow the plea, and defendant can take nothing by it.

[3] Fairly interpreted, plaintiff's evidence tended to show the value of his boat before and after it had been injured in the accident. This evidence was competent to establish the measure of plaintiff's damages, and was admitted without error. *Central of Georgia Ry. Co. v. Barnett*, 151 Ala. 407, 44 South. 392.

[4, 5] There was no error in allowing the plaintiff to answer the question, "What repairs did you have done to it, in order to use it?" The form of the question indicated a purpose to elicit testimony in respect of repairs necessary in order to put the boat in fit repair for use. The witness did not state what the repairs had cost him, nor what they were reasonably worth. That was left to be inferred from his statement of the value of the boat before and after the injury done it. If the evidence was not altogether satisfactory, we are unable to see how it was incompetent, illegal, or inadmissible, as defendant objected it was, or how we can say it prejudicially affected defendant's case.

[6] Plaintiff's case, in one aspect, was that defendant's agent was negligent in loading the cars upon the wet and inclined track without tightening the brakes. We think it was permissible to have witnesses who had seen such operations to say that to load cars in such a situation had a tendency to loosen or release the brakes. In the situation there, which was open to casual observation, to release or loosen the brakes on the cars would necessarily cause them to run down the incline and do damage to whatever might receive the force of their impact.

We think it unnecessary to proceed further in the statement of our opinion concerning the several assignments of error. Perhaps we have already said more than the merits of the appeal demand. We have found no error in the record, and the judgment below will be affirmed.

Affirmed.

McCLELLAN, DE GRAFFENRIED, and GARDNER, JJ., concur.

(191 Ala. 524)

CITY OF HUNTSVILLE v. PHILLIPS.
(No. 737.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. MUNICIPAL CORPORATIONS — §816 — DEFECTIVE STREETS — ACTION — COMPLAINT — SUFFICIENCY.

A complaint, in an action for injuries to a passenger of a hack driver in a collision between the hack and rock placed in the street by a contractor of the city, which alleges that the pile of

rock was negligently allowed to remain in the street for an unreasonable time, that the collision caused the hack to be overturned causing injuries complained of, that the claim on which the action was based was filed with the clerk of the city by his next friend duly sworn to as required by law, states a cause of action against the city as against a demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. ¶ 816.]

2. NEGLIGENCE ¶ 117—CONTRIBUTORY NEGLIGENCE—CHILDREN.

In an action by an infant under 10 years of age for a personal injury negligently inflicted, a plea of contributory negligence which does not show the degree of discretion of the infant is insufficient.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 195-197; Dec. Dig. ¶ 117.]

3. JUDGMENT ¶ 470—RECORD OF FIRST TRIAL—PLEA IN SECOND TRIAL.

A defendant cannot by plea impeach the record of the first trial of the case.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. ¶ 470.]

4. MUNICIPAL CORPORATIONS ¶ 741—CLAIMS FOR INJURIES—PRESENTATION—SUFFICIENCY.

A claim against a city for injuries to an infant under 10 years of age without a guardian may be presented and sworn to by its mother as next friend.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. ¶ 741.]

5. MUNICIPAL CORPORATIONS ¶ 799—DEFECTIVE STREETS—LIABILITY.

A city ordering the paving of a street must protect the traveling public from dangers of unguarded material in the street and is negligent in permitting material to be left at night without an appropriate signal of danger.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1659; Dec. Dig. ¶ 799.]

6. MUNICIPAL CORPORATIONS ¶ 816—DEFECTIVE STREETS—ACTIONS—PLEAS.

In an action against a city for injuries to a passenger of a hack driver in a collision between the hack and a pile of unguarded rock in the street, a plea, which alleges that the proximate cause of the injury was the reckless driving of the driver of the hack, if intended as a mere traverse of the complaint, was unnecessary, for the fact could be shown under the general issue.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. ¶ 816.]

7. MUNICIPAL CORPORATIONS ¶ 816—DEFECTIVE STREETS—ACTIONS—PLEAS.

A plea, in an action against a city for injuries to a passenger of a hack driver in a collision between the hack and a pile of rock in the street, which alleges that the proximate cause of the injury was the reckless driving of the driver of the hack, if regarded as a plea of contributory negligence is bad; the passenger being an infant under 10 years of age.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1711-1716, 1718, 1720-1723; Dec. Dig. ¶ 816.]

8. MUNICIPAL CORPORATIONS ¶ 801—DEFECTIVE STREETS—INJURIES TO TRAVELERS—LIABILITY.

That a hack carrying a passenger injured in a collision between the hack and an obstruction in the street did not display its number, as re-

quired by a city ordinance, did not defeat a recovery against the city for its negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1660-1665; Dec. Dig. ¶ 801.]

9. NEGLIGENCE ¶ 92—IMPUTED NEGLIGENCE—INJURIES TO PASSENGERS OF HACK DRIVERS—DEFECT IN STREET.

Where a city negligently left at night unguarded a pile of rock in a street, the negligence of the driver of a hack carrying a passenger injured in a collision between rock and the hack did not relieve the city from liability, for the passenger had no control over the driver.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 142-146; Dec. Dig. ¶ 92.]

10. MUNICIPAL CORPORATIONS ¶ 806—DEFECTIVE STREETS—LIABILITY—INJURIES TO PASSENGERS OF HACK DRIVERS.

A driver of a hack carrying a passenger need not look for obstructions in the street, but may presume, in the absence of knowledge to the contrary, that the street is free from obstructions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1678, 1682; Dec. Dig. ¶ 806.]

11. APPEAL AND ERROR ¶ 1004—PERSONAL INJURIES—EXCESSIVE DAMAGES—REVIEW.

Where the trial court has refused to set aside a verdict in a personal injury action because excessive, the amount of damages will not be reviewed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. ¶ 1004.]

12. TRIAL ¶ 133—IMPROPER ARGUMENT OF COUNSEL—WITHDRAWAL OF ARGUMENT BY COUNSEL.

Where, on objection to argument of counsel, he withdrew the argument and the court, in response to a motion to direct the jury that the argument was withdrawn because improper, stated that the attorney had withdrawn the argument, the improper argument was not ground for reversal.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 316; Dec. Dig. ¶ 133.]

Appeal from Circuit Court, Madison County; D. W. Speake, Judge.

Action by Daniel J. Phillips, pro am, against the City of Huntsville and others. From a judgment for plaintiff, the City of Huntsville appeals. Affirmed.

The first count of the complaint sets out that on a certain night, while plaintiff was riding in a hack within the corporate limits of said city, the hack collided with a large pile of crushed stone or rock which had been placed in the street by Felix Lanier in front of the residence of W. M. Yarbrough on the east side of the street in the course of construction by Lanier of a sidewalk for said Yarbrough, which pile of rock defendant had carelessly and negligently allowed to remain in said street for an unreasonable length of time; that the collision caused a vehicle or hack in which plaintiff was riding to be overturned, precipitating plaintiff out of same onto the street and under the vehicle, and as a proximate consequence thereof he suffered certain injuries which are set out. The other counts of complaint are substantially the same, and at the end of complaint it is al-

leged that the claim upon which this action was based was filed with the clerk of the city of Huntsville by plaintiff through his next friend duly sworn to as required by section 1275. Defendant seeks by plea to set up the order of the court entering a judgment of mistrial as to the two defendants here and a judgment in favor of defendant Yarbrough, setting up that, if defendant was liable in any way, he was jointly liable with William Yarbrough, and that before this trial plaintiff, through his attorneys, had consented to release the said William Yarbrough, and that all liability of these defendants had been thereby discharged.

David A. Grayson, of Huntsville, for appellant. Betts & Betts, of Huntsville, for appellee.

DE GRAFFENRIED, J. The plaintiff's mother came into the city of Huntsville on a train. She was a widow, and brought with her her four children, and hired a hack to take her and them to a point in the city. The hack ran into a pile of rock which had been placed in the street, and the plaintiff thereby received painful and serious injuries. The injury occurred at night, and the pile of rock was neither guarded nor had a light near it. This suit was brought by the plaintiff, a minor under 10 years of age, for damages, against the city of Huntsville, one Yarbrough, and one Lanier. The record shows that the case has been twice tried. On the first trial the jury returned a verdict in favor of the defendant Yarbrough, and failed to agree on a verdict as to the defendants Lanier and the city of Huntsville. On the second trial a verdict was rendered against the defendants Lanier and the city of Huntsville, and from the judgment following the verdict the city of Huntsville appeals.

[1] 1. The complaint in this case was not subject to the grounds of demurrer interposed to it. *City of Bessemer v. Whaley*, 65 South. 542; *City of Bessemer v. Whaley*, 66 South. 145.

[2] 2. In the case of *Cedar Creek Store Co. v. Steadham*, 65 South. 984, this court laid down, after full consideration, the rules governing the subject of contributory negligence on the part of infants. Under the rules laid down in that case, the pleas of contributory negligence filed by the defendant in this case were not sufficient. The complaint shows that the plaintiff is an infant, and the pleas do not show that degree of discretion on the part of the plaintiff which is required by the rule laid in *Cedar Creek Store Co. v. Steadham*, supra.

[3] 3. The defendant undertook by plea to impeach the record of the first trial. This could not be done by plea. 23 Cyc. 1055; *Alexander v. Nelson*, 42 Ala. 462.

[4] 4. The claim which was presented to the city of Huntsville for damages sustained by the plaintiff was presented and sworn

to by the mother of the plaintiff as his next friend. The plaintiff was a minor of tender years, without a guardian, and this was sufficient. *Strode v. Clark*, 12 Ala. 621.

[5] 5. The city of Huntsville, under an ordinance, either directly or indirectly—it matters not which—was having certain paving done at the point where the injury occurred. This paving necessarily required the presence of rock at the point where the work was being done, and, of course, cast the duty upon the city of Huntsville of protecting the members of the traveling public at that point from dangers which unguarded material might entail upon them. The fact that the city was having the work done, or requiring it to be done, at that point, gave notice to the city of its duties in that regard. The city was therefore undoubtedly guilty of negligence in permitting rock, which had been piled in the street at the point named, to be left there at night, without appropriate signals of danger. *City of Bessemer v. Whaley*, supra; *Mayor & Ald., Birmingham, v. Tayloe*, 105 Ala. 176, 16 South. 576.

[6, 7] 6. There was filed in the cause a plea in the following language:

"The proximate cause of the injury was the reckless driving of the driver of plaintiff's vehicle."

If that plea was intended as a mere traverse of the complaint, that could have been shown under the general issue. The trial court cannot be put in error for sustaining the demurrer to this plea, if it be regarded as a plea of contributory negligence; for it is manifestly bad as such.

[8] 7. The mere fact that the hack did not display its number as required by the city ordinance did not outlaw the hack. *Birmingham Ry., Lt. & Power Co. v. Aetna Accident & Liability Co.*, 64 South. 44.

[9] 8. The defendant desired to show that the negligence of the city of Huntsville in permitting the rock pile to remain in the street in the condition above stated was not the sole cause of plaintiff's injuries, that the driver of the hack was also negligent, and that this negligence of the driver proximately caused the plaintiff's injuries. It must be remembered that in this matter the plaintiff does not stand in the driver's shoes. The negligence of the driver is not to be visited upon him, provided, of course, the negligence of the city proximately contributed to the plaintiff's injuries. The idea of the plaintiff is that the negligence of the city created the condition upon which the subsequent negligence of the driver operated, and that therefore the negligence of the city is not to be taken as the proximate cause of the plaintiff's injuries. Each moment that the city permitted the pile of rock to remain in the street in the condition above stated, it was guilty of an act of neglect, and we affirm with confidence that if the pile of rock had not been in the street the plaintiff would

not have been injured. When the plaintiff was injured he was in the hands of a common carrier of passengers over which neither he nor his mother had control, and we think that under the best considered authorities the contention of the appellant on this subject is not well founded. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Bennett v. New Jersey R., etc., Co.*, 36 N. J. Law, 225, 13 Am. Rep. 435; 29 Cyc. pp. 547, 548, and authorities there cited.

[10] 9. The driver of the hack was under no duty to look for obstructions in the streets. He had a right to presume, in the absence of knowledge to the contrary, that the city had performed its duties and that the street was free from obstructions. *Mayor, etc., of Birmingham v. Tayloe*, supra.

[11] 10. The refusal of the trial court to set aside the verdict in this case because it was excessive cannot be permitted to work a reversal at the hands of this court. *M. & O. R. R. Co. v. Brassell*, 66 South. 447; *Montgomery Light & Traction Co. v. Marian King*, pro am, 65 South. 998; *National Surety Co. v. Mabry*, 139 Ala. 217, 35 South. 698; *Moseley v. Jamison*, 68 Miss. 336, 8 South. 745.

[12] 11. Counsel for the plaintiff made use of certain remarks to which the defendant objected. Thereupon counsel for the plaintiff withdrew the remarks. Counsel for the defendant then moved the court to instruct the jury that the remarks so withdrawn were "an improper argument." The court simply replied that the attorney had withdrawn the statement, and gave no instructions to the jury on the subject. The withdrawal by counsel of the remarks was a confession that they were inappropriate, and while the trial judge might—and, under the better practice should—have instructed the jury to disregard the remarks, we do not think that the judgment in this case should be reversed because of his failure to do so. While counsel are employed to represent their clients, they are officers of the courts in which they practice, and, theoretically at least, their office is to aid the courts in the true ascertainment of the justice and right, under the law, of the matter in litigation. Trial courts should therefore hold their arguments in proper bounds, for, after all, upon the shoulders of the trial judges had been placed the burden of the administration of the law.

12. This is a simple case, and, while the record shows that the defendant reserved for our consideration 216 points, the record also shows, from the course of the trial, that the trial was had upon a proper conception of the legal principles which were involved in the case. We content ourselves with saying that the record has received our careful consideration, and that what we have above said and the authorities which we have above cited will at least indicate to the parties in-

terested, why, in our opinion, the trial court committed no reversible error, and that therefore the judgment should be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(191 Ala. 31)

WARTEN v. WEATHERFORD. (No. 748.)
(Supreme Court of Alabama. Dec. 17, 1914.)

1. EJECTMENT ⇨9—TITLE.

Where plaintiff in ejectment had no paper title to the land in controversy, and the defendant held under color of title which was older than the plaintiff's, and showed title from the government into one with whom plaintiff did not connect himself, the plaintiff could recover only by proof of title by adverse possession.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. ⇨9.]

2. ADVERSE POSSESSION ⇨13—REQUISITES.

Adverse possession, to ripen into title to support ejectment, must have been open, peaceable, notorious, and continuous for 10 consecutive years before commencement of suit.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 65, 67-76; Dec. Dig. ⇨13.]

For other definitions, see Words and Phrases, First and Second Series, Adverse Possession.]

3. APPEAL AND ERROR ⇨1051 — HARMLESS ERROR.

Where defendant was entitled to the general charge regardless of the testimony of the witness, error in the admission of such testimony was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ⇨1051.]

4. ADVERSE POSSESSION ⇨71—COLOR OF TITLE — DEEDS IN CONVEYING LAND — EVIDENCE.

Where plaintiff offered in evidence his color of title deeds not purporting to convey the land sought to be recovered in ejectment, there was no error in excluding them, since they could not be regarded as color of title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 415-429; Dec. Dig. ⇨71.]

On Rehearing.

5. EJECTMENT ⇨110—TITLE—COLOR OF TITLE.

In ejectment, where plaintiff without paper title attempted unsuccessfully to show title by adverse possession, defendant was entitled to the general charge covering so much of the land as his prior color of title and possession related to.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 319-326; Dec. Dig. ⇨110.]

Appeal from Circuit Court, Limestone County; D. W. Speake, Judge.

Action by Henry Warten against Emmett Weatherford. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. R. Walker, of Athens, for appellant. James E. Horton, Jr., and M. K. Clements, both of Athens, for appellee.

ANDERSON, C. J. [1-3] The plaintiff had no paper title to the land in question, and as

the defendant was not a trespasser, but held under color of title, which was older than the plaintiff's color of title, and also showed the title out of the government into a party with whom the plaintiff did not connect himself, the plaintiff in order to recover was required to establish a title by adverse possession and which he failed to do. *McCreary v. Jackson Lumber Co.*, 148 Ala. 247, 41 South. 822, and cases there cited. While the plaintiff proved some possessory acts upon the part of himself and his predecessors, they were not so open, peaceable, notorious, and continuous for 10 consecutive and unbroken years before the commencement of this suit as to ripen into title. *Chastang v. Chastang*, 141 Ala. 451, 37 South. 799, 109 Am. St. Rep. 45. The trial court properly gave the general charge requested by the defendant. The defendant was entitled to the general charge regardless of the testimony of W. L. Jones, as to the land that his father would have possessed. Hence, if the question eliciting his reply was error, it was error without injury.

[4] The plaintiff offered in evidence, as color of title, three deeds which did not contain or purport to convey the land in question, and they could not therefore be regarded as color of title to said land, and the trial court did not err in sustaining the defendant's objection to same.

The judgment of the circuit court is affirmed.

Affirmed.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

On Rehearing.

ANDERSON, C. J. [5] Upon the former consideration of this case we proceeded upon the theory that all the land involved was within the defendant's color of title; that is, was located in the E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32. Upon a reconsideration, we find that the land sued for includes, as per the proof, a small quantity in the W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, and which is within the plaintiff's color of title and not the defendant's. The defendant having shown color of title, and an older possession, to the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, was entitled to the general charge as to all of the land as was located within his color of title, but the charge should have been limited so as to exclude all of the land sued for as was located within the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 32, as the complaint claimed, and the proof showed that some of the land was in the W. $\frac{1}{2}$ of the 40, and the plaintiff showed color of title and a previous possession to the said W. $\frac{1}{2}$ of said 40.

The defendant did not disclaim as to the land in the W. $\frac{1}{2}$ of the 40. Had he done this, and pleaded not guilty to so much of

the land as was located in the E. $\frac{1}{2}$ of the 40, he would have been entitled to the general charge; but having admitted possession of all of the land sued for, by his plea of not guilty, and the plaintiff having shown a right to recover as to all in the W. $\frac{1}{2}$ of the 40, the trial court erred in giving the general charge for the defendant, without limitation or qualification.

If, upon the next trial, the defendant wishes to defend only as to the land in his color of title, he can plead not guilty as to same and disclaim as to any of the land as may be located within the W. $\frac{1}{2}$ of the 40, and if he contends that none of the land of which he is in possession is in the W. $\frac{1}{2}$ of the 40, but is all in the E. $\frac{1}{2}$ of same, he can make the suggestion provided for in section 3833 of the Code of 1907.

The judgment of affirmance is set aside, and the cause is reversed and remanded.

Reversed and remanded.

MAYFIELD, SOMERVILLE, and GARDNER, JJ., concur.

(191 Ala. 104)
MORRISON et al. v. FORMBY. (No. 618.)
(Supreme Court of Alabama. Dec. 17, 1914.)

1. MORTGAGES \S 606—STATEMENT OF DEBT—PERSONS ENTITLED—STATUTES.

Under Code 1907, \S 5748, as amended by Acts 1911, p. 391, to provide that one entitled to redeem from a mortgage may make written demands of the purchaser or his vendee for a statement of the debt and charges, which shall be furnished within 10 days, and that otherwise the purchaser or vendee shall forfeit all claims to compensation for improvements, and the party entitled may file his bill without a tender, and in view of section 5757, providing that any person offering to redeem must pay to the one in possession the value of all permanent improvements made by him after he acquired title, the basis of compensation for permanent improvements is title, which implies the legal title; and hence the redemptioner might redeem upon demand to the purchaser, without a demand on the parties to whom the purchaser had contracted to sell separate parts of it, to be conveyed when the purchase money was paid, since such parties had no title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1796-1806; Dec. Dig. \S 606.]

2. MORTGAGES \S 591—REDEMPTION—NATURE AND SCOPE.

Redemption of land under the statutes cannot be exercised otherwise than as to the whole of the property bought at the foreclosure sale, as the process contemplated and required by the statute makes an indivisible entity of the act of redemption, the effect of which is to reinvest title in the redemptioner, by divesting it out of the person in whom it is vested.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. \S 1693, 1694-1708; Dec. Dig. \S 591.]

3. MORTGAGES \S 600—FORECLOSURE—ALLOWANCE OF INTEREST.

In view of Code 1907, \S 5748, providing that one entitled to redeem may make a written demand for statement of debt and charges, and after the 10 days allowed for furnishing such statement may file his bill in equity without a tender, to enforce his rights, the pur-

chaser on foreclosure, against whom the bill was good, was entitled to the legal rate of interest upon the sum to be paid to effect the redemption.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1753-1776, 1787; Dec. Dig. ¶ 600.]

4. APPEAL AND ERROR ¶833—MOTION TO MODIFY DECREE—TIME.

A motion to modify a decree, not made until after the termination of the special term at which the decree appealed from was corrected and affirmed, or until after the expiration of the time allowed by rule 38 (Civ. Code 1907, p. 1515) for presenting an application for rehearing, was too late, as the court had lost its power to alter the decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3214, 3229-3240, 3244-3246; Dec. Dig. ¶833.]

Appeal from Chancery Court, Cherokee County; W. W. Whiteside, Chancellor.

Bill by R. L. Formby against G. F. Morrison and others to redeem lands sold under a deed of trust. Decree for complainant, and respondents appeal. Corrected and affirmed.

White & Lumpkin, of Center, and Goodhue & Brindley, of Gadsden, for appellants. T. Ben Kerr, of Piedmont, and Knox, Acker, Dixon & Sterne, of Anniston, for appellee.

McCLELLAN, J. [1] On September 24, 1906, R. L. Formby and wife executed to A. O. Williams, as trustee, a deed of trust on certain real estate to secure the payment of an indebtedness to G. F. Morrison. On March 10, 1909, the trustee sold the land in execution of the trust for the satisfaction of the indebtedness it was given to secure. At the sale under the power G. F. Morrison became the purchaser of the land. On October 4, 1909, Morrison made with respondents Maxey, Wood, Ellenburg, and Floyd executory contracts of sale of separate parts of the land so bought at the foreclosure sale, giving them bonds for the conveyance of appropriate titles when the purchase money, represented by notes, was fully paid. Having in contemplation redemption of the land under the statutes to that end, Formby on January 24, 1911, through her attorney and solicitor, Mr. Kerr, made written demand upon Morrison for the statement of debt and lawful charges as stipulated in Code, § 5748. That section, before its amendment by the act approved April 13, 1911 (General Acts 1911, p. 391), reads:

"5748. Written Demand for Charges; May File Bill.—Any one desiring and entitled to redeem may make written demand of the purchaser or his vendee for a statement in writing of the debt and all lawful charges claimed by him, and such purchaser or vendee shall, within ten days after such written demand, furnish such person making the demand with a written itemized statement of the debt and all lawful charges claimed by him, and failing so to do, shall forfeit all claim or right to compensation for improvements, and the party so entitled to redeem may, on the expiration of the ten days, file his bill in equity without a tender to enforce his rights hereunder."

This demand upon Morrison was not complied with by him. There was no demand made upon Maxey, Wood, Ellenburg, and Floyd, the purchasers from Morrison under the executory contracts.

It is insisted that since, as appears, Formby knew of these dispositions of several parts of the land to Maxey, Wood, Ellenburg, and Floyd, demands should, under the statute, have been made upon each for and with reference to the tract he had contracted to buy, and so in order to lay the condition upon which the statute visits its forfeiture of the "right to compensation for improvements." The chancellor concluded against this contention, and our opinion accords with his.

[2] Redemption of lands under our statutes to that end cannot be exercised otherwise than that of the whole of the property bought at the sale. The process contemplated and required by the statutes makes an indivisible entity of the act of redemption. Section 5748, set out before, does not appear to have contemplated a case where there has been a sale or sales of part only of the land bought by the purchaser at a sale under execution, under mortgage or deed of trust, or under decree of a court of equity. However that is, the office and effect of statutory redemption is to reinvest *title* in the redemptioner, to divest it out of the person in whom it is vested. Such is also the clear purport of this provision of Code, § 5757:

"Any person offering to redeem must pay to the person in possession the value of all permanent improvements made by him *after he acquired title*" (italics supplied).

The established foundation, on redemption, for the right to compensation for permanent improvements is *title*, meaning necessarily the repository of the legal title. Such is the principle underlying the analogy present in rulings made in the administration of section 5749. *Lehman-Durr v. Collins*, 69 Ala. 127, 131. The respondents Maxey, Wood, Ellenburg, and Floyd were in possession under contracts of purchase, but the legal title remained in Morrison. Upon him alone could the demand contemplated in Code, § 5748, be made. He had not parted with the *title*. He was entitled to the fund redemption affords. He had only promised—engaged—to convey it upon a contingency. His contractees had engaged in the full light of the law allowing the redemption here sought. If permanent improvements were made by them, it was with the conclusively imputed knowledge that redemption might be sought and effected. If the process of redemption has placed them in a predicament as respects improvements made by them, it cannot be charged to the redemptioner, rather to him whose contracts to convey, subject of course to redemption, they accepted. Under these contracts, they certainly cannot be regarded as substitutes, in degree even, for Morrison.

They have not *title*; the element and essence of property right to which redemption must be referred for effectual operation. It results, consequently, that Morrison's failure to furnish the statement required by the demand, under the statute (5748) was a failure within the condition of the statute and wrought, according to its express provisions, a complete forfeiture of the right to claim or enforce, as against this redemptioner, compensation for improvements made on the land by any one. So there was no error in the decree disallowing any claim made for the value of permanent improvements as a condition to the effectuation of redemption by the mortgagor, Formby.

[3] According to the authority of *Weathers v. Spears*, 27 Ala. 455, the decree appealed from is affected with error, as separately assigned by Morrison, in that the court did not allow Morrison the legal rate of interest upon the principal sum to be paid to effect redemption; for that the filing of the bill to redeem was, in virtue of Code, § 5748, equivalent to *tender*. The fact that the decree declined allowance of any sum as for rents and profits after tender cannot serve to extinguish or toll this right of the purchaser to interest upon the principal sum. If the redemptioner (Formby) conceived that there was error in declining to make the stated allowance for rents and profits (if such were allowable under the evidence in the cause), he should have sought, in the usual way, review of the decree in that respect. We do not understand *Steele v. Hanna*, 91 Ala. 190, 9 South. 174, to pronounce a rule in conflict with that soundly announced in *Weathers v. Spears*, *supra*.

The decree is affirmed in all respects, except that it will be corrected, so as to include in the sum required of Formby to redeem, interest, at the legal rate, from the date of the filing of the bill to the date of the decree confirming the report of the register.

The decree is corrected, as indicated, and, as corrected, is affirmed.

Corrected and affirmed.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

Addenda.

MCLELLAN, J. [4] After the termination of the *special* term at which the decree appealed from was *corrected* and *affirmed*, and after the expiration of the period alluded to by rule 38 (Civil Code, p. 1515) for presenting an application for rehearing, appellant now moves the court to modify the decree, so as to *affirm in part and reverse in part* and *render* the decree here which should have been rendered in the court below. Without considering the merits of the matter now presented, it must be ruled—according to the theory underlying appellee's motion to strike

the appellant's motion—that the motion the appellant has undertaken to make comes too late, at a time when this court has lost its power to alter its decree. Motion of appellant is stricken.

SAYRE, DE GRAFFENRIED, and GARDNER, JJ., concur.

(191 Ala. 424)

WESTERN UNION TELEGRAPH CO. v. HUGHSTON. (No. 655.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ⇨1042—SCOPE OF REVIEW—DISCRETIONARY RULINGS—PLEADINGS.

Refusal to strike from the complaint allegations of damage, for which the law allows no recovery, is not reviewable error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. ⇨1042.]

2. PLEADING ⇨193—DEMURRER—GROUNDS—ALLEGATION OF DAMAGES.

Allegations of damages in a complaint for which the law allows no recovery did not render it subject to demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 425, 428-435, 437-443; Dec. Dig. ⇨193.]

3. TELEGRAPHS AND TELEPHONES ⇨66—TRANSMISSION OF MESSAGE—MISTAKE—EVIDENCE.

In an action against a telegraph company for damages for mistake in transmitting plaintiff's message, inquiring "Can I get there in time?" to read "Can't get there in time," whereby she failed to see her dying sister, evidence that after she sent the message she began packing preparatory to going, and kept her things packed for several days, was admissible.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 61-63; Dec. Dig. ⇨66.]

4. EVIDENCE ⇨151—COMPETENCY—MENTAL ANGUISH.

In an action for mistake in transmitting a telegram, preventing plaintiff from seeing her dying sister, testimony by her that receipt of the news of the death of her sister made her sad was not a proper way of proving mental anguish.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 440; Dec. Dig. ⇨151.]

5. APPEAL AND ERROR ⇨1051—HARMLESS ERROR—ADMISSION OF EVIDENCE.

While plaintiff's testimony that the news of her sister's death made her sad was not a proper way of showing mental anguish, the matter was collateral, and would be inferred from the relation of the parties, in the absence of evidence to the contrary, and consequently harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. ⇨1051.]

6. APPEAL AND ERROR ⇨917—PRESUMPTIONS—GROUND FOR SUSTAINING DEMURRER.

Where the judgment entry showed that the demurrer was sustained to defendant's plea, but the demurrer or its grounds were not set out or apparent, the ruling would be sustained on appeal, if the plea was subject to any ground of demurrer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. ⇨917.]

7. TELEGRAPHS AND TELEPHONES ¶65 —
TRANSMISSION OF MESSAGE—READING.

In an action against telegraph company for mistake in transmitting plaintiff's message, a plea setting up, as part of a contract for sending the message, the stipulation that the company would not be liable where the claim was not presented within 60 days after the message was filed, and averring that the claim, which was peculiarly within the knowledge of plaintiff, was not presented in writing within 60 days after said message was filed, was technically bad in failing to aver that plaintiff did not present her claim to the defendant company.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. §§ 54-60; Dec. Dig. ¶65.]

8. APPEAL AND ERROR ¶1040—HARMLESS
ERROR—RULINGS ON DEMURRER.

Sustaining a demurrer to a plea of the general issue was not prejudicial to defendant, where the general issue was otherwise pleaded.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4089-4105; Dec. Dig. ¶1040.]

Appeal from City Court of Talladega; M. N. Manning, Special Judge.

Action by Gertrude Hughston against the Western Union Telegraph Company for damages for failure to correctly transmit and deliver telegram. Judgment for plaintiff, and defendant appeals.

Transferred from Court of Appeals. Affirmed.

The case made by the pleadings is that a sister of plaintiff, a Mrs. Keith, had been suddenly killed at or near Shreveport, La., and that plaintiff had been informed thereof by telegram, whereupon she wired Arthur Keith, her nephew, and the son of her deceased sister, as follows: "Can I get there in time to see her? Gertrude Hughston." When the telegram reached her said nephew, it read: "Can't get there in time to see her. Gertrude Hughston." Therefore the telegram was never answered, when in fact, if it had been properly transmitted, it would have been answered, and plaintiff would have had ample time to have reached Shreveport in time to have seen the body of her deceased sister, and to have been present at the burial.

The objection to evidence sufficiently appears in the opinion.

Plea 2 sets up as a part of the contract for sending the message the stipulation that the company will not be liable for damages or statutory penalty in any case where the claim is not presented in writing within 60 days after the message was filed with the company for transmission, and avers that the claim in this case, which was peculiarly within the knowledge of plaintiff, was not presented in writing within 60 days after said message was filed with the company for transmission, and therefore defendant is not liable in this action.

Plea 4 sets up the inability of plaintiff to have reached the place of burial of her sister, even if the message had been transmitted

or delivered in the manner that it was claimed it should have been, and that the failure to so transmit and deliver did not damage the plaintiff in any way.

Forney Johnston and W. R. Cocke, both of Birmingham, Knox, Acker, Dixon & Sims, of Talladega, and George H. Fearons, of New York City, for appellant. Harrison & Welch, of Talladega, for appellee.

SOMERVILLE, J. [1, 2] The refusal of the trial court, on defendant's motion, to strike from the complaint allegations of damage for which the law allows no recovery, is not reviewable error. *De Jarnette v. Dreyfus*, 166 Ala. 138, 51 South. 932. Nor is a complaint containing such allegations subject to demurrer on that account. *B. S. Bank v. Rosenbaum*, 137 Ala. 530, 34 South. 609. The assignments of error relating to these matters are without merit.

[3] The plaintiff was permitted to show that after sending the message to the telegraph office by her son for transmission by the defendant to her nephew at Shreveport, she "went to packing her things in a suit case" and getting ready, and also that she kept them packed for several days. The objections to this evidence seasonably made, were in substance that it was immaterial to the issues, that it was a conclusion of the witness, and that it was making evidence by the plaintiff for herself.

We think, however, that it was clearly relevant and competent for the purpose of showing the plaintiff's intention and readiness to promptly leave home on a journey to Shreveport if she received an affirmative answer to the message which, as the evidence adduced by her tended to show, she had delivered to the defendant for transmission. The testimony that she made such preparations may of course be false, but there is nothing to indicate that the preparations, if in fact made were simulated or self-serving merely, and that objection is without merit.

Whether the plaintiff's conduct in this behalf was competent as showing her belief that she had sent a message which foreshadowed a journey by her in the contingency of a favorable reply, and hence as corroborating her testimony as to the contents of the message she delivered to the defendant, we need not determine. See, however, 1 Wig. Ev. § 267.

[4, 5] The plaintiff was allowed to state that the receipt of the telegram announcing the death of her sister made her "very sad." This was not a proper way of showing mental anguish. *W. U. T. Co. v. Cleveland*, 169 Ala. 131, 53 South. 80, Ann. Cas. 1912B, 534. Nor do we conceive in what aspect this grief of the plaintiff, though naturally arising from the news of her sister's death, was legally relevant to any of the issues in the

case. It is not conceivable, however, that the trial judge confused this initial grief with the actionable grief resulting from the plaintiff's failure to be present at her sister's funeral, as a basis for the estimation of damages, and we are thoroughly satisfied that this evidence did not in any way affect his conclusions. The matter was purely collateral, and the fact would in any case be inevitably inferred from the relation of the parties, in the absence of evidence to the contrary, of which there was none. In this connection, we do not overlook the principle declared in *Brandon v. Progress Distilling Co.*, 167 Ala. 365, 52 South. 640, as to error without injury. We think it is not applicable here however.

[6, 7] The judgment entry shows that a demurrer was sustained to the defendant's plea No. 2, but the demurrer is not set out in the record, and its grounds are not apparent. In such a case the ruling will be sustained if the plea is subject to *any* ground of demurrer. If not otherwise defective, this plea is technically bad in failing to aver that the plaintiff did not present her *claim to the defendant's company*.

[8] Plea 4 was but the general issue, and, the general issue being otherwise pleaded, its elimination on demurrer was not prejudicial to the defendant.

We find no reversible error in the record, and the judgment will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(191 Ala. 448)

JONES et al. v. MYRICK LUMBER CO.
(No. 673.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. TRESPASS \S 68—INJURY TO FREEHOLD—INSTRUCTIONS.

On a count in an action for trespass for injury to land on which it was alleged that defendant had cut trees, an instruction limiting the right of recovery to injuries to the land itself was proper.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 151, 152; Dec. Dig. \S 68.]

2. TRESPASS \S 68—CUTTING TREES—PENALTIES—INSTRUCTIONS.

On a count in an action to recover the statutory penalty for "willfully and knowingly" destroying trees, an instruction properly limited the plaintiff's right to recovery to a finding that defendant cut the trees willfully and knowingly.

[Ed. Note.—For other cases, see *Trespass*, Cent. Dig. §§ 151, 152; Dec. Dig. \S 68.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by Zimmette Jones and others, by their next friend, against the Myrick Lumber Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

George D. Motley, of Gadsden, for appellants. Roper & Stephens, of Gadsden, for appellee.

MAYFIELD, J. The action was brought to recover damages for the destruction of trees. The first count of the complaint was in debt to recover the statutory penalty for "willfully and knowingly" destroying the trees, and the second was in trespass for injury to the land upon which the trees were cut. The trial was had on the general issue as to both counts, and resulted in verdict and judgment for the defendant, from which judgment the plaintiffs appeal.

There was no dispute that the land in question belonged to the plaintiffs, who were minors, nor was there any bona fide dispute that their guardian had sold to the defendant the timber and trees upon the land, except these trees and a few others. The contention of the plaintiffs was that a certain grove or woodland on the tract was reserved when the other timber was sold. This was denied by defendant. The evidence was all oral. No deeds or conveyances of the timber were offered in evidence. The evidence was also in dispute as to whether the defendant was warned or forbidden to cut the timber from this grove or woodland which was claimed to be reserved.

[1, 2] The only questions reserved for our consideration are the refusal of the court to give the affirmative charge for the plaintiffs and the action of the court in giving two charges for the defendant. The charges given at the request of the defendant were as follows:

"(A) The court charges the jury that, if they find from the evidence in this case that the trespass complained of upon the land described in the complaint did not injure or damage said land, then they cannot find a verdict for the plaintiffs under the second count of the complaint for any actual damages.

"(B) The court charges the jury that, unless they are reasonably satisfied from the evidence that defendant cut the trees charged in the complaint willfully and knowingly, then plaintiffs cannot recover under the first count of the complaint."

We are sure that there was no error as to the refusal to give the affirmative charge for the plaintiffs, or in the giving of either of the charges for the defendant. *Batson's Case*, 179 Ala. 490, 60 South. 313. For the same reason, charge A was properly given. As this count claimed damages only for injury to the freehold, by reason of cutting the trees, and not for the value of the trees, then, if the freehold was not damaged, the plaintiffs were not entitled to recover under this count.

The other charge was unquestionably correct. The statute makes a defendant liable to the penalty where the trees are "willfully and knowingly" cut. The count alleged that the trees here in question were so cut, and, of course, this allegation must be proven,

in order for the plaintiffs to recover under the count claiming the penalty. We feel it to be unnecessary to discuss these propositions, or to cite authorities in support of the conclusion. The result seems to necessarily follow.

Affirmed.

ANDERSON, O. J., and McCLELLAN and SOMERVILLE, JJ., concur.

(191 Ala. 38)

TIDWELL v. McCLUSKEY et al. (No. 741.)
(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. EJECTMENT \S 95—PRIMA FACIE CASE.

A defendant suing in ejectment makes out a prima facie case by showing that her husband was grantee of a grantor in possession of the land under claim of ownership, and the husband's possession until his death and conveyance to the widow by the husband's heirs.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. \S 280-295; Dec. Dig. \S 95.]

2. TAXATION \S 810—TAX SALE—EVIDENCE.

Where defendant in ejectment claims title as purchaser at a partition sale of property acquired under a tax title, the proceedings leading up to the tax sale, including the deed, are admissible in support of the defendant's plea of the three years' statute of limitations (Code 1907, \S 2311).

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1605-1608; Dec. Dig. \S 810.]

3. TAXATION \S 805 — SHORT STATUTE OF LIMITATIONS—TAX TITLE—PARTITION SALE.

Under the short statute of limitations of three years (Code 1907, \S 2311), providing that no action for the recovery of real estate sold for taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor, defendant in ejectment makes out title by showing that he purchased and held adverse possession for three years to property sold on partition; the partitioners getting a vested title by conveyance from their agent who purchased at a tax sale.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1593-1597; Dec. Dig. \S 805.]

4. TAXATION \S 794—TAX TITLE—DEFENSE.

Where defendant claims under the short statute of limitation of three years (Code 1907, \S 2311) as adverse possessor under deed at partition sale of property acquired by partitioners at tax sale, that partitioners at some time previous to the tax sale recovered judgment in ejectment against some third person would not affect defendant's right to hold under the statute.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1576; Dec. Dig. \S 794.]

Appeal from Circuit Court, Lawrence County; C. P. Almon, Judge.

Ejectment by Mrs. A. E. Tidwell against William F. McCluskey and others. From a judgment entered after an affirmative charge for defendants, plaintiff appeals. Affirmed.

Tidwell & Sample, of New Decatur, for appellant. E. W. Godbey, of Decatur, for appellees.

GARDNER, J. Suit in ejectment by appellant against one McCluskey, who was in

possession of the land sued for, as a tenant of appellee F. N. McMillan; the latter, upon suggestion of such tenant, coming in and becoming the party defendant to the suit.

[1] Appellant proved possession of the land in one W. B. Irwin under claim of ownership, and deed from Irwin to T. G. B. Pruitt (husband of plaintiff), during such possession, January 2, 1860, and possession of said Pruitt from time of the execution of said deed to his death in 1863. It was further testified by the plaintiff that she continued in possession until about the year 1904, and she offered deeds from the two children of said Pruitt (his only heirs), conveying to her their interest in said property, one deed of date July, 1882, and the other of February, 1891.

It may be conceded that under the proof offered by the plaintiff she made out a prima facie case for recovery. Dodge v. Irvington Land Co., 158 Ala. 91, 48 South. 383, 22 L. R. A. (N. S.) 1100. The proof shows that the plaintiff left the property, and the same was, it would seem, abandoned by her for a number of years prior to this suit.

In this record, a number of parties, Isaac A. J. Parker and others, are referred to as the "Parkers." Counsel in his brief so designates them, and for convenience we adopt the same course.

It appears that in 1903 one Mayfield was in possession of this land (under what character of claim, if any at all, is not disclosed), and the said Parkers brought suit in ejectment against said Mayfield and recovered judgment March 4, 1903. One J. M. West acted as their agent in the matter of this suit, and he rented the property out for the said Parkers. The said Parkers filed a bill in chancery for a sale of the property for division among them as tenants in common, and the sale was had under decree of August 26, 1907, duly confirmed; and deed was executed by the register on January 4, 1908, to the appellee F. N. McMillan, the purchaser at said sale. Said McMillan has been in the actual possession of said property since the execution of the deed of January 4, 1908, under claim of ownership, and has made many improvements of the property. This suit was brought March 29, 1912. It was also shown on the trial that for the year 1902 this property was assessed for taxation, against the plaintiff, and was sold for taxes; J. M. West, agent of the Parkers, becoming the purchaser. The certificate of sale bears date May 18, 1903, and the deed made to said West May 22, 1905.

[2] All the proceedings, from the assessment of the property for taxation, to the certificate of sale, advertisement, notice of owner, etc., were offered in evidence by the defendant, including, of course, the tax deed above referred to. Upon objection by the plaintiff, the court excluded each item of

such evidence as a muniment of title, but admitted the evidence in support of the plea of the defendant, of the statute of limitations of three years. It is not questioned by counsel that for this purpose this evidence was admissible. *Pugh v. Youngblood*, 69 Ala. 296; *Long v. Boast*, 153 Ala. 428, 44 South. 955; *Hooper v. Bankhead*, 171 Ala. 626, 54 South. 549.

J. M. West, the agent of the Parkers, and purchaser at the tax sale, deeded his interest to the property to the said Parkers, by conveyance of date March 28, 1906. In fact, it is proven without objection, and is without dispute, that West made the purchase as agent for the Parkers, and the deed made by him to them was but a consummation of the agreement between them.

[3] The Parkers were in possession from 1903 to 1907, inclusive, and were succeeded in possession by defendant McMillan, the purchaser of their title at the sale by the register; and McMillan had been in the open, actual possession, under claim of ownership and under color of title, for more than three years next before this suit was brought.

That portion of section 2311 of the Code of 1907 (Code 1896, § 4089) with which we are here concerned, designated as the "short statute of limitations," reads as follows:

"No action for the recovery of real estate sold for the payment of taxes shall lie, unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor."

Then follow exceptions not here involved.

In the case of *Capehart v. Guffey*, 130 Ala. 425, 30 South. 390, attention was directed to the change in the statute since the decision of *Jones v. Randle*, 68 Ala. 258, and the different sections of the Code with reference to this feature are there noted and commented upon. This court has recently had these sections under review in the case of *Bedsole v. Davis*, 66 South. 491 (present term), wherein it is said:

"An examination of the above-quoted sections of the Code will show that the present statute of limitations of three years begins to run in favor of a purchaser at a tax sale, or his vendee, in actual possession on the day 'when the purchaser became entitled to demand a deed therefor.'"

The time, therefore, from which may date the statute of limitations, is as above stated, and as found in the statute, "when the purchaser became entitled to demand a deed therefor."

While nothing is said in this statute requiring possession, yet as said in *Long v. Boast*, supra:

"The courts, looking to the general purpose of such acts, have likened them to the ordinary statute of limitations, so that the enactment in question is simply a short statute of limitations, applicable, on grounds of public policy, to this particular class of cases, and the limitation does not begin to run until possession of the land is taken," etc.

And in *Hooper v. Bankhead*, supra, it is said:

"In order for a purchaser of a tax title to invoke the protection of the statute of limitation considered in *Pugh v. Youngblood*, and of a like character of statute (now Code 1907, § 2311), he must have had, for the requisite period, adverse possession of the premises involved."

In *Long v. Boast*, supra, it was admitted that the tax sale was irregular and conveyed no title to the land. Long, the purchaser at the tax sale, conveyed by quitclaim to O'Rear, and the complainants to the bill received their title by quitclaim deed from said O'Rear. Neither Long nor O'Rear ever took possession of the land, but when the deed was made to complainants they went into possession and continued therein. It was there said:

"So that in this case the purchaser at tax sale, even though the proceedings were irregular, acquired an interest in the land, to wit, a right to take possession of the land and hold it for three years, and thereby acquire title; and, when he made the deed to the complainants in this case, that interest and right were conveyed to the complainants, and the complainants, by virtue thereof, took possession, and, having held possession of the land for the required time, had the right to claim the benefit of the short statute of limitations against the respondent in this case."

We are of the opinion that that case is decisive of this. It may not be, under this authority, necessary that the Parkers take possession of the land under the facts of this case, but it is without dispute that they were in possession. The right and interest of J. M. West, under the tax deed, vested in them by his conveyance; and by the deed of the register of January 4, 1908, to defendant McMillan, this right and interest vested in him. That right, as quoted above, was "a right to take possession of the land and hold it for three years, and thereby acquire title," as against this plaintiff. Whatever interest the Parkers had passed to this defendant by the deed of the register. It is without dispute that defendant immediately took actual possession, and has been in such possession openly and continuously, under claim of ownership, for more than three years next before this suit. That the possession of the defendant has been of such adverse character as to come within the decisions of this court there can be no doubt.

Had the Parkers made deed direct to the defendant, the case would be, it seems, almost on a parallel with that of *Long v. Boast*, supra, and of course it can make no difference in principle that this title passed, by sale for partition, through the chancery court. And so, also, the result would seem to be the same, even though West or the Parkers had never had possession, as was the case with Long and O'Rear in *Long v. Boast*.

[4] Such being the situation, we do not see the force of the reasoning of counsel for appellant that this defendant cannot avail of the statute of limitations because the Parkers had several years before recovered a judgment in ejectment against one Mayfield, who seems to have been at one time in possession.

The tax deed was of date the year 1905, and, had the Parkers had no possession whatever, yet under the ruling in *Long v. Boast*, the defendant, who, under his deed which conveyed to him all the right, title, and interest of the Parkers, including, of course, the rights acquired by the tax sale, took possession and has held the same adversely under his claim of ownership for more than three years, would prevail as against the plaintiff in this suit.

Under the undisputed evidence in this case, therefore, we conclude that the court properly gave the affirmative charge for the defendant at his request, and the judgment is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 438)

LOUISVILLE & N. R. CO. v. GODWIN.
(No. 759.)

(Supreme Court of Alabama. Nov. 7, 1914. Rehearing Denied Dec. 17, 1914.)

1. TRIAL \S 194 — INSTRUCTIONS — QUESTION FOR JURY.

In an action for injuries to a passenger alleged to have been thrown to the ground in alighting, where there was evidence from which the jury had a right to infer that plaintiff was not thrown to the ground or injured on the named occasion, it was reversible error to charge that when she alighted "plaintiff received some injury"; that being a question for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 413, 436, 439-441, 446-454, 456-466; Dec. Dig. \S 194.]

2. APPEAL AND ERROR \S 1064 — REVIEW — PREJUDICIAL ERROR—INSTRUCTIONS.

The giving of an instruction on the effect of evidence is reversible error under Code 1907, \S 5362, where no charge on that point was requested by either of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219, 4221-4224; Dec. Dig. \S 1064.]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by Minnie M. Godwin against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

See, also, 183 Ala. 218, 62 South. 768.

Eyster & Eyster, of New Decatur, for appellant. W. R. Francis, of Decatur, and Arthur L. Brown, of Birmingham, for appellee.

DE GRAFFENRIED, J. The plaintiff, Minnie M. Godwin, claims that she was a passenger on one of the trains of the defendant, Louisville & Nashville Railroad Company, and that while she was a passenger on such train she was, through the negligence of the defendant, or of its agents or servants while acting within the line of their employment, thrown to the ground and injured.

The plaintiff claims that her injuries were received while she was in the act of alighting from the train at Decatur. She says that while she was alighting from the train the coach upon which she had been riding was given a sudden jerk, and that she was violently thrown to the ground, and was thereby greatly bruised, etc.

[1] The question as to whether the plaintiff was thrown to the ground or injured was however a question for the jury. There was evidence from which the jury had the right to infer that the plaintiff was not thrown to the ground or injured on the named occasion. This being true, the trial court committed reversible error in charging the jury as follows:

"There is no dispute, as I understand the testimony in this case, that the plaintiff was a passenger upon the defendant's train; that she had as her intended destination, Decatur; that she had purchased a ticket; that upon arriving at Decatur she alighted or attempted to alight from the train; and that plaintiff received some injury. As to the nature, character, and extent of that injury is a question left to the jury to find or conclude from the evidence in the case."

This case must be again tried, and for that reason it would not be proper for us to engage in an extensive discussion of the testimony for the purpose of showing that the fact that the plaintiff fell or that she received some injury in getting off the train at Decatur was not admitted, but was disputed, by the defendant. The flagman's testimony alone puts that fact in dispute, and renders it a question for the sole determination of the jury.

[2] The above charge was a charge upon the effect of the evidence, invaded the province of the jury, and should not have been given. Indeed, the giving of the charge was, under our statute, reversible error. *Mayer v. Thompson-Hutchison Co.*, 116 Ala. 635, 22 South. 859; Code 1907, \S 5362.

2. There are numerous assignments of error upon this record which we do not discuss. This case involves no difficult legal propositions. It has been in this court before (see *Louisville & Nashville Railroad Co. v. Godwin*, 183 Ala. 218, 62 South. 768); and the questions not here discussed may not, and probably will not, occur upon the next trial of the case.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 111)

MURPHY v. PIPKIN et al. (No. 667.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. COURTS \S 256 — UNITED STATES CIRCUIT COURT—JURISDICTIONAL AMOUNT.

By direct proviso in Act March 3, 1887, c. 373, \S 6, 24 Stat. 555, and Act Aug. 13, 1888, c. 866, \S 6, 25 Stat. 436, suits pending at the time the jurisdictional amount of United States

Circuit Courts was raised from \$500 to \$2,000, were saved from the operation of the statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 792; Dec. Dig. ¶256.]

2. WITNESSES ¶379—IMPEACHMENT—INCONSISTENT STATEMENTS.

The deposition of defendant taken in another action, in another court, between different parties, on different issues, was admissible in evidence to impeach defendant as containing statements inconsistent with his testimony; his attention having been called to the discrepancies and opportunity given to him to explain.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 985-989, 991-995, 1353; Dec. Dig. ¶379.]

3. DEPOSITIONS ¶100—USE AS EVIDENCE—OTHER SUIT.

In a suit to set aside a fraudulent conveyance, where the grantor's fraud might have been inferred from his having retained possession of the land, his deposition taken in a previous suit on different issues, between different parties, was admissible as being relevant to the facts of the conveyance.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 297, 298; Dec. Dig. ¶100.]

4. TRIAL ¶48—RECEPTION OF EVIDENCE—INADMISSIBLE IN PART.

Where depositions taken in a previous suit, otherwise inadmissible, were attached to deeds and transfers under which the complainant judgment creditor in suit to set aside a fraudulent conveyance became holder of the judgment by assignment, the identity of such deeds, etc., being verified by officers of the court who had executed them and had had them in custody in the previous suit, in which the depositions were taken, were admissible in evidence for the purpose of bringing with them the deeds and transfers, but were not to be considered themselves.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 120; Dec. Dig. ¶43.]

5. FRAUDULENT CONVEYANCES ¶300—DEEDS—RECITAL OF CONSIDERATION.

Where a fraudulent conveyance is charged, the recital of consideration in grantor's deed is a mere declaration, and not evidence against the creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. ¶300.]

6. FRAUDULENT CONVEYANCES ¶277—BURDEN OF PROOF.

Where a fraudulent conveyance is charged, the burden of proof that there was a consideration for the transfer rests on the grantee.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 799, 809-814; Dec. Dig. ¶277.]

7. FRAUDULENT CONVEYANCES ¶300—PARENT TO CHILD—EVIDENCE.

Where an alleged fraudulent conveyance was from parent to child, the evidence of a consideration paid in good faith must be clear and convincing to prevail if the conveyance is to stand against creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 896-903; Dec. Dig. ¶300.]

On Rehearing.

8. EVIDENCE ¶83—PRESUMPTIONS—REGULARITY OF OFFICIAL ACTS.

In an action by a judgment creditor to set aside a conveyance as fraudulent, where complainant held the judgment by assignment, and claimed to prove his ownership by the depositions of officials of a foreign court, as to their acts as officials in transferring such judgment to him, the presumption of regularity of official

acts served, for the purposes of suit, to establish the complainant's ownership of the judgment.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 105; Dec. Dig. ¶83.]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Action by Jere Murphy against J. W. Pipkin and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded, with directions.

S. S. Pleasants and Jere Murphy, both of Huntsville, and E. W. Godbey, of Decatur, for appellant. Callahan & Harris, of Decatur, for appellees.

SAYRE, J. This bill was filed by appellant to vacate a conveyance of real estate, made by the defendant J. H. Dutton to the defendants J. W. Pipkin and his wife, Luella Pipkin, as having been made upon a simulated consideration, and so in fraud of complainant's rights as a creditor. Complainant claimed as assignee of a judgment rendered by the Circuit Court of the United States for the Northern Division of the Northern District of Alabama on December 3, 1889, in favor of C. Aultman & Co. against the defendant Dutton for the sum of \$1,530.88, and duly recorded for a lien in the county in which the land was situated in pursuance of the statute of this state. Code, §§ 4156, 4157. Pending the cause, defendant Dutton died, and there was a revivor against J. W. Pipkin as his administrator.

[1] Denying relief and dismissing complainant's bill, the chancellor was of opinion that the judgment of the federal court was without the jurisdiction of that court, null, and void, for the reason that the amount involved "was less than two thousand dollars, the jurisdictional amount fixed by Acts of Congress of March 3, 1887, and August 13, 1888, said judgment having been rendered after the passage of said acts, which made no exceptions as to pending suits." In this the chancellor fell into error, induced, probably, as counsel for appellant suggests, by the chancellor's examination of the Compiled Statutes, where no saving appears in favor of pending suits. It appears in evidence that the suit in which the judgment was rendered was brought in 1885, and an examination of the acts in the official edition of the United States Statutes at Large shows that in those acts, which limited the jurisdiction of the federal courts, so far as concerned amount involved, to cases where the matter in dispute, exclusive of interest and costs, exceeded the sum or value or \$2,000, instead of \$500 as previously, there is an express proviso saving suits commenced before their passage. Act Cong. March 3, 1887, c. 373, § 6, 24 Stat. 555; Act Cong. Aug. 13, 1888, c. 866, § 6, 25 Stat. 437.

[2-4] The chancellor was further of opinion that complainant had failed by proper

and sufficient evidence to show that he was the owner of the judgment, even if it were valid, stating as his reason for this conclusion that complainant attempted to show his ownership by a line of transfers, the proof of which was undertaken by noting in evidence depositions, containing numerous exhibits, taken in another court, the Morgan county law and equity court, in another cause wherein the Pipkins were not parties and where the issues were not the same as in this cause, and, as to defendants Pipkin, the chancellor concluded that the depositions were incompetent as *res inter alios acta*. The deposition of defendant Pipkin, taken in the other court, was admissible as containing some statements inconsistent with his testimony taken in the present case; his attention having been called to the discrepancies and an opportunity afforded him of explaining them. The deposition of Dutton, the grantor, taken in the other court, was certainly relevant, for it concerned this transaction. It was also competent on the ground that there was evidence that the grantor then remained in possession after the sale as if he were the owner, and from this circumstance a fraudulent combination may have been inferred. *Goodgame v. Cole*, 12 Ala. 77; *Byrd v. Jones*, 84 Ala. 336, 4 South. 375. It was perhaps admissible on other grounds also. *Humes v. O'Bryan*, 74 Ala. 64. As for the rest, the depositions were introduced, as we understand, in order to get before the court the several exhibits attached, and to that extent the procedure involved no reversible error. The depositions themselves will be ignored in the consideration of the decree to be rendered. These exhibits were the several deeds and transfers under which complainant claimed in the present case. The execution of such instruments was properly proved, as for any objection taken against them, by the depositions of witnesses taken in this cause, and the identity of such instruments with the muniments of title upon which complainant here relied was proved by the deposition of E. W. Godbey, Esq., who at one time had had them in his keeping for use in the Morgan county law and equity court, and by the deposition of A. S. Blackwell, clerk of that court, in whose custody they had remained since the trial in that court. We think therefore that this reason for dismissing complainant's bill cannot be sustained.

[6-7] This brings us to the evidence. It is well settled that the burden of proving that the deed was not a voluntary conveyance is cast by law upon the appellees, and that the recital of a consideration in the deed is the mere declaration of the grantor, and is not evidence against the creditor. The sufficiency of the proof of consideration must depend on the relations between the parties, the circumstances surrounding them at the time, and their conduct subsequent to the transaction. The vendees were the daughter and

son-in-law of the vendor. Transactions between parent and child are jealously watched in a court of equity, even when the controversy arises between them, and, when the rights of creditors are involved, fuller proof must be given of an adequate and valuable consideration, and of the good faith of grantee or vendee, than would be required of a stranger. This is substantially the language of *Hubbard v. Allen*, 59 Ala. 283. The case for the creditor is even more strongly stated in *Harrell v. Mitchell*, 61 Ala. 270, where the court, in circumstances closely analogous to those shown by the case in hand, held that, in the absence of clear and convincing evidence of an adequate, valuable consideration, the right and equity of the creditor should prevail. But every case must stand on the bottom of its own facts, and so we have examined the evidence offered by the grantees in this case, without preconceived suspicion of its veracity, allowing to it such credit as the undisputed situation of the parties and other inherent considerations seem to justify. It would serve no purpose to discuss the evidence at length. It has left upon our minds, as the sum of its effect, a very strong impression, far deeper than any mere suspicion, that the moving cause and sole consideration of the transaction was the purpose to put the property beyond the reach of complainant, who was at the time in pursuit of it. No other satisfactory explanation is proved as to why, in the then circumstances of the parties, grantor should have desired to divest himself of the title, or why grantees should have wished so to invest the alleged purchase price. Grantor had need of his property, and afterwards remained in possession substantially as he had been before. Grantees had been accustomed to make careful use of such means as they had, but here they are supposed to have invested a large proportion of their laborious savings in a property which yielded them, at best, almost no return. And, besides, the testimony as to the ability of defendant vendees to purchase and grantor's disposition of the purchase price is not at all satisfactory. *Harrell v. Mitchell*, supra. In short, appellees have failed to sustain their case by that measure of proof which the reason and authority of the adjudicated cases require of parties in their situation. The decree below must be reversed.

Reversed and remanded to the court below, where a decree will be made in accordance with this opinion.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

On Rehearing.

SAYRE, J. On application for rehearing, appellees have addressed their argument, that appellant has not shown his ownership of the judgment, to this point specifically: That

the conveyances purporting to have been executed by Hiram Doll, special master commissioner under appointment by the court of common pleas of the county of Stark, and state of Ohio, and by J. J. Sullivan, trustee in bankruptcy of the Aultman Company, under authority of the District Court of the United States for the Northern District of Ohio, Eastern Division, are not shown to have been executed by competent authority, and that the only competent evidence of such authority would be the duly authenticated records of those courts showing their action in the premises. This point was not noticed in the original opinion for the reason that it was not made. It is, however, necessarily involved in any proper disposition of the cause, and our consideration concerning it will now be stated.

[8] In paragraph 4 of the bill, it is averred that the judgment had been duly and legally transferred to complainant and is his property. The defense, as to this question, was content to rest upon a general denial of the averments of the paragraph. As we have stated in the original opinion, the execution of the several transfers under which complainant claimed ownership of the judgment was proved by the depositions of witnesses taken in this cause; the transfers now in question being established by the deposition of the grantor or transferrer in each case. But since these transferrors were acting in the capacity of agents of the courts, not as private individuals, it is necessary that it be made to appear, not only that the documents were genuinely executed by the persons named, but that these persons thus claiming to act officially were in fact the lawful officials they claimed to be, and the precise point now taken in favor of the decree rendered by the chancellor is that this could be shown only by the records of the court showing their authority. These persons purporting to act under the appointment of foreign courts, it may be conceded that the court does not take judicial notice of their authority. The records would be conclusive, of course, but it does not follow that the production of the record or a certified copy is indispensable. These transferrors deposed that they sustained at the time of the execution of the several transfers the several characters—officers of court—in which they assumed to act. They could not so prove their incumbency in suits against themselves, nor in a direct proceeding to try their right or title to act as such officials; but where the question of official capacity arises, as in the case here, collaterally—there seems to be no better term by which to describe the relation between the issue raised as to official capacity and the question of ownership here propounded—the usual and ordinary mode of proof, when the act of an officer has to be proved, is the mode adopted by complainant in this case. Ken-

nedy v. Dear, 6 Port. 90; East v. Pace, 57 Ala. 521; Potter v. Luther, 3 Johns. (N. Y.) 431; Rex v. Howard, 1 Moo. & Rob. 187; Bunbury v. Matthews, 1 C. & K. 380.

"It is a general presumption of law that a person acting in a public capacity is duly authorized to do so." Rex v. Verelst, 3 Cawp. 432.

In note 2 to section 2168 of Wigmore on Evidence may be found cited numerous cases supporting this doctrine. So we hold that the proof in this case, standing without contradiction on this point, was prima facie sufficient to authorize and require a finding that the transfers in question were duly executed by competent authority. Hence our conclusion to deny the rehearing.

Rehearing denied.

(191 Ala. 476)

**SLOSS-SHEFFIELD STEEL & IRON CO.
v. TERRY. (No. 740.)**

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR ⇨621—DOCKETING—TRANSMISSION OF RECORD.

Where appeal was taken in July, 1913, in vacation, it was returnable at the next term, beginning in November of that year, and the transcript being filed during that term on February 2, 1914, and on the first day of the call of the division to which the appeal belonged, the appeal was not subject to dismissal, under Supreme Court rule 41 (175 Ala. xx, 56 South. vi), requiring that transcript on such appeals be filed with the clerk of the Supreme Court not later than the first day of the first week of the term during which the case is subject to call.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2724-2731; Dec. Dig. ⇨621.]

2. APPEAL AND ERROR ⇨384—APPEAL AND SUPERSEDEAS BOND—DATING.

Under Code 1907, § 2886, providing that any appeal shall be dismissed for want of sufficient appeal bond, omission to date the bond was not fatal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2049-2056; Dec. Dig. ⇨384.]

3. MASTER AND SERVANT ⇨258—INJURY TO SERVANT—SAFE PLACE TO WORK—EMPLOYERS' LIABILITY ACT.

Under Employers' Liability Act (Code 1907, § 3910), making a master liable for injury to servant by defects in the condition of the ways, works, machinery, or plant connected with the work, a complaint for injury from a defect in such ways, etc., in the language of the statute, and then averring: "Which defect consisted in this: A wall of ore and clay near which plaintiff was engaged in the performance of his duty at the time of his said injuries was insecure and unsafe, so that a large embankment therefrom fell upon plaintiff, to his damage"—was not demurrable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. ⇨258.]

4. MASTER AND SERVANT ⇨259 — INJURY TO SERVANT—SUFFICIENCY OF COMPLAINT.

A complaint under Code 1907, § 3910, defining the liability of a master for injury to servant, which alleged that plaintiff's injuries and damages were proximately caused by reason

of the negligence of one D., a person in the service or employment of defendant, to whose orders or directions plaintiff was bound to conform and did conform, which negligence was that D. negligently ordered plaintiff to place a plank or piece of timber on which a steam shovel's wheels were run, and in conforming to the order an embankment fell on plaintiff injuring him, was not subject to demurrer.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 837-843; Dec. Dig. ¶ 259.]

5. MASTER AND SERVANT ¶259 — INJURY TO SERVANT—SUFFICIENCY OF COMPLAINT.

Counts of a complaint by an injured servant, under Code 1907, § 3910, which alleged that plaintiff's injuries were caused by the negligence of D., a person who had superintendence entrusted to him, while in the exercise of such superintendence, in that he negligently permitted an overhanging bank of iron ore and clay to be and remain in an unsafe condition near the place where plaintiff was engaged in the discharge of his duties, and as a proximate consequence plaintiff was injured, and another count averring that the injuries and damages were proximately caused by such D. in that he negligently allowed the work of defendant to be performed in a manner dangerous to the safety of plaintiff, whereby the embankment fell upon or against plaintiff, were not demurrable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 837-843; Dec. Dig. ¶ 259.]

6. MASTER AND SERVANT ¶107—PERSONAL INJURIES—SAFE PLACE TO WORK—"DEFECT."

Where the condition from which injury to a servant is alleged to have resulted was the immediate product of the progress of the work in which the servant was properly engaged, such condition was not a "defect" within the first subdivision of Code 1907, § 3910, making a master liable for injuries to a servant caused by any defect in the condition of the ways, works, machinery, or plant connected with the business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 199-202, 212, 254, 255; Dec. Dig. ¶107.]

For other definitions, see Words and Phrases, First and Second Series, Defect.]

7. MASTER AND SERVANT ¶287, 289 — ACTIONS FOR INJURIES—QUESTIONS FOR JURY—NEGLIGENCE IN GIVING ORDERS—CONTRIBUTORY NEGLIGENCE.

The question of negligence of a superintendent in ordering plaintiff to place a board under the wheels of the engine of a steam shovel, in doing which he was injured by the fall of a bank of clay or ore, and the question of plaintiff's contributory negligence, held for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1034, 1045, 1051, 1052, 1064-1067, 1089, 1090, 1092-1132; Dec. Dig. ¶287, 289.]

Appeal from Circuit Court, Franklin County; C. P. Almon, Judge.

Action by Carlos Terry against the Sloss-Sheffield Steel & Iron Company, for damages sustained while in its employment. Judgment for plaintiff, and defendant appeals. Affirmed.

The case was submitted on counts 7, 10, 11, 12, 13, and 14 of the amended complaint. Count 7 sufficiently appears from the opinion of the court.

Count 10 adopts the seventh count as to its charging part and avers plaintiff's injuries and damages to have been proximately caused by reason of the negligence of one Cliff Daniels, a person in the service or employment of defendant, to whose orders or directions plaintiff was bound to conform and did conform, which negligence consisted in this: That said Cliff Daniels negligently ordered plaintiff to place a plank or piece of timber upon which the steam shovel's wheels were to run, and in conforming to the order the said embankment of ore and clay fell upon plaintiff, injuring him.

Count 11 is also like count 7, and the averment of injuries was the negligence of Cliff Daniels, a person who had superintendence entrusted to him, etc., while in the exercise of such superintendence, in that he negligently permitted an overhanging bank of iron ore and clay to be and remain in an unsafe condition near the place where plaintiff was engaged in the discharge of his duties, and as a proximate consequence plaintiff was injured.

(12) Same as 7, averring the injuries and damage to have been proximately caused by reason of the negligence of Cliff Daniels, entrusted with superintendence, etc., in that he negligently allowed the work of defendant to be performed in a manner dangerous to the safety of plaintiff, whereby the embankment fell upon or against plaintiff, as aforesaid.

(13) Same as 10.

(14) Under subdivision 1, the Employers' Liability Act, in that a wall of ore and clay near which plaintiff was engaged in the performance of his duty at the time of his said injury was insecure and unsafe, so that a large embankment therefrom fell upon plaintiff and injured him.

The following are the excerpts from the court's oral charge:

Assignment 8: Plaintiff is bound to conform to the orders of the superintendent, unless he orders him to go into a dangerous place, and that danger is obvious to plaintiff.

Assignment 9: It was the duty of plaintiff to obey the orders of his superintendent, unless the place where his superior ordered him to go was obviously dangerous to plaintiff.

Assignment 10: If the place where the superintendent ordered plaintiff to go was not obviously dangerous, but the superintendent knew it was a dangerous place, and ordered plaintiff to go into said place, and in obedience to said order plaintiff went into said place and was injured, then plaintiff would not be guilty of contributory negligence.

E. B. Almon, of Sheffield, and Tillman, Bradley & Morrow and Charles E. Rice, all of Birmingham, for appellant. R. T. Simpson, of Florence, Kirk, Carmichael & Rather, of Tusculumbia, and Travis Williams, of Russellville, for appellee.

McCLELLAN, J. [1, 2] The motion to dismiss the appeal is without merit. It appears from the certificate of the clerk that the ap-

peal was taken July 11, 1913, in vacation, between terms of this court. In such case the appeal was returnable at the next term, viz., that beginning in November, 1913. *Martin Machine Works v. Miller*, 132 Ala. 629, 82 South. 305. The transcript on appeal was filed February 2, 1914, during the term to which the appeal was returnable. The transcript was filed on the first day of the call of the division to which this appeal belongs. Rule 41, Supreme Court Practice (175 Ala. xx, 56 South. vi); *Street v. Street*, 113 Ala. 333, 21 South. 138; *Martin, etc., v. Miller*, supra; *South. Ry. Co. v. Abraham*, 161 Ala. 317, 49 South. 801. The appeal and supersedeas bond was approved by clerk on the date the appeal was taken, viz., July 11, 1913. The mere omission to date the bond is palpably without merit. Code, § 2886.

The plaintiff (appellee) was, when injured, in the employment and service of the defendant (appellant). The work in progress was the "surface mining" of ore by means of a shovel. The shovel was operated by steam power afforded by an engine that, with the shovel's apparatus, was resting and moved upon a temporary roadway laid on the surface of the earth, so as to allow the "dipper" to scoop the ore out of the face of the bank ahead of the shovel. Plaintiff was the crane-man, whose duty it was to operate the dipper, and to scoop out the dirt and ore in the bank, and to empty the contents of the dipper, after each scoop, into cars provided for the purpose of moving the material.

[3] The seventh count was drawn under the first subdivision of the Employers' Liability Statutes. Code, § 3910. In the usual terms, following the statute, it ascribes the injury to a defect in the condition of the ways, works, etc., of the defendant, and then avers:

"Which defect consisted in this: A wall of ore and clay near which plaintiff was engaged in the performance of his duty at the time of his said injuries was insecure and unsafe, so that a large embankment therefrom fell upon plaintiff, to his damage."

According to the apt authority of *A. G. S. R. R. Co. v. Davis*, 119 Ala. 572-582, 24 South. 862; *Jackson Lumber Co. v. Cunningham*, 141 Ala. 206, 218, 37 South. 445; *Huyck v. McNeerney*, 163 Ala. 244, 254, 50 South. 926; *St. Louis R. R. Co. v. Sutton*, 169 Ala. 389, 400, 55 South. 589, Ann. Cas. 1912B, 366; *Pell City Co. v. Cosper*, 172 Ala. 532, 536, 55 South. 214; *Little Cahaba Co. v. Gilbert*, 178 Ala. 515, 520-523, 59 South. 445; *St. Louis R. R. Co. v. Phillips*, 185 Ala. 504, 510, 511, 51 South. 638; *Stephens v. Pierson*, 8 Ala. App. 626, 62 South. 969—count 7 was sufficient in all respects, and was hence not demurrable. Neither the decision nor the opinion in *T. C. I. & R. R. Co. v. Smith*, 171 Ala. 251, 55 South. 170, qualify the ruling and doctrine of the long line of decisions noted above. Like considerations confirm the cor-

rectness of the trial court's action in overruling the demurrer to the fourteenth count.

[4] Counts 10 and 13 were also sufficient. *Reiter-Connolly Co. v. Hamlin*, 144 Ala. 192, 213, 40 South. 280; *L. & N. R. Co. v. Bargainier*, 168 Ala. 567, 578, 53 South. 138, treating count 14 there under review. The citation, in brief, of *Bargainier's Case*, as authority for a contrary conclusion, results from mistaking the dissenting opinion for that of the majority.

[5] Neither the eleventh nor the twelfth counts were subject to the demurrer. *Woodward Iron Co. v. Marbut*, 183 Ala. 310, 62 South. 804.

The report of the appeal will contain a condensed statement of all the counts mentioned above, except that numbered 7, which has been quoted before.

[6] There is no assignment of error urged here as for the refusal by the court of general affirmative instructions with respect to particular counts. But we may here remark that there was no evidence tending to show a defect in the condition of the ways, works, etc., as, for instance, declared on in count 7. *Langhorne v. Simington*, 66 South. 85. Where the condition, from which the injury to the servant is alleged to have resulted, was the immediate product of the progress of the work in which the servant was properly engaged, that condition could not have been a defect, within the first subdivision of the statute (section 3910).

The general affirmative charge on the whole case was refused to defendant. The insistence for error in this regard may be disposed of by the citation of the decision made in *Langhorne v. Simington*, supra, where, under similar circumstances, invoking the application of like principles, it was ruled that the question whether there was negligence of one intrusted with superintendence was correctly submitted to the jury.

[7] Manifestly there was no prejudicial error in the substance of the court's instructions, in this case, as set out in the excerpts purported to be made in assignments of error 8, 9, and 10.

There was evidence to the effect that plaintiff, who was the crane-man in the service before described, had in the usual way in the operation of a steam shovel removed the earth carrying the ore from the face of the bank to an height of about 20 feet from the level of the base whereon rested the machine; that the "dipper" did not reach to the top of the bank, so that the gradual removal of the earth, by the scooping out process, gave a concave shape to the face of the bank, leaving about four feet of soft, overhanging earth that was liable at any time to fall and did fall to the level of the base of the machine; that plaintiff was fully aware of the instability of the earth forming the overhang and of its practically

constant falling, in varying quantities, to the base level of the machine; that his place for operating the shovel was elevated and nearer the face of the bank than that of any other employé serving in that work; that Daniels, an employé of superior authority to plaintiff, ordered or directed plaintiff to move up, which necessitated his (plaintiff's) going to the base level and putting timbers under the wheels of the machine; that, while obeying this order or direction, earth from the overhang fell upon him, causing his injury; that Daniels' duty was to watch the wall and to take care of the wall; and that Daniels knew or should have discovered, by the exercise of reasonable diligence, that earth from the, in degree, unsupported top of the bank was liable to fall at any moment, and that it had been falling to the base level, to which place his order sent plaintiff to lay the timbers on which to "move up" the machine nearer the bank.

It could not be affirmed, as a matter of law, that, under the circumstances disclosed by the evidence, Daniels was not negligent. If he knew of the danger from the falling earth to one engaged as he ordered plaintiff to serve, or if his duty required him to observe the condition of the bank's top—both jury questions under the evidence—and in breach of that duty he ordered plaintiff from a place of safety on the machine to a place of danger on the base level, it is clear there were bases laid for a finding of liability, unless plaintiff was himself contributorily negligent. If the plaintiff's injury had proximately resulted from the fall of the earth upon him while he was on the crane and engaged in the operation of taking the earth from the face of the bank, a very different question would be presented—a question that would be largely affected by the plaintiff's knowledge of the liability of the bank's overhang to fall at any moment. But the plaintiff's stated knowledge of the unstable condition of the earth at the top of the bank could not be accorded, as a matter of law, an effort to impute to plaintiff a disregard of the dictates of ordinary prudence in going to the place and serving where obedience to Daniels' order carried him. It was for the jury to determine whether plaintiff was contributorily negligent in the light of its knowledge of the unstable condition of the overhanging earth.

The application of the familiar rule of *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, forbids the pronouncement of error in the trial court's refusal to set aside the verdict. There being no merit in the errors assigned and urged here, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(191 Ala. 137)
COFFEY v. GAY et al. (No. 670.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

RECEIVERS §188—AUTHORITY OF RECEIVER.

Where a receiver was authorized to institute an action, but the court which authorized the action and had appointed him decided against the claim, the receiver, not being personally interested, cannot appeal without leave of court, as he is an officer of the court, subject to its direction.

[Ed. Note.—For other cases, see *Receivers*, Cent. Dig. § 378; Dec. Dig. §188.]

Appeal from Chancery Court, Jackson County; W. H. Simpson, Chancellor.

Action by R. A. Coffey, as receiver, against J. W. Gay and others. From a judgment for defendants, plaintiff appeals. Appeal dismissed.

Lawrence E. Brown, of Scottsboro, for appellant. John F. Proctor, of Scottsboro, for appellees.

GARDNER, J. The First State Bank of Bridgeport, Ala., was placed in the hands of a receiver under appointment of the chancery court of Jackson county, upon bill filed by Alex M. Garber, as Attorney General of the state, as provided by statute (section 3560, Code of 1907) of force at that time. Pending the administration of the affairs of said bank in said court, the receiver first named resigned, and appellant, R. A. Coffey, was duly appointed his successor, and is now acting as such. This bill was filed by said receiver against stockholders, seeking recovery from them upon the theory of unpaid subscriptions, etc. The suit is by said Coffey in his official capacity only; he being without any interest therein except in an official way.

The first averment of the bill is as follows:

"That orator is receiver of the First State Bank, acting under appointment of this court made in the case of Alex M. Garber, Attorney General, etc., v. First State Bank, and brings this, his bill of complaint, in his official capacity as such receiver."

Upon submission of the cause for final decree, the chancellor was of the opinion that the complainant had failed to make out his case, and, of consequence, dismissed the bill; the reasons therefor being expressed in the decree. From this adverse decree the receiver brought this appeal.

Appellees move that the appeal be dismissed upon the ground that the appeal is taken by the receiver, as such, without any authority from the court appointing him, and without disclosing any special or personal interest in said appeal.

"The appointment of a receiver is one of the prerogatives of a court of equity, exercised in aid of its jurisdiction, in order to enable it to accomplish, as far as practicable, complete justice between the parties before it."

"He [receiver] is said to be the arm and the hand of the court, a part of the machinery of

the court, by which the rights of the parties are protected." 34 Cyc. 16, 17.

"A receiver appointed by the court of chancery, is, to every extent, an officer of that court." Magee v. Cowperthwaite, 10 Ala. 966.

By the decided weight of authority it is established as the general rule that a receiver cannot institute an action connected with the administration of his trust without first procuring the leave of the court appointing him. High on Receivers (4th Ed.) § 208; 34 Cyc. 377.

As a reason for the above rule, it was said, in *Screen v. Clark*, 48 Ga. 41:

"A receiver is at last only an officer of the court, and the foundation of the rule probably is that it is always for the court itself to determine whether it shall be dragged into litigation."

Speaking to the question of an appeal by the receiver from an order entered in the court from which he received his appointment, the Supreme Court of Wisconsin, in the case of *McKinnon v. Wolfenden*, 78 Wis. 237, 47 N. W. 436, after noting that the appeal by the receiver was not authorized by the court, said:

"Without such authority it was not competent for him to take the appeal. A receiver is the mere servant or agent of the court to do its bidding, and he cannot be heard to question by appeal the regularity or propriety of the orders of the court in the action, unless the court first authorizes him to do so."

"And, since he is the mere servant or agent of the court, he will not be allowed of his own volition to appeal from an order made in the progress of the cause in which he is appointed." High on Receivers (4th Ed.) § 284b.

See, also, *First Nat. Bank v. Bunting Co.*, 7 Idaho, 27, 59 Pac. 929, 1106; 34 Cyc. 447.

Authority to institute the suit in the instant case may be found in the order appointing appellant receiver, and, while it is true the suit is by a separate and independent bill, yet it may still be considered as merely a part of the administration of the trust estate and as ancillary to the main suit. Such was the effect of the holding in *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67, wherein it is said:

"The Circuit Court obtained jurisdiction over the * * * company by the filing of the original creditors' bill, * * * and by appointment of a receiver, and any suit by or against such receiver, in the course of the winding up of such corporation, whether for the collection of its assets, or for the defense of its property rights, must be regarded as ancillary to the main suit," etc.

The fact, therefore, that the suit was by separate bill filed in the same court from which the receiver received his appointment, can have no effect upon the principle involved. This suit the receiver was without authority to bring until he first obtained permission of the court of his appointment. This consent given, he files his bill in the chancery court, from which he received his

power to act. Whether or not the authority given to sue would also carry with it the implied authority to appeal from an adverse judgment had the suit been in a court other than the one from which he obtained his appointment we need not stop to inquire. That question is not before us. We think that most clearly there could be no implied authority in the instant case for an appeal from its adverse decree. Indeed, this question is answered in the recent case of *Cobbs v. Vizard Inv. Co.*, 182 Ala. 372, 62 South. 730, wherein it is said:

"The receiver is the mere creature of the court. He must give heed to his master's voice. He cannot make authority for himself. Neither the recited language of the decree nor any reasonable implication to be found in it authorizes the receiver to question the court's decree by appeal. In the general expression of this decree there is nothing to indicate that it was written with the view of conferring unusual authority upon the receiver, or that the court had in contemplation the propriety of the receiver's appeal from its future orders."

The language is directly applicable here. The court gave permission to bring the suit, and the same court heard and determined the cause adversely to the receiver. There is nothing in the order permitting suits indicating any purpose to grant leave to appeal from any order or decree of that court. The court has by its decree determined that there is no merit in the suit, and dismissed the bill. "The receiver is the mere creature of the court. He must give heed to his master's voice." Without the permission of the court he had no authority to bring suit, and it is entirely within the same line of reasoning to require that he obtain leave to prosecute the appeal from an adverse decree from the same court. There are, of course, exceptions to the rule, but with these we are not concerned.

The court may deem an appeal a useless consumption of the fund of the estate, as well also as productive of unnecessary delay in its administration. We doubt not that in all proper cases the court would give the permission for review of the decree, a matter resting largely in the sound discretion of the court, and for an abuse of the discretion the party aggrieved is not without remedy.

The principles recognized in *Cobbs v. Vizard Inv. Co.*, supra, seem decisive of this case, and in the conclusion of the opinion the rule here invoked was declared a salutary one. We adopt, as applicable here, the concluding sentence of that opinion:

"The court may, in its discretion, authorize its receiver to bring its decree under review by appeal, but in this case it has not done so, and the appeal must be dismissed."

Appeal dismissed.

ANDERSON, C. J., and MCCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 508)

NORTON et al. v. ORENDORFF. (No. 752.)
(Supreme Court of Alabama. Nov. 7, 1914.
On Application for Rehearing,
Dec. 17, 1914.)

1. PLEADING \S 251—AMENDMENT—SUFFICIENCY.

An amendment to a petition by alleging new facts "and by striking out those parts" was confusing and not good pleading.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 734, 735; Dec. Dig. \S 251.]

2. LANDLORD AND TENANT \S 251—LANDLORD'S LIEN—LIABILITY FOR DESTRUCTION.

In an action for the destruction of a landlord's lien upon cotton produced by a tenant, defendant's acts with reference to it, done without knowledge of the lien, or of facts which upon reasonable inquiry would have led to that knowledge, and innocently as a friend of the tenant in carrying the cotton to the compress, receiving tickets for and samples of it, and offering it for sale, so that the tenant received the proceeds, did not make him liable, since there was no wrongful act.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 1021, 1027-1030; Dec. Dig. \S 251.]

On Application for Rehearing.

3. PRINCIPAL AND AGENT \S 136—LIABILITY OF AGENT—INTERMEDDLING WITH PROPERTY.

An agent intermeddling with the property or possession of another is liable to such other in an action for damages, although ignorant of such other's title or possession.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. \S 447-450, 476-491; Dec. Dig. \S 136.]

4. LANDLORD AND TENANT \S 251—"LANDLORD'S LIEN"—NOTE.

A "landlord's lien" confers no right of property in, or possession of, the crop, but simply a right to charge it in priority to all other rights, except those of a purchaser without notice, with a payment of the rent, so that, if it is removed or destroyed, he can maintain no action against the wrongdoer founded on the right of property or possession.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. \S 1021, 1027-1030; Dec. Dig. \S 251.]

Appeal from Circuit Court, Morgan County; D. W. Speake, Judge.

Action by Eliza A. Orendorff against Lawrence W. Norton and another. Judgment for plaintiff, and defendant Norton appeals. Transferred from Court of Appeals. Reversed and remanded.

Wert & Lynne, of Decatur, for appellant.
E. W. Godbey, of Decatur, for appellee.

DE GRAFFENRIED, J. The following is the declaration upon which this case was tried, and upon which a judgment was rendered against one Prince and the appellant Norton:

"Count 2. Plaintiff claims of defendants a like sum of \$125, for that heretofore, to wit, on the 14th day of November, 1911, the plaintiff had a lien upon two certain bales of cotton, which, or plaintiff's landlord's lien on which, the defendants on or about said date did wrongfully dispose of and make way with. And plaintiff avers that for the year 1911 the said R. L. Prince was a tenant of plaintiff's upon and with respect to a certain plantation known

as the Orendorff place, located near Hillsboro, and in Lawrence county, Ala.; that the rent of the said plantation, which the said R. L. Prince was to pay to the plaintiff for the year 1911, amounted to a large sum of money, to wit, the sum of \$625. And plaintiff avers that said rent to the extent of more than \$100 the said defendant Prince failed to pay or satisfy. And plaintiff further avers that said Prince, in the year 1911, raised a large amount of cotton on said plantation, on which the plaintiff had a lien as landlord under the laws of the state of Alabama. Said cotton was sold and made way with by defendants, whereby plaintiff's rent was wholly lost to her, and her lien defeated and destroyed; hence this suit."

"Plaintiff amends second count of complaint by averring that defendants took charge of and disposed of the cotton in Decatur, Ala., whereby plaintiff lost her lien thereon, to wit, two bales of cotton raised on said plantation and brought to Decatur, Ala., by said R. L. Prince and one Patterson, and taken to the compress by said Patterson and defendant Norton, and by striking out those parts."

1. Courts of last resort, in passing upon questions presented by demurrer, must, out of necessity, resolve themselves into critics, and must occasionally point out the inadvertent lapse of some counsel into such obscurity of expression in some pleading as to destroy its potency. In one of our own cases the learned justice—and he was a most excellent judge—who wrote the opinion for the court, said:

"When there is no generally received English pronunciation of the names as one and the same, and the difference in sound is not so slight as to be scarcely perceptible, the doctrine of idem sonans cannot be applied without the aid of extrinsic evidence, unless when sound and power are given to the letters, as required by the principles of pronunciation, the names have the same pronunciation or sound." *Munkers v. State*, 87 Ala. 94, 6 South. 357.

The quoted language from the above case, no doubt, gives a correct definition of idem sonans, but, to use the language of Mayfield's Digest (see 1 Mayfield, p. 417, subd. 9, and note), the "statements seem confused."

[1] That the above declaration upon which this case was tried is, growing out of the amendment, subject to the criticism that its statements are "confusing," there can be no doubt. What the plaintiff meant to strike out of the second count of the complaint above quoted we do not know. All that we know is that she struck out "those parts." This case must be, for reasons set out below, again tried, and, as this is true, we deem it necessary to only call attention to the condition of the complaint as it now exists. It can, of course, be so amended upon the next trial as to meet the requirements of good pleading.

[2] 2. There was evidence in this case tending to show that the defendant Norton had no knowledge of the existence of the plaintiff's lien upon the cotton at the time of the alleged destruction of the lien. There was evidence tending to show that Prince, the tenant, was sick on the day of the alleged destruction of the lien, and that all that Norton

did with reference to the cotton was done without the knowledge of the landlord's lien, and that it was innocently done as a friend of Prince and out of respect to the fact that Prince was sick. Of course, if Prince used Norton as an innocent instrument in disposing of the cotton, then Norton, the victim of misplaced confidence, is not liable to the plaintiff. If Prince was sick, and Norton, as his friend, without knowledge of the existence of the plaintiff's lien or of facts which upon reasonable inquiry would have placed him in possession of that knowledge, innocently carried the cotton to the compress, received tickets for and samples of the cotton, and innocently offered that cotton for sale or innocently sold it, and Prince received the proceeds, then certainly Norton is not liable to the plaintiff. An action on the case is an equitable action, and, under the circumstances named, the plaintiff would not be entitled to a judgment against Norton. *Teat v. Chapman & Co.*, 1 Ala. App. 491-498, 56 South. 287; *Foxworth v. Brown Bros.*, 120 Ala. 59, 24 South. 1.

The case of *Leuthold v. Fairchild*, 35 Minn. 99-111, 27 N. W. 503, 28 N. W. 218, cited in 1 *Jaggard on Torts*, p. 287, seems to be decisive of the above proposition. The complaint alleges a wrongful disposition of the cotton, and if Norton acted without knowledge of the existence of the plaintiff's lien, or was not possessed of facts putting him on inquiry as to plaintiff's lien, then, in so far as he is concerned, the disposition of the cotton cannot be said to have been wrongful. *Leuthold v. Fairchild*, supra.

3. The legal principles governing cases of this sort are simple and plain, and we deem it unnecessary to discuss any of the other questions presented by this record. Many of the rulings of the trial court were not in accordance with the above views, and for that reason the judgment of the court below is reversed, and the cause is remanded to that court for further proceedings.

Reversed and remanded.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

On Application for Rehearing.

DE GRAFFENRIED, J. There is abundant authority for the proposition that a master cannot confer upon a servant authority to commit a tort upon the property or possession of another. *Lee v. Mathews*, 10 Ala. 682, 44 Am. Dec. 498; *Hudmon Bros. v. Du Bose*, 85 Ala. 446, 5 South. 162, 2 L. R. A. 475.

[3] For the above reason it has frequently been held that an agent intermeddling with the property or possession of another is liable to such other, in an action for damages, although ignorant of the title or possession of such other. *Lee v. Mathews*, supra, 10 Ala. 682, 44 Am. Dec. 498.

[4] In this case Mrs. Orendorff did not own the cotton, and she had never had possession of the cotton. The party for whom Norton acted had the legal title to the cotton and was in possession of the cotton, and there was evidence tending to show that all that Norton did was without knowledge of the lien of Mrs. Orendorff.

In the case of *Hussey, Adm'r, v. Peebles*, 53 Ala. 432, this court, through Brickell, C. J., said:

"No right of property, nor right of possession of the crop, is conferred on the landlord, simply a right to charge it in priority to all other rights (except those of a purchaser without notice), with the payment of the rent. Of consequence, if it is removed or destroyed, he can maintain no action against the wrongdoer, which is founded on the right of property, or the right of possession."

We think that the situation developed by the evidence in this case differentiates it from the cases of *Lee v. Mathews*, supra, and *Hudmon Bros. v. Du Bose*, supra, and brings it within the principle announced in *Merchants' & Planters' Bank v. Meyer*, 56 Ark. 499, 20 S. W. 406.

An examination of the case of *Merchants' & Planters' Bank v. Meyer*, supra, will demonstrate that the Supreme Court of Arkansas, when it delivered the opinion in that case, had in mind the decisions of this court upon the subject now in hand.

In this case there was evidence tending to show that the defendant Norton was not guilty of converting any property which belonged to Mrs. Orendorff. There was also evidence tending to show that he violated no possession of Mrs. Orendorff, and that all that he did was at the request of the owner of the legal title to the property, who had possession of it, and without notice, actual or constructive, of the lien which Mrs. Orendorff, as landlord, had upon the cotton.

In our opinion, therefore, this application for a rehearing should be overruled. *Merchants' & Planters' Bank v. Meyer*, supra; *Lee v. Mathews*, supra; *Hudmon Bros. v. Du Bose*, supra; *Hussey, Adm'r, v. Peebles*, supra; *Nelson v. Iverson*, 17 Ala. 216; *Thompson v. Powell*, 77 Ala. 391.

Application overruled.

(191 Ala. 158)

ANDERS v. SANDLIN et al. (No. 658.)

(Supreme Court of Alabama. Nov. 7, 1914.

Rehearing Denied Dec. 17, 1914.)

1. BILLS AND NOTES   92  WANT OF CONSIDERATION.

Complainant agreed with a mortgagor to buy the land at foreclosure and to have the use of it for a year to reimburse him, and that the amount paid was not to exceed the amount due on the mortgage, \$117, and that if the amount bid by complainant exceeded that amount, he should be relieved from paying more, and acquired possession of the land for a year by paying the amount due, which was less than half of the sum bid at the sale and less than the rental value of \$150, and acknowledged the re-

lation of tenant, and, after paying rent for a number of years, and while in possession, executed a note for rent to the landlord's guardian. *Held*, that complainant could not contend that the note was without consideration on the ground that he owned the legal title to the land, and it was immaterial that the mortgagor's interest was only a life estate, and that the note was made to the guardian of the mortgagor.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 166-173, 175-205, 208-212; Dec. Dig. ¶62.]

2. LANDLORD AND TENANT ¶62—DENIAL OF LANDLORD'S TITLE.

A tenant while occupying the leased premises is estopped from denying the title of the landlord, and before he can assert a title to the rented premises in himself or in any one in hostility to the landlord, he must surrender possession, so that complainant, in a bill to cancel a note given for rent could not assert legal title in himself in hostility to that of his landlord.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 152-158, 168, 170, 189; Dec. Dig. ¶62.]

3. EQUITY ¶65—MAXIM—CLEAN HANDS.

The maxim that "he who comes into equity must come with clean hands" is not confined alone to those cases where fraud or illegality prevents a suitor from relief in equity, but any unconscientious conduct connected with the controversy to which he is a party will suffice to deny him relief.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. ¶65.]

4. EQUITY ¶367—DISMISSAL OF BILL—EFFECT AS TO CROSS-BILL.

On a bill to cancel a note given for rent, a cross-bill, seeking a mere personal judgment and having no independent equity, was carried out by a dismissal of the original bill.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 773, 774; Dec. Dig. ¶367.]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Bill by James A. Anders against Randolph Sandlin and others, for cancellation of note, with cross-bill by Sandlin. Decree for defendant, with order of reference on the cross-bill, and plaintiff appeals. Corrected and affirmed.

O. Kyle, of Decatur, for appellant. Wert & Lynne, of Decatur, and Tidwell & Sample, of New Decatur, for appellee.

GARDNER, J. The bill in this case was filed by appellant, for the cancellation of a certain negotiable note, not then due, executed by him and payable to respondent Randolph Sandlin, who claimed to be the guardian of one James A. Sherrill, a non compos mentis, on the ground of fraud in its procurement, and on the further ground that there was no consideration therefor. The equity of the bill was not questioned. So. States Fire Ins. Co. v. Whatley, 173 Ala. 101, 55 South. 620; Ahlrichs v. Parker, 65 South. 815; Merritt v. Ehrman, 116 Ala. 278, 22 South. 514; Andrews v. Frierson, 134 Ala. 626, 33 South. 6. Respondent Randolph Sandlin was made party to the suit individually, and as guardian of James A. Sherrill.

His answer disclosed only an interest in the cause as guardian for said Sherrill, and the answer was made a cross-bill.

During the progress of the cause the said ward, James A. Sherrill, died, and the decree of the chancellor dismisses the cross-bill, and as this suit is by the complainant alone whose original bill was dismissed, the said cross-bill needs no consideration. Upon suggestion of the death of the said James A. Sherrill, the court permitted the duly appointed administrator of his estate to file answer and cross-bill. This cross-bill also needs no further reference at this time, for reasons hereinafter stated.

The chancellor found from the evidence that the charge of fraud in the procurement of the note was not sustained. A careful review of the record convinces us that in this conclusion he was very clearly correct, and we content ourselves with this statement, without entering into any discussion of this feature of the bill.

[1] The remaining insistence for relief is that the note was without consideration, based upon the assumption that the complainant had the legal title to the certain 160-acre tract of land in Morgan county described in the bill, and that the note, being given for rent, was without consideration because he was the owner thereof and in possession.

Although, from this record, we may be inclined to the view that James A. Sherrill was the owner of only a life estate in said 160 acres of land, yet (as hereinafter appears, complainant's only claim of title is through said Sherrill) it is in fact, so far as concerns the result of this case, immaterial whether said Sherrill was the owner in fee of the land or the owner of only a life estate.

While there is some conflict in the evidence, we are well convinced of the following facts as the established truth of this case: James A. Sherrill executed his mortgage on said 160 acres of land, to one Echols, for \$100, due December 1, 1906. Upon the land's being advertised for sale under the mortgage, upon default in payment thereof, said Sherrill, after discussion with complainant and with one Sample, an attorney, agreed with complainant that he (complainant) buy in the land at the foreclosure sale, and have the use of the same for the year 1906, to reimburse him for the amount expended; that the sum to be paid by complainant was in no event to exceed the amount due on the mortgage, to wit, \$117 in round figures; that if the sum bid by complainant should exceed the amount due, complainant was relieved from paying the same, and was to pay only the amount due. While there were doubtless numerous negotiations as to this agreement, we may, from the evidence, very reasonably conclude: That the same was consummated on the day of the sale, January 2, 1906. There were other bidders at the sale, complainant being the highest at \$250,

and it was agreed between the parties that the difference between the sum bid and the amount due be not paid, but that complainant, upon payment of the amount actually due, should take possession, and be reimbursed out of the use of the place for that year. Foreclosure deed was made to complainant purchaser, and under this agreement he acquired possession. That after that year complainant rented the place from Sherrill at \$125 per year, paying the rent therefor to one Stewart for said Sherrill. That such rental was also made for the year 1909, but that Sherrill was sent to the asylum in the fall of 1909, and complainant did not pay the full amount, but only \$65 of the rent, as testified to by Stewart. Respondent Randolph Sandlin was appointed guardian for said Sherrill, and as such demanded rent note for the year 1910. This was at first refused. Soon thereafter said Sandlin demanded possession as guardian for said Sherrill, which demand, being read to complainant, stimulated him to go to see the attorney, John R. Sample, with whom he and Sherrill had advised at the time of the purchase at foreclosure sale. We are convinced that in this interview complainant was reminded by Sample of the original agreement between himself and Sherrill, and that there was no deception practiced, but a full disclosure made. That after this complainant came to said Sandlin and executed the note, the subject-matter of this litigation, which note shows upon its face that it was given for the rent of the James A. Sherrill place; and while the note is payable to Randolph Sandlin, yet it is made clear from the evidence that he was acting for his ward, and that James A. Sherrill, the ward, is the beneficial owner thereof. Sandlin was made a party respondent as an individual and as guardian, and then both the legal, and the equitable title were before the court. *McGhee v. Importers*, etc., Bank, 93 Ala. 192, 9 South. 734; *Moore v. Pope*, 97 Ala. 462, 11 South. 840; *Dawson v. Burrus & Williams*, 73 Ala. 111. The complainant continued in possession and, a short time before this note became due, filed this bill for its cancellation.

We have made no effort to set out this evidence in detail, but have merely, in a general way, attempted to state the facts, of the truth of which we are convinced by this record.

[2] It thus appears that this complainant, by agreement with said Sherrill, acquired possession of the land by paying the amount actually due on the mortgage, which was less than half the sum bid at the sale. The difference between the two sums would, of course, have gone to Sherrill, but the amount thereof, under the agreement, complainant was not to pay. There were competitive bidders, running the bid as high as \$250, but by this advantageous arrangement complainant outbid the others. The difference between the sum bid and that actually

paid by complainant constituted a very valuable consideration, released by Sherrill to complainant and for his benefit. He thus acquired possession under agreement that the use of the place for 1906 would reimburse him. The rental value of the land is shown to have been \$150. Complainant had known Sherrill for a long number of years and worked for him when a boy. Having thus acquired possession, he acknowledges the relation of landlord and tenant as existing between him and Sherrill, and pays rent for the subsequent years, some years executing rent contracts or notes. After much hesitation, but with full time for reflection and consideration, he executes this note to respondent Sandlin upon his demand as guardian, and after said Sandlin, as guardian, had demanded possession. He retains possession, then, for the year 1910, and now seeks to show that the note is without consideration, and void, because he held the legal title and was the owner of the land. He restores no possession to the guardian, nor offers to do so. He has acknowledged the rental relationship with Sherrill himself, and after Sherrill's confinement in the asylum for the insane, with his guardian. He first acquires possession under such rental agreement as above noted. He reaps the full benefit, and, after having done so, asks that he be permitted in a court of equity to now show that there is no consideration for the note, by denying any title in the landlord and setting up a title in himself. This, under the evidence in this case, he cannot be permitted to do.

"A tenant while occupying the leased premises is estopped from denying the title of the landlord, and before he can assert a title to the rented premises in himself or in any one in hostility to his landlord, he must surrender the possession of the premises." *Davis v. Williams*, 130 Ala. 530 (2d headnote), 30 South. 488. 54 L. R. A. 749, 89 Am. St. Rep. 55; and the following quotation found in that case: "For reasons of public policy a tenant is never allowed to dispute his landlord's title after having accepted possession under him. This rule is elementary."

See, also, *McLeod v. McEachern*, 65 South. 790.

True, the bill in this case is not filed to remove a cloud on title, but for cancellation of the rent note, yet the very ground for relief insisted upon rests upon the assertion of legal title in the complainant, the tenant, as in hostility to the landlord, and such title is thus sought to be directly involved.

In what we have here said, it has been assumed (which we hold is established by the evidence) that there was no fraud or misrepresentation, and that the note was executed after full consideration and with full knowledge by the complainant.

The chancellor held that the agreement between complainant and Sherrill, followed by the use of the land for the year 1906, worked a redemption of the same. Whether such could be considered as the effect of such

agreement and consummation thereof, or whether such agreement would fall under the doctrine of *Deming v. Lee*, 174 Ala. 410, 56 South. 921, as to resulting trust, or what in fact was the effect thereof, need not be, and is not determined.

[3] We think the above principle suffices for a determination of the result. And, indeed, the principle alluded to in *Harton v. Little*, 65 South. 951, may be said to have some bearing, as the maxim, "He who comes into equity must come with clean hands," is not confined alone to those cases where fraud or illegality prevents a suitor from obtaining relief in equity, but, as said by Mr. Pomeroy:

"Any really unconscientious conduct, connected with the controversy, to which he is a party, will repel him from the forum whose very foundation is good conscience." *Eq. Jur.*, vol. 1. § 404.

We are persuaded that the complainant, under the evidence in this case, is in no position to say that the note is without consideration, for the reason that he had the title to the land. The decree dismissing his bill was proper.

[4] The administrator of Sherrill, in his cross-bill, sought a cancellation of the foreclosure deed made to complainant, and also sought a personal judgment against him for the balance due on the note. The chancellor refused to give relief upon the cross-bill, as to cancellation of the deed, for the reasons stated in his decree, but did order a reference to ascertain the balance due on the note, to the end of granting a personal judgment against complainant. There is no cross-appeal, but the appeal is by the complainant only. We are therefore only to review the action of the court in ordering the reference to the end of entering a personal judgment for the balance due. It is of course clear that such feature of the cross-bill contains no independent equity. It is the general rule, established by the decisions of this court, that a cross-bill which shows no equitable relief growing out of the subject-matter of the original bill, and which has no independent equity which would sustain the jurisdiction of the court, is carried out by the dismissal of the original bill. *Meyer v. Calera Land Co.*, 133 Ala. 554, 31 South. 938; *Etowah Mining Co. v. Wills Valley, etc., Co.*, 121 Ala. 672, 25 South. 720; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688; *Sims' Chancery Prac.* § 649. This feature of the cross-bill, therefore, seeking a mere personal judgment, and having no independent equity, is carried out by a dismissal of the original bill. The chancellor ordered a reference to the end of granting relief as to this feature of the cross-bill. This, we conclude, is error which may be here corrected by striking from the decree such order of reference. This is accordingly done; and the decree of the

chancellor, as thus corrected, is here affirmed.

Corrected and affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 514)

LOUISVILLE & N. R. CO. v. GRAY.

(No. 714.)

(Supreme Court of Alabama. Nov. 7, 1914. On Application for Rehearing, Dec. 17, 1914.)

1. MASTER AND SERVANT ~~243~~—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—VIOLATION OF RULE OF EMPLOYMENT.

An employer, to sustain a plea of contributory negligence, may show that the injured employé, at the time of the accident, violated a known rule of employment, and that the violation had a causal connection or probable causal connection with the injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 682, 759-775; Dec. Dig. ~~243~~.]

On Application for Rehearing.

2. WITNESSES ~~280~~—CROSS-EXAMINATION—FORM OF QUESTION.

Where, in an action for injuries to an employé, the employer relied on a violation by the employé of a rule of employment, a question asked the employé, "Isn't there a rule there that required you to put a light on the engine you was working on?" called for the employé's knowledge of the rule in force at the time of the accident, and a general objection was properly overruled.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 988, 990-993; Dec. Dig. ~~280~~.]

3. EVIDENCE ~~157~~—BEST AND SECONDARY EVIDENCE.

In the absence of anything to show that an employer's rule had been printed or reduced to writing, the rule could be shown by parol.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460-470; Dec. Dig. ~~157~~.]

4. MASTER AND SERVANT ~~264~~—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—PLEADINGS—EVIDENCE.

Where the minute entries showed that an action for injury to an employé was tried on the pleading of the general issue, with leave to give in defense any matter that could be well pleaded, evidence of a rule of employment and of the employé's violation thereof was within the issues.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 861-876; Dec. Dig. ~~264~~.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by John G. Gray against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, and application for rehearing overruled.

Eyster & Eyster, of New Decatur, for appellant. Wert & Lynne, of Decatur, for appellee.

DE GRAFFENRIED, J. The plaintiff was injured while at work, or while he claims that he was at work, on a dead engine in a roundhouse at Decatur. The injury occurred

about 1 o'clock at night. While the plaintiff was at work, or claims that he was at work, on the engine, another engine was run into the roundhouse, and, while this latter engine was being put in place, it struck a tank, causing it to collide with the dead engine upon which the plaintiff was at work, or upon which he claims he was at work, and the plaintiff thus received painful and serious injuries.

[1] According to the testimony of the plaintiff, he had his lantern or light sitting on the floor of the roundhouse when the injury occurred. While the plaintiff was on the stand testifying as a witness in his own behalf, the defendant offered to prove by him that there was a rule at the roundhouse requiring servants, while at work on a dead engine, to put a light on the engine. This rule—if there was such a rule—was a reasonable one. The reasons for it are plain. A light upon a dead engine would herald to the other employes of the defendant that there was a man at work upon the engine, and that therefore they should govern themselves accordingly. In this case the engineer in charge of the live engine testified that he did not know of the presence of the plaintiff on or near the dead engine, and it was for the jury—if there was a rule which the plaintiff had violated—to say whether the violation by the plaintiff of this rule was not a direct and contributing cause of his injury. Under the pleadings in this case, the trial court should have required the plaintiff to testify on the subject above referred to. *Dresser on Employes' Liability*, § 118, pp. 625, 626; *Cogbill v. L. & N. R. R. Co.*, 152 Ala. 156, 44 South. 683; 8 *Ency. Ev.* pp. 544-546.

We do not know why the trial court sustained the plaintiff's objection to the question calling for the above testimony, but the record shows the ruling and an appropriate exception. It seems to be a rule of universal application, in cases of this sort, that a defendant, to sustain a plea of contributory negligence, may show that, at the time of the injury, the servant was violating a rule of the master, and that he knew of the existence of the rule, provided, of course, the violation of the rule had a causal connection, or probably had a causal connection, with the injury. The record in this case fails to show any reason why the master did not have the right to show the existence of this rule, and knowledge of its existence on the part of the servant, by the testimony of the plaintiff himself. The testimony sought to be elicited was relevant and material, and, in sustaining the plaintiff's objection to the question calling for it, the trial court committed reversible error.

2. There are many questions presented by briefs of counsel, which we have not above discussed. This is an ordinary suit under the *Employers' Liability Act*, and the other questions discussed in briefs of counsel, to

which we make no reference in this opinion, have been frequently before the courts, and fully determined, and we deem it unnecessary to discuss them.

Reversed and remanded.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

On Application for Rehearing.

DE GRAFFENRIED, J. It is earnestly insisted upon this application for rehearing that the court erred in reversing the judgment of the court below upon the grounds stated in the above opinion for the following reasons:

[2] First. It is insisted that the question calling for the testimony as to the rule was a question to which there was only a general objection by the plaintiff, and that if there is any ground upon which the action of the trial court, in sustaining the objection to the question, can be upheld by this court, then that it is the duty of this court to uphold the action of the trial court.

The question which called for the above rule was in the following language: "Isn't there a rule there that required you to put a light on the engine you was working on?" The undisputed evidence showed that the plaintiff, at the time of his injuries, was at work, or claimed to be at work, on an engine in a roundhouse, and that he received his injuries at night while so at work. While the above question is not in perfect grammatical form, it is perfectly plain that it called for the plaintiff's knowledge as to the existence of a rule which was in operation at the roundhouse at the time he received his injuries. To hold that the question might refer to a rule which was adopted subsequent to the time when the plaintiff was injured would do violence to the plain meaning of the question. The reasoning of this court in *Watters v. Brown*, 177 Ala. 78, 58 South. 293, has no applicability to the question in hand.

[3] Second. There was no evidence in this case tending to show that the rule inquired about had ever been printed or reduced to writing. The proposition that "a witness cannot testify as to the terms of a rule adopted by a railroad company, which is contained in a printed book of rules, unless the book itself is produced, or its absence is accounted for," is familiar. *Ga. P. R. Co. v. Propst*, 90 Ala. 1, 7 South. 635; *L. & N. R. R. Co. v. Orr*, 94 Ala. 602, 10 South. 187.

As there was nothing in the evidence in this case tending to show that the rule inquired about—a rule operative in a roundhouse—was in writing, the action of the trial court in sustaining the plaintiff's objection to the question cannot be upheld upon this ground. While this court has by a long line of decisions declared that error in excluding evidence upon a general objection to

a question calling for such evidence will not be imputed to the trial court if the ruling can be sustained on any ground, nevertheless, to uphold the action of the trial court on this particular ruling on the stated ground would, we think, be stretching the rule to an unreasonable length.

[4] Third. It is intimated that the pleadings were not broad enough to cover the evidence which was called for by the above question. In reply to this we desire to say that the record before us shows that on the 6th day of January, 1913, the court overruled the demurrers to the complaint, and the minutes of the court as of that date then proceeded as follows:

"Thereupon defendant pleads general issue with leave to give in defense any matter that can be well pleaded."

It further appears that on February 11, 1913, the cause was reopened for further settlement of the pleadings, and that the court on that day made the following order upon its minutes:

"Come the parties by their attorneys into open court, and upon the order of the court that this cause be reopened for the further settlement of pleadings by leave of the court first had and obtained, plaintiff amends first count of complaint. Thereupon the defendant refiles former demurrers to complaint as amended, and, the same being submitted to and duly considered by the court, it is therefore considered and adjudged that said demurrers refiled, to complaint, as amended, be and the same are hereby overruled. Issue joined on plea of general issue, with leave to give in defense any matters that could be well pleaded. Thereupon, by leave of the court first had and obtained, plaintiff files counts A and B; and it is agreed that demurrers be filed later."

The counts upon which this case was tried were numbered 1, 2, 3, A, and B. It is plain from the above quotation of the minutes as of February 11, 1913, that only the pleadings were that day before the court, and that "issue was joined on plea of general issue, with leave to give in defense any matters that could be well pleaded," to the entire complaint, and that the plaintiff was given leave to file counts A and B to the complaint, and that the defendant was given leave to file demurrers to said counts A and B at a later period.

On June 20th the demurrers to count A and B were overruled, and the court states in its minutes that thereupon, "the pleadings in this cause being now settled and issues formed," the case was tried by the jury. We think that the minute entries plainly show that this case was tried upon the plea of the general issue, with leave to give in evidence any matters of defense which could be properly pleaded to the complaint, and the bill of exceptions shows beyond question that the case was so tried by the court.

We have indulged in this reply to the application for a rehearing, because we think that the more the record is examined the plainer it is made to appear that the judg-

ment of the court below should be reversed for the reasons stated in the above opinion.

The application for a rehearing is overruled. All the Justices concur.

(191 Ala. 182)

O'NEAL et al. v. COOPER et al. (No. 723.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. TENANCY IN COMMON \S 35—RIGHT TO CONVEY INTEREST.

A tenant in common may convey his undivided interest without knowledge or consent of his cotenants.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. \S 27; Dec. Dig. \S 35.]

2. PARTITION \S 14—RIGHT OF COTENANTS.

A cotenant has the right to a partition of the common property.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 37; Dec. Dig. \S 14.]

3. PARTITION \S 18—COTENANTS—EFFECT OF DEED OF PART OF INTEREST.

Where a cotenant deeds a part of the land held in common, the other cotenants may have partition irrespective of such deed, but such purchaser's rights will be protected in equity if it can be done without prejudice to the other cotenants.

[Ed. Note.—For other cases, see Partition, Cent. Dig. \S 86, 81; Dec. Dig. \S 13.]

4. EQUITY \S 150—PLEADING—MULTIFARIOUSNESS.

Purchasers of part of the interest of a cotenant are proper parties to partition proceedings between the cotenants, and their joinder does not make the bill multifarious.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 342, 371-379; Dec. Dig. \S 150.]

5. EQUITY \S 147—PLEADING—"MULTIFARIOUSNESS."

"Multifariousness" abstractly is incapable of an accurate definition, but includes those cases where a party is brought as a defendant on a record with a large portion of which, and, in the case made by which, he has no connection whatever.

[Ed. Note.—For other cases, see Equity, Cent. Dig. \S 340; Dec. Dig. \S 147.]

For other definitions, see Words and Phrases, First and Second Series, Multifariousness.]

Appeal from Chancery Court, Lauderdale County; W. H. Simpson, Chancellor.

Bill for partition by James P. Cooper and others against Emmet O'Neal and others. From a decree for complainants, defendants appeal. Affirmed.

R. B. Evins, of Greensboro, for appellants. Kirk, Carmichael & Rather, of Tusculumbia, and Mitchell & Hughston, of Florence, for appellees.

GARDNER, J. Bill for sale of land for partition among joint owners, or tenants in common. There was demurrer by some of the respondents to the bill as amended, for multifariousness, which demurrer was overruled, and this ruling of the court presents the only question argued in brief for appellant.

The case as presented by the bill is, we think, properly and concisely stated by counsel for appellees, in brief, as follows:

"The bill was filed by Cooper and others, appellees to sell for division E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 9, township 2, range 9 west, in Lauderdale county. It is alleged that said tract was formerly owned by William Cooper and L. B. Cooper and E. A. O'Neal, who held it during their lives as tenants in common. All the parties to the bill are alleged to stand in privity of title with these, or some one of these, original cotenants, either by inheritance or by conveyance from some successor in title. The widow (Olivia O'Neal) of E. A. O'Neal took by will his undivided one-third interest. Appellant Emmet O'Neal is her son and the executor of her will. He inherited an undivided one-eighteenth interest. In 1904, Olivia O'Neal conveyed to defendant Turner Williams her interest in a described 10 acres of the 80. In 1910, defendant (and appellant) Emmet O'Neal conveyed to defendants Bailey and his wife his interest in 20 acres of the 80. All the O'Neal defendants and Turner Williams and the Baileys demurred to the bill for misjoinder of parties and for multifariousness; but only Emmet O'Neal, as an individual and as executor of Olivia O'Neal's estate, has appealed. The case proceeded to final decree, and the lands were ordered sold, but in three separate parcels to conform to the conveyances made."

It thus appears that all the parties stood in privity of title with some one of the original cotenants, either by inheritance or by purchase. The widow of E. A. O'Neal took by will his undivided one-third interest, and she, in 1904, conveyed to defendant Turner Williams her interest in a described 10 acres of the eighty. Appellant Emmet O'Neal inherited his interest in the 80 acres from his mother, and he, in 1910, conveyed his interest in 20 acres of the 80 to defendants Bailey and his wife. No effort at a conveyance of only a part of the 80 acres seems to have been made by any one standing in privity with the title of the original cotenants, except by the two conveyances above mentioned made by those in privity with title of the original cotenant, E. A. O'Neal. As previously stated, the question of multifariousness is "the one question argued in brief for appellant.

[1] It is, of course, universally recognized that a cotenant may convey at his pleasure his undivided interest in all the lands held in common without the knowledge or consent of his companions in interest. Such a conveyance places the grantee in the deed in the same position that the grantor had previously occupied; no possible injury could result to the other cotenants in the tract.

[2] The rule is further recognized that a cotenant has a right to a partition of the common property. As was said in the case of *Gore v. Dickinson*, 98 Ala. 363, 11 South. 743, 39 Am. St. Rep. 67:

"So, also, it is settled that neither the fact that inconvenience or injury will result, or mischief be entailed upon the property, or that a division may be embarrassed by difficulties, will deprive a cotenant of the right to demand a partition of the common property."

[3] In recognition of this right on the part of a cotenant, it is held by the decided weight of authority that a deed from a cotenant of a part of the land held in common cannot in any way operate to the prejudice

of the other tenants in common. And it has therefore been held that the other tenants in common have a right to have the land partitioned unaffected by such deed. In such case, however, it is held that a court of equity will protect the rights of such purchaser, if it can be done without prejudice to the other cotenants.

Speaking to this same subject, it was said in the case of *Stark v. Barrett*, 15 Cal. 368, as follows:

"It is the settled law, and hence a conveyance by one tenant of a parcel of the general tract, owned by several, is inoperative to impair any of the rights of his cotenants. The conveyance must be subject to the ultimate determination of their rights, and upon obvious grounds. One tenant cannot appropriate to himself any particular parcel of the general tract; as, upon a partition, which may be claimed by the cotenants at any time, the parcel may be entirely set apart in severalty to the cotenant. He cannot defeat its possible result while maintaining his interest, nor can he defeat it by a transfer of his interest; he cannot, of course, invest his grantee with rights greater than he possesses."

Mr. Freeman, in his work on *Cotenancy and Partition* (section 203), quotes the following from an authority cited in the note:

"The grantee then acquires all the interest of his grantor in the special tract, and that interest is the tenancy in the special tract in common with the cotenants of his grantor; but his conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, and the general tract is therefore liable to partition, so far as the cotenants of the grantor are concerned, as it would be had the conveyance of the special tract not been made."

As holding to this view, we cite the following: *Worthington v. Staunton*, 16 W. Va. 208; *Kenoy v. Brown*, 82 Miss. 607, 35 South. 163, 100 Am. St. Rep. 645; *Parker v. Harrison*, 63 Miss. 225; *Dorn v. Dunham*, 24 Tex. 366; *Hazen v. Webb*, 65 Kan. 38, 68 Pac. 1096, 93 Am. St. Rep. 276; *Freeman on Cotenancy and Partition*, §§ 199 to 205, inclusive; 30 Cyc. 176; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

[4] These authorities therefore demonstrate that one cotenant cannot, by a sale of his interest in only a part of a common tract, thus prejudice the rights of his cotenants in the property of the common estate, and that in the partition proceeding such grantees of only a part of said common estate from one of said cotenants are proper parties, and indeed their interest is treated as a tenancy in the special tract in common with the cotenants of their grantor, and that the conveyance did not sever the special tract from the general tract, so far as the cotenants are concerned, but that such general tract is liable to a partition, so far as the cotenants are concerned as would be had the conveyance of the special tract not been made. As to the right of cotenants in common to a partition of the common property, we cite, also, in this connection, *Upshaw v. Upshaw*, 180 Ala. 204, 60 South. 804; *McLeod v. McLeod*, 169 Ala. 654, 53

South. 834; *Hollis v. Watkins*, 66 South. 29, present term.

We need not here stop to inquire to what extent a court of equity would go in the protection of the interest of a grantee of a part of such common estate in a partition proceeding, but the authorities show that their interests will be fully protected in such court if consistent with the rights of the cotenants of the common tract. Our statutes (sections 5232-5233, Code 1907) were evidently intended for a liberal use of the power of a court of equity in proceedings for the partition or sale for partition of estates of tenants in common.

The bill here does not seek a partition in kind of the property, but giving full effect to the conveyances made, and out of respect for the rights and interests of such grantees of a part only of the common estate, prays a sale of the property for division into three separate tracts in accordance with the purchases so made. All of the parties are brought before the court, and the rights of each are by the decree fully preserved.

[5] No universal rule in regard to "multifariousness" is admitted to be established as to cover all possible cases. As said in the case of *Adams v. Jones*, 68 Ala. 117:

"Multifariousness, abstractly, has been properly said to be incapable of an accurate definition; but is generally understood to include those cases 'where a party is brought as a defendant on a record, with a large portion of which, and in the case made by which, he has no connection whatever.' Story's Eq. Pl. § 530; *Kennedy v. Kennedy*, 2 Ala. 573. The objection is greatly a matter of discretion, and so the circumstances under which it is allowed to prevail; so that every case must, in a measure, be governed by what is convenient and equitable under its own peculiar facts, subject to the recognized principles of equity jurisprudence. And it is always proper to exercise this discretion in such manner as to discourage future litigation about the same subject-matter, and prevent a multiplicity of suits, and never so as to do plain violence to the maxim that courts of equity 'delight to do justice, and not by halves.'"

The authorities which we have above cited clearly show that the parties demurring were proper parties to this suit and cannot be heard to complain that the bill was multifarious. We were at first somewhat impressed, upon consideration of this cause, by the case of *Inman v. Prout*, 90 Ala. 362, 7 South. 842, wherein was cited the case of *Matter of Prentiss*, 7 Ohio, 129, pt. 2, 30 Am. Dec. 203, and wherein it was said: "The parties must be tenants in common of all the lands sought to be divided."

By some of the authorities above cited, the Ohio case is treated as holding to a contrary view to the great weight of authorities and as opposed to the views expressed in these cases. Upon mature reflection, however, we are persuaded that the cause of *Inman v. Prout*, supra, is not at all in conflict with the conclusion we have here reached. The right of a cotenant to split up a common tract to

the prejudice of the right of his cotenants for partition of the common estate was not discussed nor involved in that case. Indeed, the opinion shows that the original cotenancy was dissolved by valid judicial sale. As said in the opinion:

"By the proceedings, the title of the original owners to the several lots was divested, and vested in the purchasers respectively, so that each purchaser's title and possession is separate and distinct."

Therefore, the common estate having been properly divided by a valid sale into separate and distinct parcels, the expression of the court that the parties must be tenants in common of all the lands sought to be divided in the case and under the facts as therein shown was entirely proper, for such is undoubtedly the general rule.

We are therefore of the opinion that the bill was not multifarious, and that the learned chancellor properly ruled in overruling demurrers to the bill.

The decree of the chancery court is affirmed.

Affirmed. All the Justices concur.

(191 Ala. 484)

LOUISVILLE & N. R. CO. v. JONES.

(No. 716.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. NEGLIGENCE ⇨136—PLEADING AND PROOF.

Where the negligence which the evidence tended to establish was different from that set up in the complaint, defendant is entitled to the general affirmative charge.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. ⇨136.]

2. RAILROADS ⇨396—INJURIES TO PERSONS ON TRACKS—BURDEN OF PROOF—LAST CLEAR CHANCE.

While Code 1907, § 5476, provides that when any person is killed or injured by the locomotive or cars of any railroad, the burden of proof is on the railroad company to show that it was not negligent, plaintiff, suing for the death of his intestate, a trespasser who was run down by defendant's engine has the burden of proving defendant's negligence, which was alleged to be a failure to exercise due care after discovering deceased's position of peril.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1341-1343, 1357; Dec. Dig. ⇨396.]

3. RAILROADS ⇨381—INJURIES TO PERSONS ON TRACKS—LIABILITY OF COMPANY.

Where a trespasser on a railroad track stepped in front of a switch engine and was run down before his position of peril was discovered by those in charge, the company was not liable.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1235-1293; Dec. Dig. ⇨381.]

4. APPEAL AND ERROR ⇨231—PLEADING ⇨208—DEMURRER—ASSIGNMENTS OF DEFECTS.

Neither the trial nor the appellate court can consider defects in a pleading attacked by demurrer, which were not specially assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1290, 1352; Dec. Dig. ⇨231; Pleading, Cent. Dig. §§ 513-519; Dec. Dig. ⇨208.]

5. RAILROADS — 394—INJURIES TO PERSONS ON TRACKS—PLEAS—SUFFICIENCY.

A plea that plaintiff's intestate walked up the track and, without stopping, looking, or listening, stepped on the track immediately in front of the rapidly approaching engine, in such proximity that those in charge could not, by the exercise of all diligence, stop the engine before striking the intestate, and that he went upon the track with the full knowledge that it was a dangerous place and that engines frequently traversed it, and remained thereon with such knowledge after placing himself in front of a fast approaching engine, though he had ample time to reach a place of safety, is indefinite as to whether the negligence of intestate was prior or subsequent, to that of defendant, and hence was subject to demurrer.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1331-1338; Dec. Dig. —394.]

6. RAILROADS — 359—INJURIES TO PERSONS ON TRACKS—DUTY TOWARDS TRESPASSER.

A railroad company is not bound to keep any watch out for a trespasser, being bound only to avoid injuring him when his peril is discovered.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1238, 1239; Dec. Dig. —359.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Action by Ollie Jones, as administrator, against the Louisville & Nashville Railroad Company for damages for the death of his intestate. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint and the facts sufficiently appear from the opinion of the court. Plea 2 is a plea of contributory negligence setting up defendant's position between the two tracks, and that he attempted to cross the said track or get upon the same in such close proximity to the engine that it could not have been stopped in time to have prevented injuring him, well knowing that said engine was approaching at a rapid rate of speed, and in full view of him, and in close and dangerous proximity to him, and was seen by him or should have been seen by him at the time he got between said rails, etc. Plea 3 alleges that the intestate walked up the track upon which the engine was running at a rapid rate of speed, and went upon said track without first stopping, looking, and listening, and placed himself on the track immediately in front of a rapidly approaching engine, and in such close and dangerous proximity to it that the servants or agents in charge of said engine were unable, by the exercise of all diligence known to skillful engineers, to bring said engine to a stop before striking plaintiff's intestate, and defendant further avers that plaintiff's intestate went upon said track with the full knowledge and consciousness that said track was a dangerous place, and that engines frequently traversed said tracks, and he remained upon said track with such knowledge and consciousness; after placing himself on said track in front of a fast approaching engine, he carelessly and negligently failed to get

off of the track, and in a place of safety, which he had ample time to do.

The following charges were refused to defendant:

"(18) The burden is upon plaintiff in so far as he seeks to recover under count 3 to prove to your reasonable satisfaction the allegations of the facts therein, and that defendant's employees were guilty of negligence therein alleged."

(19) Same as 18.

"D. If you believe from the evidence that defendant stepped on the track on which the engine was running without stopping, looking, or listening, and that this action on his part was the proximate cause of his death, and that he was not discovered in said place by any one on the engine keeping a lookout at the time, and that at the time of his getting upon the track, and his discovery in said position, the engine was so close to him that it could not have stopped by the application of all appliances and the use of all means known to skillful engineers in time to avoid hitting and injuring him, then your verdict should be for defendant."

"G. If you believe from the evidence that Charley Humphrey gave immediate warning to the engineer when, as he saw the deceased approach and get upon the track, and that the engineer immediately cut off the steam and applied the emergency simultaneously, and did all in his power known to skillful engineers to stop the engine, and could not avoid hitting the intestate, then defendant is not liable in this case."

Eyster & Eyster, of New Decatur, for appellant. Callahan & Harris, of Decatur, for appellee.

MAYFIELD, J. Appellee's intestate, an aged man, estimated to be between 60 and 80 years of age, was walking along appellant's roadbed between two parallel tracks, and just before a switch engine (moving in the same direction) was opposite him, he stepped upon the track in front of the engine and was killed. Plaintiff's evidence was in conflict as to how far the engine was from deceased when he stepped upon the track, placing it at distances varying from 50 or 60 yards to 15 or 30 feet. Plaintiff's evidence was also in conflict as to the speed of the train, it being variously estimated to have been from 15 to 25 miles per hour. The evidence was without dispute that deceased was a trespasser when he was killed. It was also without dispute that neither the engineer nor the fireman saw the deceased on the track or knew of his dangerous proximity to the track, until the engine had struck him, though they did know of his walking down the roadbed between the two tracks; but it was also without dispute that deceased was in no danger from a passing engine while so walking, and that if he had not stepped on the track on which the engine was moving, he would not have been stricken by the passing engine. There was on the engine a third man, a servant of the defendant, described as a *lookout*, whose business it was to look out for persons and objects on

the track in front of the engine. There was no direct evidence that this lookout saw the deceased on the track, in time to prevent hitting him, though there was possibly sufficient evidence to carry the question of his negligence to the jury, in failing to notify the engineer or the fireman of deceased's peril. That is to say, there was evidence from which the jury might infer that the lookout saw the deceased in time to give the warning and prevent the injury. The evidence is without dispute, however, that he did not give the warning until the engine had stricken the deceased.

[1] The case was tried on the general issue as to one count only. This count declared on subsequent negligence—that is, negligence after the discovery of intestate's peril. The specific negligence alleged was as follows:

"That the said agents or servants of the defendant so, as aforesaid, in charge of said engine discovered the peril of her said intestate on said track in time to have avoided killing him; and, after discovering the perilous situation of her said intestate, the said agents or servants of the defendant in charge of said engine so negligently managed or operated the same as that, as a proximate consequence of such negligence, plaintiff's intestate was killed."

It will be observed that the specific negligence alleged was the operation or management of the engine after the discovery of intestate's peril. There was therefore an entire failure of proof as to the only negligence which was alleged. As before stated, the only possible negligence proven was the failure of the lookout to notify the engineer or the fireman of intestate's peril. If it could be said that any negligence was charged against the lookout, or that he had charge or control of the engine, it was not the negligence of his failure to notify the engineer or the fireman. There was no allegation of the only negligence which the proof tended to show, nor was there any general allegation of negligence which could be supported by the proof. For this reason the general affirmative charge should have been given for the defendant.

[2] The trial court also fell into error in its oral charge as to the burden of proof in this case, and as to the effect and application of the statute (Code, § 5476). The trial court, among other things, charged the jury as follows:

"Gentlemen of the jury, our lawmakers have enacted a section of the Code, which prescribed whenever a person is injured or killed by a railroad company along the tracks, as has been detailed in this case, then the burden is not upon the plaintiff to show that the employees were negligent, but, gentlemen of the jury, whenever they establish the fact that this person was killed, the burden is upon the railroad company to show that it was not negligent."

"Our lawmakers have said whenever the evidence discloses that fact, and you are satisfied that the injury has occurred, or that death has resulted, that the burden is not upon the plaintiff to prove that defendant's servants, or agents, or employees are negligent, but the bur-

den is upon the defendant to show that the servants, agents, or employees of defendant were not negligent."

Each of these two propositions was erroneous, as applied to the undisputed facts of this case. The intestate was a trespasser, and was therefore himself guilty of negligence. The complaint here admitted that the intestate was a trespasser, and the only theory of the count was that defendant's negligence followed the intestate's. The statute referred to by the court, therefore, does not place the burden of proof on the defendant to show that the intestate's negligence was subsequent to that of defendant's agents or servants. The burden of proof, in this case, was clearly on the plaintiff to show that the negligence of the defendant was subsequent to that of the intestate, which was admitted by the count and which the proof showed without conflict. It could be conceded that the defendant was guilty of negligence in this case, and yet it would not be liable. The only disputed issue on the trial was as to whether there was any negligence after the discovery of plaintiff's intestate's peril. The count alleged that there was; and as to this, of course, the burden of proof was on the plaintiff and not on the defendant. In *Southern Railway Co. v. Smith*, 163 Ala. 174, 186, 50 South. 390, 394, it was said:

"The history of the successive statutes on this subject shows that the matter which the Legislature had in view was only injuries occurring at the places specified, and section 5476 itself places the burden on the railroad company to show a compliance with the requirement of such sections, and that there was no negligence on the part of the company or its agents." There would be no reason in requiring proof of the compliance with the requirements of said sections when the injury occurred at any other place, and it would be impossible to show what place is referred to where the injury occurred between two road crossings. Consequently we hold that the effect of this statute is only to require that, when an injury occurs to persons at any one of the places mentioned in the statute, the burden is on the railroad company to show compliance with the requirements of the statute, and also that there was no other negligence."

It is true that what is said above has been modified and, in part, overruled, by a later case (*Ex parte Southern Railway Co.*, 181 Ala. 486, 61 South. 881), but not to the extent of making the charge of the court, above set out, correct in a case like the one on trial, where the injury was not at one of the places mentioned, and where the person injured was confessedly a trespasser, and the railroad company owed him no duty except not to wantonly or intentionally injure him, nor to negligently injure him after the discovery of his peril. A case like this was anticipated, as follows, in *Ex parte Southern Railway Co.*, supra, where it was said:

"We are, of course, aware of the fact that in the practical application of said statute there may be a distinction between stock and persons, as one can be, and the other is not, deemed a trespasser. Nor do we mean to hold that the statute enlarges the care owing a trespasser, or that it increases the liability to them, or

that it changes the rule of pleading, so as to relieve the plaintiff from averring that he is not a trespasser when charging only simple initial negligence. *L. & N. R. Co. v. Holland*, 164 Ala. 73, 51 South. 365, 137 Am. St. Rep. 25. What we do hold is that this statute does make a change from what the law was in the Code of 1896, and as so changed is not confined in its operation to persons, stock, or property as to injuries sustained only at points covered by the three preceding sections, as was held in the *Smith Case*, supra."

The burden of proof was certainly not on the defendant to show that the plaintiff's intestate's negligence was subsequent to that of defendant, which was in effect what the court charged the jury. In a later case, very much like the one at bar, the trial court gave a charge requested by the defendant, which was as follows:

"The burden is upon the plaintiff to prove, by the evidence in this case, to your reasonable satisfaction, every material allegation of his complaint, or of some one count thereof, and, if he has not so reasonably satisfied you by the evidence, then you must find a verdict for defendant." *Cardwell v. L. & N. R. Co.*, 64 South. 564.

This court held the giving of such charge to be without error, and spoke as follows on the subject:

"There was no error in giving charge G requested by the defendant. It stated a proposition of law fundamentally correct and necessarily applicable in every case. If, in order to give point to appellant's argument against the charge, it be construed with special reference to section 5473 of the Code, which imposes certain duties on the operators of railroad trains at public road crossings, at regular stations and stopping places, or when entering into, or while moving within, or passing through, any village, town, or city, and section 5476, which puts upon them the burden of showing a compliance with section 5473, and that there was no negligence, still, in view of the necessary principle upon which the courts proceed in every department of jurisprudence, namely, that wrong is not presumed, and the proof lies upon him who affirms, not upon him who denies, in view of this principle of law and right, the charge merely meant that the burden rested upon plaintiff to prove the basic fact of his case, namely, that he was injured by the operation of defendant's cars or train at a place and in circumstances that brought him within the protective purview of the statute." 64 South. pages 565, 566.

[3] For the same reason it was error to refuse charges 18 and 19. Charges D and G were also correct charges, as applied to the issues and the evidence in this case, and the refusal of each was error.

[4] Plea 2 was not subject to any ground of the demurrer interposed, and our statute precludes this court, as well as the trial court, from considering any ground not specially assigned. There is in the plea the alternative allegation that the intestate saw the approaching engine, or ought to have seen it. The last alternative is probably not

sufficient, but the demurrer did not take this point, and hence it could not be considered by the trial court. What was said of similar pleas in *Blackmon's Case*, 169 Ala. 304, 310, 311, 53 South. 805, 807, is applicable to plea 2 in this case. It was there said:

"If the special pleas, 2, 3, and 4 only set up contributory negligence on the part of plaintiff's intestate, anterior to the subsequent negligence of the defendant's servants as averred in the complaint, such as negligently going or being on the track, they would not be good, and would be subject to the grounds of the demurrer interposed thereto; but said pleas not only set up the intestate's negligence in going upon and being on the track, but invoke his negligently remaining on the track until he was struck, with a knowledge or consciousness of his danger. If he remained on the track after becoming aware of his danger, this would be negligence concurring with or subsequent to the negligence charged to the defendant's servants, and would be a complete defense to the complaint, and the trial court erred in sustaining the demurrers to defendant's pleas 2, 3, and 4, as they were certainly not subject to the grounds assigned in the demurrer."

[5] Plea 3 attempted to set up the same defense, but it is indefinite and uncertain, as to whether the negligence of intestate, relied upon, was prior or subsequent to that alleged in the complaint, and hence it was subject to the demurrer interposed.

[6] There is one feature of this case which the trial court seems to have overlooked, and that is that the only count on which the case was tried alleged that plaintiff's intestate was a trespasser, walking along the defendant's track, when the injury was received; and there is no attempt to allege or to prove wantonness; reliance being placed solely upon subsequent negligence. Under this issue the defendant owed the intestate no duty to keep a lookout for him, and it was not negligence to fail to discover him on the track; consequently no duty was owing to him until his peril was discovered, and the burden was therefore on the plaintiff to show that plaintiff's intestate was discovered on, or dangerously near to, the track, in time to have prevented the injury. This was really the only disputed issue, and the burden was not on the defendant to negative this fact.

The statute referred to by the court was intended for the protection of persons on or dangerously near to a railroad track, who are there rightfully, and not of those who are confessedly trespassers and wrongdoers, such as the plaintiff in this case alleges, and the proof indisputably shows, the intestate to have been.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 333)

SOUTHERN RY. CO. v. HUNTSVILLE
LUMBER CO. (No. 706.)(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)1. RAILROADS — 17 — RATIFICATION OF
FREIGHT AGENT'S ACTS.

Where its freight agent contracted for defendant railroad company to build a spur track for plaintiff lumber company, and it was built, such action was a binding ratification by the railroad of the agent's contract on its behalf.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 86-88; Dec. Dig. —17.]

2. CONTRACTS — 1 — DEFINITION.

A "contract" is the thing upon which two or more people agree.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1; Dec. Dig. —1.

For other definitions, see Words and Phrases, First and Second Series, Contract.]

3. CONTRACTS — 32 — AGREEMENT TO BE
REDUCED TO WRITING.

Where the parties contracted by parol with the understanding that a formal instrument was to be prepared later, and such instrument, when prepared, contained stipulations not contemplated by the memorandum the parties had signed, the defendant could not claim that plaintiff's refusal to sign such instrument abrogated the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 159; Dec. Dig. —32.]

Appeal from Chancery Court, Morgan County; W. H. Simpson, Chancellor.

Suit by the Huntsville Lumber Company against the Southern Railway Company. Decree for plaintiff, and defendant appeals. Affirmed.

Wert & Lynne, of Decatur, for appellant.
E. W. Godbey, of Decatur, for appellee.

DE GRAFFENRIED, J. I. L. Graves, general freight agent, acting for and on behalf of the Southern Railway Company, made a contract with the Huntsville Lumber Company to build, at the expense of the Huntsville Lumber Company, a side track. This side track was to be constructed for the purpose of enabling the Southern Railway Company to haul logs to and lumber from a sawmill which is owned and operated by the Huntsville Lumber Company. We quote the agreement which was made by the said I. L. Graves, general freight agent, acting for the Southern Railway Company, and the lumber company:

"Jan. 14, 1908.

"Mr. F. Webster, Vice Pres. Huntsville Lbr. Co., Decatur, Alabama.—Dear Sir: Industrial: Side Track Huntsville Lumber Co., at Decatur, Ala. Since receipt of your letter of December 21st, I have handled with our operating department the matter of the construction of your side track; and for mutual benefit and protection, it is felt that it will be well to exchange letters, giving *positive assurances* of what will be done. To this end I beg to advise our understanding of the matter:

"First: The Southern Railway Company *will construct* track at Decatur Junction, 500 feet from point of switch, with total clearance of 350 feet.

"Second: The Huntsville Lumber Company *will immediately*, upon completion of this track and rendition of the bill, reimburse the Southern Railway Company for the entire expense thereof; this expense at present being estimated at \$799.95.

"Third: The Southern Railway Company *will refund* to the Huntsville Lumber Company the value of the rails, fastenings, switches, and other hardware used in the construction of the track, at present estimated to cost \$459.18, on basis of 5 per cent. of the revenue accruing to the Southern Railway Company for lumber manufactured at the plant of the Huntsville Lumber Company at Decatur, Alabama, from logs shipped from the track in question.

"Fourth: Owing to the difficulty of positively identifying lumber actually manufactured from these logs, the Southern Railway is agreeable to this refund being made on basis of making a refund of one car of lumber for three cars of logs shipped into the plant; that is to say, when three cars have actually been shipped into the plant, the Huntsville Lumber Company will be entitled to refund on one car of lumber, when six cars have been shipped, to refund on two cars of lumber, when nine cars have been shipped, to refund on three cars of lumber, and in the same manner until the entire value of the rails and fastenings is refunded, provided this refund is entirely accomplished within two years, commencing eighteen months after the completion of track.

"As explanation of the above basis for refund: It has been determined that the revenue on the logs into the plant is too low to justify the making of any refund therefrom, and the alternative is to make a refund on the lumber manufactured from these logs.

"I am sending you this letter in duplicate. If it meets with your approval, will you please sign below on the space indicated and return to me at once; when instructions will be given to put the track in.

"Yours truly, I. L. Graves,
"General Freight Agent.
"Approved: F. W. Webster, Vice Pt. of
"Huntsville Lumber Company."

It appears from this record that the above was intended by the parties, when it was signed, as a memorandum of the agreement, and that it was contemplated that subsequently a formal instrument was to be prepared setting out the agreement, and that this formal agreement was to be signed by both parties. The formal agreement which the parties had in contemplation has never in fact been signed and delivered by them, *but the side track has been built*, and the Huntsville Lumber Company stands ready to pay for the same.

(1) The Southern Railway Company prepared an agreement for the Huntsville Lumber Company to sign, which contained stipulations not appearing in the above memorandum, and the Huntsville Lumber Company refused to sign it on *that account*. Thereupon the Southern Railway Company proposed to remove the side track, and this bill was filed by the Huntsville Lumber Company to enjoin the Southern Railway Company from removing the side track. The chancellor rendered a decree granting to the Huntsville Lumber Company the relief prayed for in its bill of complaint, and this appeal is prosecuted for the purpose of reversing that decree.

[1] (2) The appellant claims that this decree should be reversed because the evidence fails to show that Graves had any authority to bind the railroad company to build this side track or to execute a contract with reference to the building of a side track. On this subject the appellant says in its brief:

"There are three things that it was necessary for the appellee to have established, viz.: First, that the appellant had clothed Graves with the power to execute this contract; or, second, clothed him with the power to do acts including the execution of this contract; or, third, permit him, by acquiescence or otherwise, to possess, as to the public, the appearance of such power. On the contrary, the evidence showed, without conflict, that he was not clothed with power to execute this contract; that the letter itself showed that this power was vested in another and distinct department of the Southern Railway Company, and that the appellee understood the lack of power on the part of Graves."

As sustaining the quotation from the brief, the appellant cites us to the following authorities: 2 Thomp. on Cor., §§ 1607-1609; City of Owensboro v. Weir, 95 Ky. 158, 24 S. W. 115; Des Moines Mfg. Supply Co. v. Tilford Mill Co., 9 S. D. 542, 70 N. W. 839; St. Clair v. Rutledge, 115 Wis. 583, 92 N. W. 234, 95 Am. St. Rep. 964; Conqueror Gold Min. Mill Co. v. Ashton, 89 Colo. 133, 90 Pac. 1124.

The trouble with the above argument is that the Southern Railway Company *built the side track*. Certainly that department of the railway company which built the *side track* was the department which was authorized to build side tracks, and the *only* evidence of an agreement to which the building of the side track can possibly be referred is the paper which was signed by Graves, and which we have above quoted in this opinion. The building of the side track was not blindly done, and its building must be taken as a ratification by the railway company of the agreement which was made by Graves, if it be true that the agreement needed ratification. "The ratification of an act is equivalent to an original authorization of the act." Holloway v. Harper, 108 Ala. 647, 18 South. 663.

[2, 3] (3) A contract is the thing upon which two or more people agree. Contracts are frequently reduced to writing, and when this is done, the writings are generally referred to as contracts. The writings are, however, *not* contracts, but *written evidences* of the contracts. We think that it is clear that when the above quoted memorandum was made, it was understood between the parties that at a later date a formal writing was to be drawn up and signed by the parties, to be kept by them as a written memorial of what had *then* been agreed upon by them. The memorandum showed what this future writing was to contain. Neither party had a right to expect the other party to sign a writing in any way varying the terms of the contract. A writing was prepared,

but is contained stipulations not contemplated in the above memorandum and, of course, the railroad company has no right to complain of the fact that the Huntsville Lumber Company refused to sign it. We think that the following, which is taken from Emerson & Company v. Stevens Gro. Co., 95 Ark. 421, 130 S. W. 543, is expressive of the law:

"If the contract is actually entered into and made, whether by messages, correspondence, or by word of mouth, the agreement becomes at once effective, although it was expected that the terms should afterwards be embodied in a written instrument and signed."

On this subject also see Woldert v. Arledge, 4 Tex. Civ. App. 692, 23 S. W. 1053; Rankin v. Mitchem, 141 N. C. 277, 53 S. E. 855; Concannon v. Point Min. & Mill Co., 156 Mo. App. 79, 135 S. W. 991; Sanders v. Pottlitzer Bros. Fruit Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 434, 43 Am. St. Rep. 760.

(4) This case is, under the principles above announced, one of *fact*, and, in our opinion, the decree of the court below is supported by the facts. We are therefore of the opinion that the decree of the court below should be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., concur.

(191 Ala. 369)

McCALLEY v. PENNEY. (No. 777.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. APPEAL AND ERROR §1005—REVIEW—REFUSAL OF NEW TRIAL.

Where the evidence was conflicting, the judgment of the lower court in denying motion for new trial will not be disturbed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. §1005.]

2. TRIAL §321½—VERDICT—DUTY OF UNANIMITY OF JURORS.

The jury must be unanimous in favor of a party after consideration of all the evidence before it can properly return a verdict.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 742; Dec. Dig. §321½.]

3. APPEAL AND ERROR §216—INSTRUCTIONS—HARMLESS ERROR.

In suit on a duobill, where the defendant pleaded that plaintiff agreed to accept the rents of a farm in full satisfaction of such bill, the contention of the plaintiff being that the rent was a mere security which he might collect or not at his option, and the contention of the defendant being that the agreement was that the rents should satisfy the bill at all events, where the court charged that the jury might look to the fact, if such it was, that plaintiff collected rents on the land for a year in determining whether defendant agreed with plaintiff to let him have the rents in satisfaction of the bill, although the charge was misleading, since it asserted no incorrect proposition of law, and since plaintiff failed to ask any explanatory charge, it was not reversible error.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §216.]

Appeal from Circuit Court, Morgan County; A. H. Alston, Judge.

Action by Charles S. McCalley against James E. Penney. Judgment for defendant, and plaintiff appeals. Transferred from Court of Appeals. Affirmed.

The charges complained of as given for defendant are as follows:

(5) If there is a single member of this jury who, after considering all the evidence in this case, does not believe that plaintiff ought to recover a verdict, then you should not render a verdict against defendant.

(3) As a circumstance to which you may look in connection with all the other evidence in this case in determining whether defendant agrees with plaintiff to let him have the farm as is alleged in pleas 4 and 5 filed in this cause, you may look to the fact, if it be a fact, that plaintiff collected rents from some of the tenants on said land for the year 1903.

E. W. Godbey, of Decatur, for appellant.
Kyle & Hutson, of Decatur, for appellee.

GARDNER, J. Suit upon a duebill. The issue litigated by the parties was contained in the special pleas of the defendant setting up a subsequent and separate agreement in satisfaction and settlement of the claim evidenced by the duebill; it being insisted that it was agreed between the parties that the plaintiff, holder of the duebill, would accept the rents of a certain farm of the defendant, for the year 1903, in full satisfaction and settlement of said duebill.

The trial, from which this appeal is taken by the plaintiff, in the court below, was had in October, 1913. The record discloses a judgment in favor of the plaintiff in November, 1910, and nowhere indicates in what manner the same was disposed of, nor does brief of counsel so inform us. From the similarity of names, pleas, statement of the case, etc., as found in the case reported as *Penney v. McCauley*, 3 Ala. App. 497, 57 South. 510, it might be assumed that this was the same cause which was reviewed by the Court of Appeals.

[1] But three assignments of error are urged in brief of counsel for the appellant. That most earnestly insisted upon is that relating to the action of the court in overruling the motion of the plaintiff for a new trial on the ground that the verdict in favor of the defendant was against the overwhelming weight of the evidence, and manifestly wrong and unjust.

We have studied the evidence with much care, and given careful consideration to argument of counsel thereon. We will not here discuss the evidence, but content ourselves with the statement of our conclusion that, under the well-understood rule announced in *Cobb v. Malone*, 92 Ala. 630, 9 South. 738, and subsequently followed by a number of our decisions, we do not feel authorized to disturb the ruling of the trial court upon the motion for a new trial.

[2] Charge 5 states no incorrect proposi-

tion, and the giving of this charge is not reversible error.

[3] Charge 3 is criticized upon the ground that the duebill itself authorized the plaintiff to collect the rents, while the charge permitted the jury to look to that fact in determining whether the defendant had such an agreement with plaintiff as alleged in his special pleas.

Under the contention of plaintiff the rent was a mere security which he could collect or not, as he saw fit, without in any wise impairing the obligation as evidenced by the duebill. The theory of the defense, however, was that it was the agreement of the parties that the rent for 1903 should settle and satisfy the debt evidenced by the duebill. Under this contention it would be obligatory (from a standpoint of self-protection only, of course) upon plaintiff to rent out the farm and collect the rents, because they were his, absolutely, and unless collected, he received nothing for his debt. Indeed, the collection of the rents may be considered upon either the theory of the plaintiff or that of the defendant, as the case may be. The charge is confessedly misleading, and could properly have been refused. It asserts, however, no incorrect proposition of law. As a misleading charge, if the plaintiff thought any injury might result therefrom, it was open to him to ask an explanatory charge. While the charge, as stated, could properly have been refused, yet the giving of the charge by the court is not an error for which the cause will be reversed. We have here treated of the charge only as it is criticized by counsel in brief. It may be also subject to other criticism, as pointed out in *Penney v. McCauley*, supra; but, as we have concluded that the giving of the same is not reversible error, it is unnecessary that such criticism be pointed out. *Bancroft v. Otis*, 91 Ala. 279, 8 South. 286, 24 Am. St. Rep. 904; *Austin v. State*, 145 Ala. 37, 40 South. 989.

We have reviewed the assignments of error which are insisted upon by counsel for appellant, and, finding no reversible error in the record, the judgment of the court below is affirmed.

Affirmed.

MCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

(191 Ala. 494)

HUBBARD v. COFFIN & LEAKE.

(No. 604.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. MASTER AND SERVANT ~~§~~88—EXISTENCE OF RELATION—INDEPENDENT CONTRACTOR.

Plaintiff's decedent contracted with defendants engaged in the surface mining of iron ore to get out ore from a pit, to be delivered at the washers at a fixed price per ton. He employed and paid his own help and furnished his own tools, wagons, and vehicles. Defend-

ants assigned him to work in the pit, and their superintendent inspected the output; but there was no reserved right to say at what point in the pit or how in any respect decedent should conduct his operations. It was expected that he should be diligent, and the superintendent gave some attention thereto. The superintendent knew there was danger of the bank falling and gave decedent warning thereof. Held, that decedent was not an employé within the Employers' Liability Act (Code 1907, §§ 3910-3913), but an independent contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 144-151; Dec. Dig. ¶1058.]

2. APPEAL AND ERROR ¶1056—HARMLESS ERROR—RULINGS ON EVIDENCE.

Where a witness showed that he did not know a fact sought to be proved by him as of his own knowledge, exclusion of questions was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. ¶1056.]

Appeal from City Court of Talladega; Cecil Browne, Judge.

Action by Dora Hubbard, administratrix, against Coffin & Leake, receivers. From judgment for defendants, plaintiff appeals. Affirmed.

Knox, Acker, Dixon & Sims, of Talladega, for appellant. Riddle, Ellis & Riddle, of Columbia, for appellees.

SAYRE, J. Appellant, suing as administratrix for damages on account of the alleged wrongful death of her intestate while in the employment of defendants, stated her cause of action in several counts under the Employers' Liability Act, adding a count under the common law for the employers' failure to use due care in furnishing her intestate with a safe place in which to do the work for which he was employed. To recover, it was necessary, of course, that plaintiff should show that her intestate was at the time of his injury, resulting in death, a servant or employé in the service of defendants. The general issue pleaded contained a denial of this essential fact.

[1] Defendants, as receivers of the Alabama Consolidated Coal & Iron Company, were engaged in the surface mining of iron ore and had been taking ore from a pit or cut which had been excavated to a depth of 10 or 12 feet over an area some 15 or 20 feet across. A day or two after intestate went to work in this pit the wall or bank out of which he was taking ore fell upon him causing his death. We find the facts, touching upon the relation between intestate and defendants and established beyond any reasonable inference otherwise, to be that intestate had contracted with defendants to get out ore for them, to be delivered at the washers at a fixed price per ton. Intestate employed and paid his own help and furnished his own tools, wagons, and teams. Defendants assigned him to work in this cut, and their superintendent inspected the output to see that it did not contain too much

dirt; but they did not say, nor does it appear that they reserved the right to say, at just what point in the pit or how in any respect intestate should conduct his operations. It was, however, expected—no doubt, required—that he should be diligent, and defendants' superintendent gave some attention to this feature of his operations, but this had effect only upon the quantum of output not the means or agencies employed to produce it. From these facts it follows, we think, that intestate rendered service to defendants in the course of an independent occupation, representing the will of his employers only as to the result of his work, and not as to the means and agencies by which it was accomplished, and hence that he was an independent contractor, not a servant or employé as alleged in the complaint or within the meaning of the law upon which appellant relied. *Harris v. McNamara*, 97 Ala. 181, 12 South. 103; *Lookout Mt. Iron Co. v. Lea*, 144 Ala. 169, 39 South. 1017; *Ala. Western R. R. Co. v. Talley-Bates Co.*, 162 Ala. 396, 50 South. 341; *Warrior-Pratt Coal Co. v. Shereda*, 183 Ala. 118, 62 South. 721.

We have not overlooked the evidence tending to show that defendants' superintendent assigned intestate to work in the pit where he was, for that has already been stated, nor that he knew or suspected that there was danger of the bank falling, and gave intestate warning of the fact. None of this, nor all of it together, tended to discredit or impair the force of the testimony which went to show that intestate was an independent contractor within the rule of the cases we have cited above.

[2] There was no reversible error in the court's rulings on questions of evidence. Plaintiff sought to draw out from one of her witnesses broad general statements as to the authority of defendants' superintendent over her intestate. If these questions were not objectionable as asking for the mere opinions or conclusions of the witness, the rulings against them were still without error as to plaintiff for the reason that the witness in other parts of his testimony showed affirmatively that he did not know what the contract between defendants and intestate was, and was hence incompetent to answer the questions as of his own knowledge.

Having reached the conclusion that there was no error in the rulings on evidence and that defendants were entitled to the general affirmative charge for the reason that plaintiff failed to make out the case alleged in her complaint, we need not consider those assignments of error which go to the rulings on the sufficiency of some of the special pleas interposed. Let the judgment be affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(191 Ala. 150)

NATIONAL JEWISH HOSPITAL FOR CONSUMPTIVES et al. v. COLEMAN. (No. 633.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. CHARITIES §19—CERTAINTY AS TO BENEFICIARIES.

Charitable gifts are not invalid because the trustee or donee is erroneously or uncertainly designated, where it can be made clear what was intended from the context of the instrument of gift, or by parol evidence of the surrounding circumstances, and where a corporation is indicated by an erroneous name, the mistake will not avoid the gift where it is possible to identify the corporation intended.

[Ed. Note.—For other cases, see Charities, Cent. Dig. § 42; Dec. Dig. §19.]

2. WILLS §489—BENEFICIARIES—UNCERTAINTY—EVIDENCE TO AID CONSTRUCTION.

Where the name of a beneficiary expressed in a will making a gift to charity is applicable in a general way to several different charities, but precisely to none, the latent ambiguity may be explained, and parol evidence is admissible to determine the charity intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. §489.]

3. WILLS §489—BENEFICIARIES—UNCERTAINTY.

Where a testamentary gift to a charity is ambiguous, because applicable to several different charities and precisely to none, the religious and social affiliations of testator and his acquaintance with, relations to, interest in, and transactions with a particular charity, or the lack thereof, may be shown.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. §489.]

4. WILLS §489—BENEFICIARIES—UNCERTAINTY.

Where a provision in a will applies equally to two or more objects or persons, declarations of testator at the time of the execution of the will, or about the time of the execution thereof, are admissible to identify the beneficiary intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1037-1046; Dec. Dig. §489.]

5. CHARITIES §33—GIFTS TO CHARITY—AMBIGUITY—EVIDENCE.

Testator made a gift to "the Jewish Hospital for Consumptives at Denver." There was at Denver a "National Jewish Hospital for Consumptives" and a "Jewish Consumptives Relief Society" located in a suburb, but with its business office in Denver. The National Jewish Hospital was supported chiefly by Jews of the reformed faith while the "Relief Society" was controlled very largely by the Jews of the orthodox faith. Testator belonged to the orthodox faith, but there was nothing to show that he was dominated in his charities by sectarian feeling. He was well acquainted with both institutions. *Held*, that the gift was to the National Jewish Hospital for Consumptives.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 68-74; Dec. Dig. §33.]

6. CHARITIES §33—GIFTS TO CHARITY—AMBIGUITY—EVIDENCE.

Testator, a Russian Polish Jew who had lived in Jerusalem, and while there had been a member of a congregation composed of Polish Jews, made a gift to "the Jewish Hospital at Jerusalem." At the time of his residence at Jerusalem there were two Jewish hospitals, the Bicur Cholim and the Rothschild. The support of the congregation of which he had been a member went to the Bicur Cholim. He had

personal knowledge and acquaintance with this institution and had upon one occasion been a patient therein. The Rothschild Hospital was supported by the Rothschild family, and had never received nor solicited private contributions. Testator had never been interested in other Jewish hospitals in Jerusalem established after he left there. During his lifetime he had made several donations to the Bicur Cholim and had referred to it as "the Jewish Hospital at Jerusalem." *Held*, that the gift was to the Bicur Cholim Hospital.

[Ed. Note.—For other cases, see Charities, Cent. Dig. §§ 68-74; Dec. Dig. §33.]

Appeal from Chancery Court, Calhoun County; W. W. Whiteside, Chancellor.

Suit by Thomas W. Coleman, Jr., against the National Jewish Hospital for Consumptives and others for the construction of the will of L. H. Kaplan, deceased. From a decree declaring devises and legacies void for uncertainty, certain of the defendants appeal. Reversed and rendered.

Blackwell & Agee and Willett & Willett, all of Anniston, and Hanaw & Pillans, of Mobile, for appellants. R. C. Brickell, Atty. Gen., and W. P. Acker and Niel P. Sterne, both of Anniston, for appellee.

SOMERVILLE, J. The bill is filed by the executors of the will of L. H. Kaplan, deceased, to secure a construction of certain provisions therein. The testator, a resident of Anniston for many years, executed his will on March 5, 1910, while in an infirmary in Atlanta, where he died three days later. The will gives a part of his estate "to the Jewish Hospital for Consumptives at Denver, Colorado"; and a part "to the Jewish Hospital at Jerusalem." There is nothing else in the will which serves to further identify the beneficiaries thus described by the testator. The difficulty of identification arises from the fact that there is neither at Denver nor at Jerusalem any institution which formally bears a name identical with the designations used in the will; and from the further fact that at or near Denver there are and then were two Jewish hospitals for consumptives, one incorporated as the "National Jewish Hospital for Consumptives," located in Denver, and the other incorporated as the "Jewish Consumptives Relief Society," located in Edgewater, a suburb immediately adjacent to Denver, and with its business office in Denver, and in Jerusalem there are and then were four Jewish hospitals called, respectively, the Bicur (or Bikkur) Cholim Hospital, the Rothschild Hospital, the Misgob Ladoch Hospital, and the Sharre Zadek Hospital. All these institutions were made parties respondent to the bill, but the only ones claiming as beneficiaries under the will are the "National" Hospital of Denver, and the "Bicur Cholim," of Jerusalem.

A great mass of testimony has been taken and introduced with a view to proving or disproving that these claimants are the bene-

ficiaries intended and described by the testator in the will. The chancellor held, upon a consideration of this evidence, that the beneficiaries intended in the several provisions quoted could not be determined with reasonable certainty; that the devises and legacies were therefore void; and that they would pass to the Kaplan Hospital, to be established at Anniston, as the residuary legatee under the will.

[1] The rule is well settled that:

"Charitable gifts are not invalid because the trustee or donee is erroneously or uncertainly designated, when it can be made clear who is intended from the context of the instrument of gift, or by parol evidence as to the surrounding circumstances." 6 Cyc. 936, and cases cited.

"It is an elementary principle that where a corporation is indicated in a will by an erroneous name, such a mistake will not avoid the gift if it be possible by means of the name used, or by extrinsic evidence, to identify the corporation intended as beneficiary with sufficient certainty." Page on Wills, § 539.

See, also, Judge Freeman's note, 50 Am. St. Rep. 287.

[2] Where the name of the beneficiary, as expressed in the will, is applicable in a general way to several different charities, but precisely to none of them, the latent ambiguity may be explained, and parol evidence is admissible to determine which of the charities is intended. *Hinckley v. Thatcher*, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719; *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848; *Appeal of Washington, etc., University*, 111 Pa. 572, 3 Atl. 664; *Webster v. Morris*, 66 Wis. 366, 28 N. W. 353, 57 Am. Rep. 278; *Chappell v. Miss'y Society*, 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276.

[3] In the note by Mr. Browne to *Chambers v. Watson*, 60 Iowa, 339, 14 N. W. 336, 46 Am. Rep. 77, it is said:

"A corporation may be designated by its corporate name, by the name by which it is usually or popularly called and known, by a name by which it was known and called by the testator, or by any name or description by which it can be distinguished from every other corporation; and when any but the corporate name is used, the circumstances to enable the court to apply the name or description to a particular corporation and identify it as the body intended, and to distinguish it from all others and bring it within the terms of the will, may in all cases be proved by parol. *St. Luke's Home v. Association*, 52 N. Y. 191, 11 Am. Rep. 697; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige [N. Y.] 11."

For this purpose it is clear that the religious and social affiliations of the testator and also his acquaintance with, relations to, interest in, and transactions with, a particular body, or the lack thereof, may be inquired into. *Hinckley v. Thatcher*, 139 Mass. 477, 1 N. E. 840, 52 Am. Rep. 719; *Gilmer v. Stone*, 120 U. S. 586, 7 Sup. Ct. 689, 30 L. Ed. 734; *Matter of Kilvert's Trust*, L. R., 7 Ch. App. 170, 1 Eng. Rep. 499; *Chappell v. Missionary Society*, 3 Ind. App. 356, 29 N. E. 924, 50 Am. St. Rep. 276.

[4] And, although there is some lack of

harmony in the decisions, the rule is well settled that:

"In cases of equivocation, as where the will or a provision thereof applies equally as well to two or more objects or persons, evidence of statements or declarations made by the testator at the time of the execution or about the time of the execution of the will is admissible for the purpose of identifying the person, or property, he intended." 40 Cyc. 1435, and cases cited; *Vandiver v. Vandiver*, 115 Ala. 323, 22 South. 154, 2 Prob. Rep. Ann. 355; *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

[5] In regard to the Denver gift, we think that the testator's use of a name or description for the donee which is identical with the name of the claimant corporation except for the omission of the word "National" is sufficient to show, prima facie, that it is the beneficiary intended; this in view of the fact that the testator was evidently well acquainted with both the National, etc., Hospital and the Jewish, etc., Society, and must have known the corporate name of each from its literature and letter heads received by him, as well as from other sources. It is certain that the testator intended this devise for one of these two Jewish institutions at Denver; and it cannot be reasonably supposed that a man of Mr. Kaplan's intelligence and culture, choosing between two similar charities, equally well known to him by name and otherwise, and to both of which he had occasionally made small gifts in his lifetime, would have designated the "Jewish Consumptive's Relief Society" as the "Jewish Hospital for Consumptives." And we think the conclusion is reasonable, if not inevitable, that the testator rather intended that institution which he was approximately describing by its actual corporate name. Nor is this conclusion materially affected by the consideration that the "Relief Society" was supported and controlled very largely by Jews of the orthodox faith of the testator, while the "National Jewish Hospital" was supported and controlled chiefly by Jews of the reformed faith. There is nothing in the evidence to show that Mr. Kaplan was dominated in his charities by narrow sectarian feeling. On the contrary he seems not to have discriminated, as is evidenced by his generous provision for a general and non-sectarian hospital at Anniston. And its broader character, greater capacity for service and more extended field of usefulness, may well have induced the testator to give his posthumous support to the "Hospital" rather than the "Society."

It may be remarked that where the corporate names of two similar charities are as radically dissimilar as these are, there would be no occasion in ordinary parlance for using their full corporate names when referring to them; and it is perfectly natural that the word "National" as a part of this claimant's name should have fallen into disuse for other than formal occasions and purposes, as in fact seems to have been the case.

On the whole, we conclude that the un-

doubted duty of courts to give full effect to all testamentary provisions consistently with their express terms and with the rules of law requires us to hold in this case that the testator intended this gift for the "National Jewish Hospital for Consumptives" at Denver, and that this claimant is entitled thereto.

[8] In regard to the Jerusalem gift, we can entertain no reasonable doubt as to the identity of the beneficiary intended.

The facts leading to our conclusion may be briefly outlined as follows: (1) The testator was a Russian Polish Jew, and lived in Jerusalem from 1872 to 1878. (2) While in Jerusalem he was a member of the Lomser (or Lomze) Congregation, composed of Polish Jews from Lomser, Poland. (3) During that time there were only two Jewish hospitals in Jerusalem, the Bicur Cholim and the Rothschild, and the support and patronage of the Lomser Congregation went to the Bicur Cholim. (4) The testator had personal knowledge of and acquaintance with the Bicur Cholim, and was on one occasion a patient therein. (5) Among the hospitals of Jerusalem, the Bicur Cholim is most particularly an object of interest and support among the Russian Polish Jews of America, who ordinarily designate it as the Jewish Hospital at Jerusalem. (6) The Rothschild Hospital is supported by the Rothschild family, and has never solicited or received private contributions. (7) It does not appear that the testator has ever been in any way interested in or concerning the Misgob Ladoch or the Sharre Zadek Hospitals, which were established after he left Jerusalem, the one by Sephardic (or Spanish) Jews, and the other by the German Jews of Frankfort-on-the-Main; and it is a matter of pure conjecture whether he ever even knew of their existence. (8) He kept in his recollection, and perhaps in his affection also, the Bicur Cholim, made several small donations to it, discussed it in conversation with an Atlanta friend, referring to it as the Jewish Hospital at Jerusalem; and, if the witness Housdorff is to be believed, the testator had this hospital much in his mind during the last days of his life, and wished to do something for it. (9) In the preparation of his will, and to identify the Jerusalem hospital intended as his beneficiary, the testator directed his attorney and scrivener to get the name from Housdorff; he being an agent of the Bicur Cholim in America, to whom the testator had previously given a contribution therefor, and with whom he had just been discussing that hospital.

We have not overlooked the reasons and arguments presented by opposing counsel in derogation of our several conclusions of fact. On the contrary, we have given due weight and consideration to all of them, but do not think them sufficient to overcome or to substantially weaken our main conclusion.

We entertain no reasonable doubt but that Bicur Cholim is the Jewish hospital at Jerusalem intended by the testator as the beneficiary of this bequest, and we so hold.

It results that the decree of the chancellor is in error as to the validity of these charitable bequests, and the identity of the donees thereof.

That decree will be reversed, and a decree will be here rendered in accordance with the findings above set forth.

Reversed and rendered.

ANDERSON, C. J., and MCLELLAN and SAYRE, JJ., concur.

(191 Ala. 530)

DAVIS v. MCCOLLOCH et al. (No. 782.)

(Supreme Court of Alabama. Nov. 7, 1914.

Rehearing Denied Dec. 17, 1914.)

APPEAL AND ERROR \Leftrightarrow 10 — DISMISSAL OF COMPLAINT—FINAL JUDGMENT.

Where the complaint was stricken an appeal from the action of the court will be dismissed, since mandamus is the only remedy where there has been a final judgment against neither party in the court below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 34-38; Dec. Dig. \Leftrightarrow 10.]

Appeal from Circuit Court, Lawrence County; C. P. Almon, Judge.

Action by John W. Davis against R. N. McColloch and others. Judgment for defendants, and plaintiff appeals. Appeal dismissed.

As sheriff of Morgan county, R. N. McColloch, by his deputy, Harvey Wright, having a warrant for the arrest of John Davis, arrested appellant in Lawrence county, Ala., incarcerated him in the calaboose at Courtland for several hours, and carried him from there to Morgan county, where he was confined several days, and delivered him to the sheriff of Blount county, who carried him to Oneonta, in said county, and there incarcerated him in jail. It was then discovered that the John Davis arrested was not the John Davis wanted. The suit was brought in Lawrence county, and the appellees moved to strike the complaint: First, because it shows on its face that if there was a cause of action it should have been brought in Morgan county; and, second, that the complaint showed on its face that the circuit court of Lawrence county was without jurisdiction to hear and determine the cause. The court granted a motion to strike, and this appeal is prosecuted from that order.

O. Kyle, of Decatur, for appellant. Wert & Lynne, of Decatur, for appellees.

DE GRAFFENRIED, J. In the case of *Ex parte Tarlton*, 2 Ala. 35, this court said:

"In England, to which, in the absence of legislation, we look for rules to guide our practice and decisions, it is said to be well settled that

error does not lie when the court whose judgment is complained of, acts in a summary manner, or in a new course different from the common law."

In the case of *Stephenson et al. v. Mansony*, 4 Ala. 317, this court held that an appeal does not lie from an order of a court striking a cause from its docket, and upon that subject said:

"The defendants are not, however, remediless. It is entirely competent for them to ask this court to compel a reinstatement of the cause by mandamus. This is a writ, introduced it is said, to prevent a failure of justice, and ought to be used on all occasions where the law has established no specific remedy, and where in justice there ought to be one."

In the case of *Ex parte Lowe*, 20 Ala. 330, this court said, in speaking of the dismissal of a cause by a court:

"The court, therefore, erred in striking it off, and the writ of mandamus is the proper remedy to have it reinstated."

In the case of *Ex parte State ex rel. Stow et al.*, 51 Ala. 69, this court said:

"There can be no doubt that mandamus is a proper remedy, under our practice, in such a case as this."

In the case of *Terry & Bro. v. Hughes & Co.*, 93 Ala. 432, 8 South. 686, this court, in discussing an appeal from an order quashing a garnishment proceeding which had been sued out in aid of a pending suit and which was quashed while the original suit was still pending, said:

"The appeal is taken from the judgment quashing the garnishment. There is no statute authorizing an appeal from such an interlocutory order and no final judgment having been rendered, the appeal must be dismissed."

In the case of *Ex parte Hendree et al.*, 49 Ala. 360, this court held that when a cause is dismissed from the docket of a court and a final judgment is rendered therein against one of the parties for the costs, then that an appeal will lie from such judgment, and that mandamus is not an appropriate remedy.

In the case of *Ex parte Abrams*, 48 Ala. 151, mandamus was held to be the proper remedy to require the reinstatement of a cause which has been improperly stricken from the docket of a court.

In the case of *Ex parte Merritt*, 142 Ala. 115, 38 South. 183, it was held that mandamus would not lie from the order of a chancellor dismissing a bill for want of equity, and on other grounds, "when the matter complained of can be revised on appeal, either under the statute in regard to interlocutory decrees, or from the final decree in the case."

In the case of *Ex parte State ex rel. Attorney General*, 142 Ala. 87, 38 South. 835, 110 Am. St. Rep. 20, this court, upon the relation of the Attorney General, vacated by mandamus an order of a court dismissing a criminal case from its docket. In the latter case, regardless of the rules declared in *Ex parte Tarlton*, supra, *Stephenson et al. v. Mansony*, supra, and *Ex parte Lowe*, supra,

mandamus was in any event the only remedy because, except in certain special cases, the state has no right of appeal.

The idea which controlled the court in holding in the above cases in which mandamus was held to be the appropriate remedy, was that, as the orders of dismissal were not accompanied with final judgments, appeals would not lie and that therefore mandamus was the only remedy. In each of the above cases where there was a final judgment or where the order of dismissal was, by virtue of some statute, such an order as would support an appeal, it was held that mandamus would not lie. In the instant case there is a mere order of dismissal. There is a final judgment against neither party.

While in many jurisdictions an appeal lies from the order of a law court dismissing a cause from its docket (see *Elliott on Appellate Procedure*, § 94, and authorities cited in the notes to said section) the rule to the contrary has been too long established in this state for this court now to disturb it. The question, it is true, is one of mere procedure, but in matters of long established practice the doctrine of stare decisis should not be disregarded.

For the reasons above given, this appeal must be dismissed.

Appeal dismissed.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

(191 Ala. 500)

BROWN v. ALABAMA GREAT SOUTHERN R. CO. (No. 664.)

(Supreme Court of Alabama. Dec. 17, 1914.)

1. PLEADING \Leftrightarrow 76—METHOD OF ATTACK—DEMURRER OR PLEA.

It is not permissible to give to pleas an effect equivalent to demurrer, and counts which defectively stated a cause of action as for wanton or willful wrong could not be assailed by a plea; the remedy being by demurrer.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 156; Dec. Dig. \Leftrightarrow 76.]

2. NEGLIGENCE \Leftrightarrow 100—CONTRIBUTORY NEGLIGENCE—WILLFUL OR WANTON WRONG.

Contributory negligence is no defense to an action for wanton or willful wrong.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 85; Dec. Dig. \Leftrightarrow 100.]

3. PLEADING \Leftrightarrow 8—CONCLUSIONS.

In an action against a railroad for obstructing a culvert and flooding plaintiff's mill, a plea that plaintiff contributed to the injury, in that he caused debris to be placed in the culvert, and thereby "contributed to the obstructions complained of," was demurrable, as expressing the conclusion of the pleader.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 12-28½, 68; Dec. Dig. \Leftrightarrow 8.]

4. WATERS AND WATER COURSES \Leftrightarrow 179—FLOODING OF MILL—DAMAGE—EVIDENCE.

In an action against a railroad for obstructing a culvert, thereby flooding plaintiff's mill, plaintiff being entitled to show the suspension of the operation of his mill, its duration, and the net loss of the business entailed thereby, it was error to refuse to permit a wit-

ness to testify to the daily capacity of the mill, and that plaintiff was engaged in supplying the retail trade for several counties adjacent, and that this meal was being ground daily.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

5. WATERS AND WATER COURSES ¶179—FLOODING OF MILL—DAMAGES—CAUSE—EVIDENCE.

In an action against a railroad company for obstructing a culvert, and thereby flooding plaintiff's mill, testimony for defendant tending to show that the operation of the mill was hindered by a deficient or intermittent electric current upon which it relied for power was admissible, as tending to refute the contention that there was a loss in the suspension of the business, and that this was caused by the flood.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

6. TRIAL ¶253—INSTRUCTIONS IGNORING DEFENSE.

In an action against a railroad company for obstructing a culvert, thereby flooding plaintiff's mill, a requested instruction that, if the injuries complained of were proximately caused by the negligent failure of the defendant to maintain a sufficient drainage under its roadbed to convey away the water, plaintiff was entitled to recover, was properly refused for its failure to hypothesize defenses pleaded and predicated plaintiff's right to recover only on the establishment of the cause of action stated in the complaint.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. ¶253.]

7. WATERS AND WATER COURSES ¶179—FLOODING OF MILL—INSTRUCTIONS.

In an action for obstructing a culvert, thereby flooding plaintiff's mill, a requested instruction that it was the duty of defendant to keep its culvert, sewer pipe, or drain free from gravel, sand, or other debris, and, if the jury reasonably find from the evidence that this was not done, but that the same was stopped with such gravel, sand, or stone, then, as a matter of law, defendant was negligent, was properly refused, as misstating the measure of proof necessary to warrant recovery.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

8. WATERS AND WATER COURSES ¶179—FLOODING OF MILL—INSTRUCTIONS.

The court properly refused a requested instruction that, "if plaintiff's mill was flooded at the time claimed, and this flooding was caused by the water backing up from defendant's railroad by reason of the fact that the drainage under said railroad was so stopped or filled that it was insufficient to let the water through fast enough, and that defendant had been notified of such condition or had knowledge thereof, and was notified or had knowledge of the fact that plaintiff's mill would be probably flooded unless said drainage under the railroad was remedied, and then negligently failed to remedy said drainage, you would be justified in assessing punitive damages against defendant, unless you find that plaintiff was guilty of contributory negligence as charged in defendant's plea," as such instruction appeared to make contributory negligence a defense to a wanton injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 244-250, 256-259, 263, 264; Dec. Dig. ¶179.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by A. Brown against the Alabama Great Southern Railway Company for damages for obstructing natural flow of water. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

The case made by the pleadings is that plaintiff owned a large gristmill (operated by steam) and several lots contiguous thereto, and that near said mill was defendant's railway upon an artificial embankment or fill of considerable width and several feet in height, and under said embankment defendant had a culvert or sewer to receive and convey off the water that accumulated from rainfalls above and upon the said lots of plaintiff and naturally drained in the direction of and through said culverts to lands lying lower and beyond said railway from plaintiff's gristmill, and that in times of rainfall considerable water accumulated on the lots of plaintiff, and, flowing through a well-defined channel, joined with waters draining off of plaintiff's said lot down to and through said embankment by way of the sewer. The fifth count alleges the negligence to be that defendant negligently allowed said culvert, sewer pipe, or drain to become obstructed or filled with earth, gravel, stone, or other debris, and, as a proximate consequence, the said waters from a heavy rainfall which occurred on February 26, 1913, and which accumulated at the mouth of said culvert and against said embankment, were thrown back upon the lots of plaintiff, and rose so high thereon that said waters poured through the windows or other openings in the basement of plaintiff's said mill, and filled said basement with such a depth of water, mud, and refuse matter. (Here follows catalogue of injuries.) The seventh count avers that plaintiff sustained the injuries and damages enumerated in the fifth count, and that the same was proximately caused by the willful, wanton, or intentional negligence of defendant, its servants and agents, in permitting or allowing the said culvert, sewer pipe, etc., to become filled up with earth, gravel, stone, or other debris. The eighth count sets up the damages as enumerated in the sixth count, and that they were proximately caused by the willful, wanton, or intentional negligence of the defendant, through its servants and agents, charged with the duty of maintaining said sewer pipe, culvert, etc., to remove the said earth, gravel, stone, and other debris.

The following are the pleas filed to the seventh and eighth counts:

(9). To the seventh count defendant says that the injuries complained of were proximately caused by the contributory negligence of plaintiff, in this, that at and prior to the happening of the injuries complained of in said count plaintiff caused debris to be thrown into or otherwise placed in said sewer, culvert, or pipe, and thereby contributed proximately to the obstructions complained of.

(10) Answering plea 8, contributory negligence of plaintiff in this, that at and prior to the happening of the injury complained of in said count plaintiff caused debris to be thrown into or otherwise placed in said sewer, culvert, or pipe, and thereby proximately contributed to the obstruction.

Plea 7 is filed to the fifth count of the complaint, and is similar in allegation to pleas 9 and 10. The sixth ground is that the plea is no more than a conclusion of the pleader.

On the direct examination the witness T. C. Banks testified concerning the condition of the mill at the time complained of, and that it could not be operated until the water dried out or had been pumped out, and that Mr. Brown was using a pump to get rid of the water. Plaintiff then offered to prove by the witness that the mill had a capacity of about 1,000 bushels per day; that Mr. Brown was engaged in supplying the retail trade for several counties adjacent thereto the meal that was being daily ground by the mill. Defendant interposed objection to this testimony and the court sustained it.

The following charges were refused to plaintiff:

(17) If the injuries of plaintiff complained of in the complaint were proximately caused by the negligent failure of the defendant to maintain a sufficient drainage under its roadbed to convey away the water, then plaintiff would be entitled to recover.

(18) It was the duty of defendant to keep its culvert, sewer pipe, or drain free from gravel, sand, or other debris, and, if the jury reasonably find from the evidence that this was not done, but that the same was stopped with such gravel, sand, or stone, then, as a matter of law, defendant was negligent.

(19) If plaintiff's mill was flooded at the time claimed in the complaint, and this flooding was caused by the water backing up from defendant's railroad by reason of the fact that the drainage under said railroad was so stopped or filled that it was insufficient to let the water through fast enough, and that defendant had been notified of such condition, or had knowledge thereof, and was notified or had knowledge of the fact that plaintiff's mill would be probably flooded unless said drainage under the railroad was remedied, and then negligently failed to remedy said drainage, you would be justified in assessing punitive damages against defendant unless you find that plaintiff was guilty of contributory negligence as charged in defendant's plea.

McCord & Davis, of Gadsden, for appellant. Goodhue & Brindley, of Gadsden, for appellee.

McCLELLAN, J. The perfect observance, by Mr. E. L. Hurst, the clerk of the city court of Gadsden, of Supreme Court rule No. 26, set out in 175 Ala. xix, 61 South. vii, and the general neatness of the transcript, on this appeal, warrants this court in commending him for the excellent performance of his duty in this important regard.

[1, 2] The action is by appellant against appellee for damages to plaintiff's mill and property in consequence of surface water be-

ing retarded in its natural flowage by reason of an alleged insufficient culvert under or through an embankment or fill made and maintained by the defendant in the construction and operation of its railway in the city of Attalla. The defendant's demurrers to all the counts were overruled. The demurrer to count 7 did not question its sufficiency as a count ascribing the injury and damage alleged to wanton, willful, or intentional misconduct of servants of defendant "in permitting or allowing the said culvert, sewer, or pipe to become filled with earth, gravel, stone, or other debris as aforesaid." No demurrer of any kind appears to have been interposed to count 8. Both counts 7 and 8 purport to impute the aggravated wrong to the defendant through the nonobservance of duty by its employés. To these counts, thus unquestioned in respect of their sufficiency to charge wantonness or willfulness, defendant undertook by pleas 9 and 10 to be exonerated in consequence of the therein asserted contributory negligence on the part of the plaintiff. Contributory negligence is, of course, no answer to counts ascribing the injury and damage to wanton or willful wrong. It is not permissible to give pleas an effect equivalent to aptly grounded demurrer. Counts which defectively state a cause of action as for wanton or willful wrong cannot be assailed as by plea. Demurrer is the remedy. The court was in error, therefore, in overruling the demurrer to pleas 9 and 10 as answers to counts 7 and 8.

[3] Count 5 attributed the injury and damage to simple negligence of servants of the defendant in allowing the culvert to be so clogged as that the surface water from a heavy rainfall was retarded and thrown back in plaintiff's mill. To this count defendant interposed plea 7. This plea asserted that plaintiff was guilty of proximately contributing negligence, in that he caused debris, etc., to be placed in the culvert, and thereby "contributed to the obstructions complained of" in count 5. The plea (7) was, in our opinion, subject to the sixth ground of the demurrer interposed thereto. This ground asserts that the plea only expresses the conclusion of the pleader. The facts from which the pleader deduces his conclusion that the debris placed in the culvert by the plaintiff contributed to the obstructions complained of are, in material parts, left unstated. Whether the contributions averred to have been made by plaintiff to the obstruction were sufficient to make any practical difference in the clogging, in whole or in part, of the culvert, is only to be inferred by reference to the avowal of the pleader's conclusion to that end. Indeed, this plea's averments would be sustained by proof that plaintiff caused completely inconsequential debris to be placed in the culvert; whereas, in order to conclude the plaintiff as for acts of this character and exonerate the defendant from

the consequences of the wrong averred in count 5, it was necessary that the contributions made by the plaintiff should have been such as to effect the clogging, in whole or in material part, of the culvert. The plea is also defective in that it is not averred therein that the matter placed in the culvert by the plaintiff proximately contributed to the injury complained of in count 5, instead of, as averred, to the obstructions mentioned therein. But this objection to the plea is not pointed out by any ground of demurrer. Plea 8 is, upon like considerations, subject to the same criticisms as those made of plea 7. The demurrer should have been sustained to plea 8.

As we understand the record, pleas 4 and 5 we held to be subject to demurrer—a ruling favorable, of course, to appellant.

[4] Under counts of the complaint averring particular elements of damage resulting from the flooding of the mill, it was admissible for plaintiff to show the suspension of the operation of his mill, its duration, and the net loss of the business entailed thereby. *Sparks v. McCreary*, 156 Ala. 382, 47 South. 332, 22 L. R. A. (N. S.) 1224; *Sou. I. & E. Co. v. Holmes*, 164 Ala. 517, 525, 51 South. 531. The court was in error in denying admission to features of the testimony looking to that end on the examination in chief of the witness T. C. Banks.

[5] There was no error in allowing the defendant to elicit from the witness Cassels testimony tending to show that the operation of the mill was hindered by a deficient or intermittent electric current upon which it relied for power; this as tending to refute the contention that there was loss in suspension of the business of the mill, and that the flooding was the occasion of that suspension, if sustained.

[6, 7] Charges 17 and 18 were refused to plaintiff without error. The former did not take due account in its hypothesis of the defenses pleaded, but predicated plaintiff's right to recover only upon the establishment of a cause of action set forth in the complaint. The latter charge misstated the measure of proof necessary to warrant a recovery by plaintiff.

[8] Charge 19 refused to plaintiff appears to confuse the rules of law pertaining to willful or wanton misconduct or omission. Contributory negligence is not available to defeat a recovery on that account. It was proper to refuse that request.

There is evidence tending to support every material allegation of the complaint, both as for liability for simple negligence and for a conscious disregard of the damnifying consequences to plaintiff's property that would probably ensue if a heavy, though not unusual, rainfall should come. The issues on the complaint were for the jury. Such was the view prevailing in the trial court.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and DE GRAFFENRIED, JJ., concur.

(12 Ala. App. 498)

CAPITAL SECURITY CO. v. DAVIS.

(No. 106.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

BUILDING AND LOAN ASSOCIATIONS — CONTRACTS—FRAUD OF AGENT—RIGHT TO RELIEF.

Where a person dealing with an agent to take applications for home purchasing investment contracts negligently signed without reading an application reciting that the applicant relied solely on the terms of the contract and the options set forth on the back of the application, and retained the contracts without reading them, he was not entitled to relief against the company on the ground of fraud, based on the agent's statements as to the contents of the contracts, where no confidential, fiduciary, or special relation existed between them.

[Ed. Note.—For other cases, see *Building and Loan Associations*, Cent. Dig. § 10; Dec. Dig. § 8.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Action by Irene Davis against the Capital Security Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

L. A. Sanderson, of Montgomery, for appellant. Well, Stakely & Vardaman, of Montgomery, for appellee.

PELHAM, P. J. The Supreme Court, in an opinion rendered November 7, 1914, in a case in which the same party is appellant as in the case before us on this appeal, has passed upon the fundamental question presented by this appeal. See *Capital Security Co. v. Gilmer*, 67 South. 258.

Since the rendition of the opinion in that case, and after the Supreme Court had overruled the appellee's application for a rehearing, the appellee has filed an additional brief in this case making the contention that the *Gilmer* Case is not controlling because of a difference in the evidence in the two cases as shown by the evidence set out in the bills of exceptions. The difference pointed out, and the distinction sought to be made is based on the contention that in the instant case there is evidence to show that the appellee had been fraudulently induced by the misrepresentations of the company's agent as to its contents to sign the application for the loan contract, and that in the *Gilmer* Case there was no such evidence. The appellee urgently insists that the opinion in the *Gilmer* Case is "rested upon this fact."

We do not so read the opinion in that case. It seems to us that the holding there is "rested" principally, if not altogether, on the prop-

osition that no confidential, fiduciary, or special relation was shown to exist between the parties entitling the appellee to avoid the obligation entered into upon the ground of fraud. The writer of the opinion of the court in the Gilmer Case, referring to the evidence before the court on that point, says:

"Under the evidence in this case there is no legally sufficient reason shown by the plaintiff for her failure to read her application, and we see no reason why, under the evidence in this case, she should be permitted, upon the ground of fraud, to defeat the defendant's recovery."

Upon this proposition, also, as the "one material element lacking" to authorize a recovery under the evidence, the case of Southern Loan & Trust Co. v. Gissendaner, 4 Ala. App. 523, 58 South. 737, is distinguished from the Gilmer Case in the latter opinion. The substantial and real question presented on this appeal, under the evidence set out in this record, brings it under the influence of this holding in the Gilmer Case on the cardinal proposition there involved and decided, and requires a reversal of the judgment of the trial court.

To answer the appellee's contention that a distinction exists between this and the Gilmer Case because of a difference in the evidence as to fraud being used to induce signing the application, we can say that an examination and comparison of the evidence set out in the bills of exceptions in the two records will not show any substantial difference between the evidence in the two cases on this point. On page 49 of the Gilmer transcript the appellee, as a witness in her own behalf, is shown by the recitals contained in the bill of exceptions to have testified that:

"At the time she entered into the contract, she signed a certain paper called by Phillips [the agent] an 'application,' but she did not read it, nor did she ever read same."

Following this it is shown by the further recitals in the bill of exceptions that the witness was permitted to testify, against the objection of the defendant, that she did not read the application because of her reliance on the statements of the agent, who told her his word was his bond, and that she could rely on it, and that she did rely upon it as to such statements. What these representations or statements of the agent were with respect to the contract and application in the instant case and the Gilmer Case, as shown by the two records, went to the same matters in the main and were substantially the same in both cases. They had reference principally to the time when, and upon making what number of payments, the appellee would be entitled to receive a loan from the company.

We do not think it is essential to a disposition of this case, after the opinion in the Gilmer Case, whether the evidence in that case did or did not show misrepresentations made by the agent with respect to the application as apart from the contract, but that

this was not overlooked as one of the matters relied upon and considered in the Gilmer Case is shown by the brief of counsel filed in that case, where they say (page 3):

"He [the agent] induced Mrs. Gilmer to buy six of these contracts on his statement of what the contracts contained, and also induced her to sign a written application for these contracts, stating that the application was for the contracts as represented to her. Shortly thereafter Mrs. Gilmer, relying on this statement of what the contracts contained, and on the statement as to what the application was, received from the defendant six of the contracts," etc. (Italics supplied.)

And further on the same page:

"The testimony showed that Mrs. Gilmer neither read the application nor the contracts because of her reliance on what Phillips [the agent] had told her of their contents."

There is no material or substantial difference between the evidence in this case and that in the Gilmer Case, as applied to the principle of law involved and decided in that case, and on the authority of that case a judgment here reversing the judgment of the lower court is ordered.

Reversed and remanded.

(12 Ala. App. 662)

CAPITAL SECURITY CO. v. UNDERWOOD. (No. 152.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Action between the Capital Security Company and L. C. Underwood. From the judgment, the company appeals. Reversed and remanded.

Ed. S. Watts, of Montgomery, for appellant. C. N. White, of Montgomery, for appellee.

PELHAM, P. J. There is no substantial difference between the evidence shown by the record in this case and that in the case of Capital Security Co. v. Gilmer, 67 South. 258, decided by the Supreme Court at the present term. In fact, there is not as much evidence in the case before us going to show fraudulent inducement on the part of the agent in securing the appellee's signature to the application for the "loan contract" as in the Gilmer Case, and on the authority of that case the judgment of the lower court in this case must be reversed. See, also, Capital Security Co. v. Davis, 67 South. 705.

Reversed and remanded.

(12 Ala. App. 662)

CAPITAL SECURITY CO. et al. v. HOLLAND. (No. 154.)

(Court of Appeals of Alabama. Jan. 14, 1915.)

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Action between the Capital Security Company and others and George W. Holland. From the judgment, the parties first mentioned appeal. Reversed and remanded.

Edward S. Watts, of Montgomery, for appellants. Weil, Stakely & Vardaman, of Montgomery, for appellee.

PELHAM, P. J. The appellee, in additional brief filed in this case since the opinion of the Supreme Court in the case of Capital Security Co. v. Gilmer, 67 South. 253, refers us to the brief filed contemporaneously in the pending

case of Capital Security Co. v. Davis, and states that "the same distinction in the facts exists between the Gilmer Case and the case at bar." We have disposed of this contention of the appellee in our opinion in the case of Capital Security Co. v. Davis, 67 South. 706; the holding being adverse to the appellee on the proposition presented.

The evidence relied upon and pointed out in this case as differentiating it from the Gilmer Case on the question of the evidence in the latter case failing to show fraudulent inducements by the agent of the company in securing the appellee's signature to the application through misrepresentations of its contents is on page 37 of the transcript, and is as follows: "Witness then testified that at the time he had the first conversation with Phillips [appellant's agent], he signed a paper called the application for the contract; that he did not read it; that Phillips told him that the application was for the contract as Phillips had told him the contract was." By a reference to what we have said in the case of Capital Security Co. v. Davis, and by noting the evidence quoted from the record in the Gilmer Case in the opinion in that case, it will be seen that, if anything, there is more evidence in the Gilmer Case than in the instant case to sustain the evidential fact under discussion and claimed by appellee as lacking in the Gilmer Case, although appearing in this case.

It is our opinion, from an examination of the entire evidence set out in the record in the two cases, that there is no material or substantial difference between the evidence in these cases that would justify this court in reaching a different conclusion from that reached by the Supreme Court in the Gilmer Case, the appeal presenting, as it does, the same propositions for determination.

Reversed and remanded.

(12 Ala. App. 353)

ILLINOIS CENT. R. CO. v. J. R. KILGORE & SON. (No. 485.)

(Court of Appeals of Alabama. Nov. 10, 1914.
Rehearing Denied Jan. 21, 1915.)

1. PARTNERSHIP — 197 — ACTION BY — USE OF FIRM NAME — "ENTITY."

While at common law a partnership is not a legal entity, partners may, in view of Code 1907, § 2506, authorizing suit against them in the firm name, sue under such name, where the complaint describes the plaintiff as a partnership, composed of partners named.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 360; Dec. Dig. — 197.]

For other definitions, see Words and Phrases, First and Second Series, Entity.]

2. COURTS — 91 — ALABAMA COURT OF APPEALS — DECISION OF SUPREME COURT.

Under Act March 9, 1911 (Laws 1911, p. 100), § 10, requiring the Court of Appeals to follow decisions of the Supreme Court, the Court of Appeals must follow a decision of the Supreme Court holding a local statute applicable to intrastate as well as to interstate shipments.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 325, 326; Dec. Dig. — 91.]

3. COURTS — 210 — STATE COURTS — ALABAMA COURT OF APPEALS — CERTIORARI.

Where the Supreme Court has construed a statute as applicable to intrastate as well as interstate shipments, the Court of Appeals should follow the case, and should not, though authorized to certify a cause to the Supreme Court in case of disagreement, certify the case to the Supreme Court, so that it might change

its decision; the party objecting having an appropriate remedy.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 499, 506; Dec. Dig. — 210.]

4. CARRIERS — 227 — CARRIAGE OF LIVE STOCK — PLEA — SUFFICIENCY.

In action for damages for injuries to a shipment of live stock, the defendant filed a plea setting up the bill of lading which required notice of loss within 10 days, as a condition to recovery. The plea also averred that the loss and injury was peculiarly within plaintiff's knowledge. Held, that the plea was not sufficient to take the case out of Code 1907, § 4297, declaring that any agreement which forfeits a right of action for failure to present to the party liable a claim for damages is void, unless the facts are peculiarly within the knowledge of one of the parties, for it is obvious that the facts surrounding the injuries to the cattle must have been within the knowledge of the carrier.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. — 227.]

5. CARRIERS — 218 — CARRIAGE OF LIVE STOCK — BILLS OF LADING — PROVISIONS.

Where the bill of lading for a shipment of live stock prescribed the maximum recovery in case of loss or injury, the bill fixed the measure of damages, and not Code 1907, § 5514, which declares the measure of damages in such cases to be the market value at the place of destination.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 674-696, 927, 928, 933-949; Dec. Dig. — 218.]

On Rehearing.

6. EVIDENCE — 591 — CONCLUSIVENESS ON PARTY INTRODUCING.

In an action for damages to a shipment of live stock, where plaintiff whose complaint in code form, was founded on the carrier's common-law liability, to show the contract, introduced the bill of lading restricting the carrier's liability, he is bound by the restriction.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2440-2443; Dec. Dig. — 591.]

Appeal from Circuit Court, Walker County; J. J. Curtis, Judge.

Action by J. R. Kilgore & Son against the Illinois Central Railroad Company, for damages for failure to deliver and for delay in delivering certain live stock. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

The complaint and the pleas sufficiently appear from the opinion of the court. The demurrers interposed to the pleas 3, 4, 5, and 6 separately and severally, are as follows:

- (1) The contract, requiring notice to defendant of plaintiff's claim, is void.
- (2) It is contrary to law.
- (3) It is unreasonable and void.
- (4) The facts present no bar to this suit.
- (5) No consideration for the contract was shown.
- (6) It is not averred that a special rate was given plaintiff to induce the execution of the contract.
- (7) It is not shown that the happening of the event complained of was peculiarly within the knowledge of plaintiff.
- (8) The fact that the loss and injury was unknown to defendant constitutes no defense to their negligence.
- (9) The injury to live stock and transporta-

tion by the negligence of a common carrier is not within the provision of section 4297, Code 1907, authorizing contracts requiring notice when the happening of the event is peculiarly within the knowledge of one of the parties.

(10) The matters presented are admissible under the general issue.

(11) A defendant cannot contract against his own negligence, and any injury not caused by such negligence is admissible under the general issue.

Davis & Fite, of Jasper, and Percy, Ben-ners & Burr, of Birmingham, for appellant. Bankhead & Bankhead, of Jasper, for appellee.

THOMAS, J. [1] At common law a partnership or firm is not regarded as a legal entity apart from its members; and, as it is a general rule that actions can only be brought by and against persons, natural or artificial—a partnership being neither—it has been almost universally held that all actions and suits involving partnership claims or liabilities must be brought by or against the persons individually who compose the firm. 15 Ency. Pl. & Pr. 839. This rule, however, has received some modification in this jurisdiction. As to suits against partners, it is here provided by statute that such suits may be brought, either against the partnership in its common name, even omitting the names of the individuals composing it, or against the individuals themselves—any one or more of them (Code, § 2506)—and as to suits by partners, it has been established and settled by the decisions of our Supreme Court that such suits may be maintained, either in the partnership name, provided the names of the individuals composing it are set out, or in the name of the individuals themselves. *Planters' & Merchants' Bank v. Lauchelmer & Sons*, 102 Ala. 457, 14 South. 776; *Simmons v. Titcher Bros.*, 102 Ala. 319, 14 South. 786; *Thompson v. Roberts*, 115 Ala. 697, 22 South. 1001; *Foreman v. Well Bros.*, 98 Ala. 497, 12 South. 815; *Thompkins v. Levy & Bro.*, 87 Ala. 263, 6 South. 346, 13 Am. St. Rep. 81; *Moore v. Martin & Hoyt*, 124 Ala. 291, 27 South. 252; *Lister v. Vowell et al.*, 122 Ala. 267, 25 South. 564.

In the present case, the plaintiff in the court below, who is the appellee here, was described in the complaint as "J. R. Kilgore & Son, a copartnership composed of J. R. Kilgore and John N. Kilgore." Although the suit is therefore, as contended, one by the partnership (*Kilgore & Son v. Shannon*, 6 Ala. App. 537, 60 South. 522), yet, setting out, as the complaint does, the names of the individuals composing it, such complaint was not subject to the demurrer aimed at it, to the effect that a partnership is without capacity to sue. The court consequently committed no error in overruling the demurrer. Authorities supra.

[2] To the complaint, which was against the defendant as a common carrier for fail-

ure to deliver (in some counts) and for delay in delivering (in other counts) certain cattle shipped by plaintiff over defendant's railroad from Jasper, Ala., to East St. Louis, Ill., the defendant, in addition to the general issue, filed three special pleas, numbered 3, 4, and 5, respectively, setting up in each a provision in the bill of lading to the effect that no claim for loss or damage to the stock should be valid unless made in writing, verified by affidavit, and filed within 10 days after the stock was removed from the cars, and averring in each of such pleas that no such claim had been filed. In addition to these averments common to them all, plea 4 contained the distinguishing additional averment that the loss and injury complained of was unknown to defendant, its servants or agents, and plea 5, the distinguishing additional averment that "the loss of and injury to plaintiff's stock, as set up in the complaint, was peculiarly within the knowledge of the plaintiff." The demurrers to these pleas, the sustaining of which is assigned as error, and which will be set out in the report of the case, were predicated upon section 4297 of the Code, which has been upheld by our Supreme Court—whose decision has been subsequently followed by this court—as applicable to both intra and inter state shipments. *N. C. & St. L. Ry. Co. v. Hinds*, 178 Ala. 657, 59 South. 669; *N. C. & St. L. Ry. Co. v. Hinds*, 5 Ala. App. 596, 59 South. 670; *So. Ex. Co. v. Ruth & Sons*, 5 Ala. App. 644, 59 South. 538; *Northern Ala. Ry. Co. v. Bidgood*, 5 Ala. App. 658, 59 South. 680; *N. C. & St. L. Ry. Co. v. Hinds*, 9 Ala. App. 534, 60 South. 409; *Western Union Tel. Co. v. Brazier*, 10 Ala. App. 308, 65 South. 95.

As to whether that decision is, as insisted by appellant's counsel, in conflict with the federal statutes regulating interstate commerce and the decisions of the United States Supreme Court construing them is a question we are foreclosed from considering, since the statutes of this state creating this court make the decisions of our Supreme Court binding on us. Nor does the suggestion of appellant's counsel that we certify the case to our Supreme Court to ascertain, in advance of any present ruling by us, if that court still desires to adhere to or to now overrule its previous decision meet with approval. The necessary effect of the operation of the statute, making their decisions binding on us, is to create the presumption—conclusive so far as may concern any action on the part of this court—that that court does desire to adhere to its former decision. We are therefore without warrant or authority to entertain any doubt or disagreement, so far as regards our official action, as to the correctness of that decision, or to in any wise bring it in question. Section 10, Gen. Act, approved March 9, 1911 (Acts 1911, p. 95).

[3] The statute permits this court to certify to the Supreme Court any question for de-

cision when, upon it, the judges of this court are unable to reach a unanimous conclusion. Section 2, Gen. Act, approved March 9, 1911. But, as to the standing decisions of that court, the statute, *propria vigore*, makes our conclusion unanimous as to their correctness (section 10, *supra*); and we would be acting in the teeth of that statute were we to question such a decision by certifying to the Supreme Court that we had disagreed as to its correctness, and by calling on them to say again whether it was correct or not. They would be justified in doing so, and should ignore such a certification. If appellant desires to bring that decision again under review by our Supreme Court, the law affords him an adequate remedy and method by certiorari.

[4] Under that decision and those cited as based upon it, it is clear, as is practically conceded, that the trial court committed no error in sustaining the demurrer as to the special pleas numbered 3 and 4 mentioned, but, it is insisted, the court erred in sustaining it as to plea numbered 5, because that plea averred, as pointed out, that the loss and injury to plaintiff's cattle, as alleged, was a fact "peculiarly within the knowledge of the plaintiff" which allegation, it is contended, brought the plea within the saving provision of the said section 4297 of the Code. We cannot so agree, as we are of opinion that injury done to cattle as the result of the negligence of the carrier in transporting them, which is of such a character as to cause their death in transit and consequent failure to deliver by the carrier, as is alleged in the complaint, is not and cannot, in the nature of things, be such a fact as is "peculiarly within the knowledge of the shipper," but is a fact equally open to the knowledge of the carrier. The plea is therefore repugnant and inconsistent, in that it alleges a fact, or conclusion rather, at variance with the facts it confesses, to wit, it alleges a fact to be *peculiarly* within the knowledge of the plaintiff, when the complaint, which such plea confesses and seeks to avoid, shows, as a necessary inference from the matters set up in it, it to have been a fact equally open to the knowledge and observation of the defendant. If so, then such plea does not show that the fact was *peculiarly* within the knowledge of the plaintiff, and consequently fails to bring the clause (in the bill of lading) relied on for defense within the saving provisions of said section 4297 of the Code; but such plea merely alleges at most, when properly construed, a conclusion repugnant to the facts which it confessed, and the court, in passing on the sufficiency of the plea, was authorized in ignoring such a conclusion, and in looking only to the facts which it confessed and upon which such conclusion was predicated. These showed that the loss of the cattle by death while on defendant's train was not a fact peculiarly within plaintiff's knowledge.

[5] Section 5514 of the Code fixes, as the

measure of damages for the failure of a common carrier to deliver goods or chattels intrusted to it for shipment, the market value of such property at the place of destination at the time and in the condition it should have been delivered. The statute to this extent seems to be but declaratory of the rule existing at common law.

The bills of lading here sued on, and which were introduced in evidence by plaintiff, undertook to fix a different rule and to this end contain, each, the following provision:

"The liability of the railroad company for any loss or damage for which it may be responsible shall not exceed the actual cost at the point of shipment, and in no event exceed the above valuation [previously set out in the bill of lading as \$50 for each bull or ox, \$30 for each cow, and \$10 for each calf] for each animal"

—it appearing from the bills of lading that the freight rate charged for the shipment was based on the valuation of the animals as stated.

Whether or not the statute last mentioned as fixing the measure of damages applies to interstate shipments, as this was, which was a shipment of 62 head of beef cattle from Jasper, Ala., to East St. Louis, Ill., or whether, if it did so apply, it would to this extent be void as encroaching upon a field from which the state was impliedly excluded, as contended, by reason of the fact of general congressional legislation upon the subject of interstate commerce (Interstate Commerce Act and amendments thereto [Act Feb. 4, 1887, c. 104, 24 Stat. 379; U. S. Comp. St. 1913, §§ 8563-8604]), though such legislation did not deal with the particular subject dealt with in that statute, are questions we need not and do not decide; since the decisions of our own courts are in accord with the appellant's other contention that the rule for the admeasurement of the damages for loss in this case is that fixed by the contract in the provision quoted, notwithstanding the statute cited. *L. & N. R. R. Co. v. Sherrod*, 84 Ala. 180, 4 South. 29; *So. Ry. Co. v. Cofer*, 149 Ala. 568, 43 South. 102; *So. Ry. Co. v. Brewster*, 9 Ala. App. 603, 63 South. 790; *A. G. S. R. R. Co. v. McCleskey*, 160 Ala. 630, 49 South. 433; *Mouton v. L. & N. R. R. Co.*, 128 Ala. 537, 29 South. 602; *So. Express Co. v. Owen*, 146 Ala. 412, 41 South. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, 9 Ann. Cas. 1143; *So. Ry. Co. v. Jones*, 132 Ala. 439, 31 South. 501.

An examination of the cases cited will show that provisions not materially different from the one here, found in the bills of lading there under consideration, were upheld as valid, in the absence there, as here, of any proof showing imposition, coercion, or undue advantage taken of the shipper, or gross undervaluation of the property in the bill of lading.

The trial court was in error, therefore, in charging the jury that the measure of damages was the market value of the cattle at the place of destination. The judgment is

consequently reversed, and the cause remanded.

Reversed and remanded.

On Rehearing.

[6] On application for rehearing, it is urged by appellee (plaintiff below) that, since the complaint is, it is insisted, predicated, not upon the bill of lading, but upon the defendant's common-law liability, and since such carrier failed, as it did, to file any special plea setting up the bill of lading and the provision contained therein limiting the amount of damages recoverable for nondelivery of the cattle, the plaintiff was entitled to have such damages measured, not by the terms of the bill of lading (the special contract), which the plaintiff himself introduced, but by the rules of law which would, as pointed out in the opinion, have governed in the absence of such a contract, and therefore that we were in error in the opinion in holding that the lower court incorrectly instructed the jury as to the measure of damages. In support of his contention that the complaint, which is in code form (Code, § 5382, form 15), is founded solely on defendant's common-law liability, we are cited to the case of *N. C. & St. L. Ry. Co. v. Parker*, 123 Ala. 683, 27 South. 323, where it was in effect so held, in that it was there decided that a plaintiff could not recover under such a complaint where the evidence developed that there was a bill of lading issued—a special contract—since, in such case, it was held that there was a variance between allegation and proof.

We find, however, that that case has been expressly overruled on this proposition, and that it is now the law that under such a complaint the plaintiff can recover even by proving a special contract—the bill of lading. *L. & N. R. R. Co. v. Landers*, 135 Ala. 510, 33 South. 482; *N. C. & St. L. R. R. Co. v. Cody*, 137 Ala. 597, 34 South. 1003; *Walter v. Ala. Great Southern R. R. Co.*, 142 Ala. 481, 39 South. 87; *So. Ry. Co. v. Webb*, 143 Ala. 310, 39 South. 262, 111 Am. St. Rep. 45, 5 Ann. Cas. 97. This being true, and the plaintiff himself having in this case proved and introduced in evidence under the complaint the bill of lading, he thereby gave his own interpretation as to what that complaint was founded upon; consequently that complaint, which, before such evidence was introduced, was comprehensive enough to include a cause of action on defendant's common-law liability where no bill of lading has been issued for the shipment, became by such evidence, which was of plaintiff's own choosing, narrowed to a cause of action upon the bill of lading; and certainly, therefore, it seems to us clear that the damages recoverable are, as we held in the opinion, to be measured, as in other cases, by the valid provisions of the special contract sued upon and introduced in evidence by the plaintiff. Authorities supra; South-

ern Ry. Co. v. Brewster, 9 Ala. App. 606, 63 South. 790.

Since a bill of lading is not necessary to a cause of action against the carrier (2 Mayf. Dig. 616, § 8), the plaintiff might have given a different interpretation to his complaint by refraining from introducing the bill of lading in evidence and by proving merely by parol evidence a delivery to and acceptance by the defendant as a common carrier of the cattle for transportation for a reward (*L. & N. R. R. Co. v. McGuire*, 79 Ala. 395), in which event the court's charge as to the measure of damages would have been free from error, as there would have then been no bill of lading before the court, unless the defendant had introduced it in evidence.

Whether, when a defendant introduces in evidence the bill, he could get the benefit of the provision limiting the damages recoverable, without specially pleading such provision, or could do so under the general issue, we need not and do not decide. What we do decide is that when the plaintiff himself introduces the bill under a complaint framed as that here, the measure of damages is governed by the provisions of the bill on that subject, if valid. *Southern Railway Co. v. Brewster*, supra. If invalid, then, of course, such provisions are not binding, and their invalidity may, as was done in this case, be tested out by requests for or exceptions to charges on the measure of damages, and by the offering of and objection to evidence tending to show a value different from that agreed on in the bill.

The application for rehearing is overruled.

(12 Ala. App. 218)

Ex parte RODGERS. (No. 175.)

(Court of Appeals of Alabama. Jan. 23, 1915.)

1. CRIMINAL LAW §1011 — "CERTIORARI" — NATURE OF WRIT.

The common-law writ of "certiorari" is an extraordinary writ, and its office is to afford a review by a court of supervisory power of the proceedings of an inferior tribunal or officer exercising judicial functions that proceed in a summary manner and not in accordance with the common law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. §1011.]

For other definitions, see Words and Phrases, First and Second Series, Certiorari.]

2. CRIMINAL LAW §1011 — CERTIORARI — RIGHT TO WRIT.

While the writ of certiorari is granted as of right when applied for by the state in criminal proceedings, this is not the rule as to individuals, as in such cases the writ will be granted or denied in the discretion of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. §1011.]

3. CRIMINAL LAW §1011 — CERTIORARI — DISCRETION OF COURT.

The discretion of the court in awarding or refusing the writ of certiorari is a sound judicial discretion depending upon the settled legal principles applicable to the case, and it will not be awarded unless its issuance is necessary to

the accomplishment of justice in the particular case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. ⚡1011.]

4. CRIMINAL LAW ⚡1011—CERTIORARI—GROUNDS FOR DENIAL OF WRIT.

A writ of certiorari will not be awarded to an individual, where, as the result, public inconvenience or detriment will likely ensue, or where the party making application for its issuance has been guilty of laches in the protecting of his rights, or where other remedies exist adequate to the ends of justice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. ⚡1011.]

5. JUDGMENT ⚡495—COURTS—GENERAL JURISDICTION—PRESUMPTION.

The circuit court is a court of record of general superior jurisdiction, and its judgments and proceedings are always presumed regular and founded on jurisdiction duly acquired until the contrary definitely appears.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 549½, 933, 934; Dec. Dig. ⚡495.]

6. CRIMINAL LAW ⚡1011—CERTIORARI—EXISTENCE OF REMEDY BY APPEAL.

Where defendant, convicted in recorder's court, entered his appearance in the circuit court by virtue of an appearance bond, and the circuit court, having original jurisdiction of the offense, tried defendant in accordance with the common law, and the complaint and affidavit sufficiently charged the offense, and the judgment was responsive to the charge, the judgment was sufficient to support an appeal from the circuit court, and hence certiorari will not lie on the ground the circuit court had no jurisdiction of the appeal because the appearance bond was not a sufficient appeal bond.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. ⚡1011.]

7. CRIMINAL LAW ⚡1011—CERTIORARI—EXISTENCE OF REMEDY BY HABEAS CORPUS.

Certiorari does not lie to review a judgment of a circuit court conceding it invalid because no appeal was filed from the conviction in the recorder's court or that such appeal was not authorized by statute, since, defendant being in custody under the circuit court judgment, habeas corpus was an adequate remedy, especially where the grant of certiorari and a judgment quashing the proceedings might embarrass the public authorities in enforcing the recorder's judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2569; Dec. Dig. ⚡1011.]

8. CRIMINAL LAW ⚡995—JUDGMENT—RECORD.

Though a judgment of conviction in recorder's court contains no formal word adjudging defendant guilty, it is sufficient if the findings of the recorder are followed by an appropriate sentence to hard labor for the county in default of the payment of fine and costs.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2530, 2536-2543; Dec. Dig. ⚡995.]

9. CRIMINAL LAW ⚡1076—APPEAL FROM RECORDER'S COURT—NECESSITY OF APPEAL BOND.

Under Acts 1909 (Sp. Sess.) p. 92, § 32, making applicable to recorder's court the law governing appeals from county courts, and Code 1907, §§ 6725, 6726, authorizing an appeal from county court without filing bond, a circuit court has jurisdiction of an appeal from a judgment of conviction in recorder's court of an offense which it had concurrent jurisdiction over though no appeal bond was given, but only an appearance bond which defendant complied with, and

hence certiorari would not lie to review the judgment of the circuit court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2708-2716, 3201; Dec. Dig. ⚡1076.]

10. CRIMINAL LAW ⚡1076—BOND PENDING BAIL—RECORDER'S COURT.

The purpose of the bail bond on an appeal from a conviction in recorder's court is not to confer jurisdiction on the circuit court, but to enable defendant to release himself from custody pending appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2708-2716, 3201; Dec. Dig. ⚡1076.]

Petition for certiorari by Garfield Rodgers to the Russell circuit court. Writ denied, and petition dismissed.

Glenn & De Graffenried, of Seale, for petitioner. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

BROWN, J. [1, 2] The common-law writ of certiorari is an extraordinary writ, and its office is to afford a review by a court of supervisory power of the proceedings of an inferior tribunal or officer exercising judicial functions that proceed in a summary manner and not in accordance with the common law. 4 Enc. P. & P. 10; 3 Am. & Eng. Ency. Law (1st Ed.) 60, 61. While the writ is granted as of right when applied for by the state in criminal proceedings (4 Enc. P. & P. 37), this is not the rule as to individuals. In such cases, the writ will be granted or denied in the discretion of the court, according to the circumstances of each particular case, as justice may require. 4 Enc. P. & P. 31.

[3, 4] While the discretion the court may exercise in awarding or refusing the writ is not an arbitrary one dependent upon whim or caprice, but is a sound judicial discretion dependent upon the settled legal principles applicable to the case, yet it will not be awarded unless some special cause for it is shown, and its issuance is necessary to the accomplishment of justice in the particular case. 4 Enc. P. & P. 33, 34. It is well settled that the writ will not be awarded to an individual where as a result public inconvenience or detriment will likely ensue, or where the party making application for its issuance has been guilty of laches in the protecting of his rights, or where other remedies exist adequate to the ends of justice. 4 Enc. P. & P. 36, 50-54; Independent Publishing Co. v. American Press Ass'n, 102 Ala. 475, 15 South. 947; City of Decatur v. Brock, 170 Ala. 149, 54 South. 209. An application of these principles to the facts disclosed by the petition in this case, and the certified record submitted with it, justifies the refusal of the writ to the petitioner and necessitates the dismissal of the petition.

The prosecution resulting in the conviction of the petitioner was commenced before the recorder of the town of Hartsboro for a violation of the prohibition law, where the pe-

petitioner being arraigned pleaded not guilty and was tried and convicted. From that judgment of conviction he prayed an appeal to the circuit court of Russell county, and on the advice of his counsel, in order to perfect his appeal and avoid incarceration pending the appeal, he procured an order from the recorder fixing the amount of bond to be given, and thereupon gave a bail bond payable to the state and conditioned for his appearance before the circuit court. The jurisdiction of the recorder and the regularity of the proceedings before him were not questioned, except in the particular hereinafter stated. The case was regularly certified to the circuit court by the town clerk, with the original papers, and was there docketed. The petitioner appeared in the circuit court, and by motion to strike the case from the docket, and plea in abatement to the complaint filed by the solicitor embodying the charge in the affidavit, the basis of the prosecution, questioned the jurisdiction of the circuit court to try him for two reasons: (1) Because the bond executed by the petitioner to perfect his appeal and accomplish his release from custody was not an appeal bond, but a mere appearance bond, and its execution was inefficacious to confer jurisdiction upon the circuit court; and (2) that in the judgment rendered by the recorder there was no formal adjudication of the defendant's guilt, and therefore that judgment was void and would not support an appeal. The circuit court overruled the motion to strike, and sustained a demurrer to the plea in abatement, and petitioner, declining to plead further, remained mute, and the court entered a plea of not guilty for him and proceeded to trial in the regular way, resulting in the judgment of conviction of which the petitioner now complains. For the reasons above stated, the petitioner now asserts that the judgment of the circuit court is void for want of jurisdiction apparent upon the record.

[5] The circuit court is a court of record of general superior jurisdiction, and its judgments and proceedings are always presumed to be regular and valid and founded on jurisdiction duly acquired until the contrary definitely appears. *Roman v. Morgan*, 162 Ala. 133, 50 South. 273; *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 173, 210. The offense of which the petitioner was convicted was one within the original jurisdiction of the court (Code 1907, § 3255), and the court had jurisdiction of the person, the petitioner being actually present in court in obedience to the obligation he had voluntarily entered into for his appearance to answer the charge, and the court proceeded according to the course of the common law to the trial before a jury duly organized and empaneled, resulting in a verdict of guilty, followed by the judgment of the court thereon.

[6] Although the proceedings under which the court assumed jurisdiction to try the

petitioner may not have been regular or sufficient to support the judgment of conviction on appeal, the offense of which he was convicted was one over which the court had original jurisdiction, and the complaint, following the affidavit, sufficiently charged the offense, and the verdict of the jury and the judgment of the court were responsive to the charge. This judgment was sufficient to support an appeal. Code 1907, § 6244; *Lee v. State*, 10 Ala. App. 191, 64 South. 637; *Anderson v. State*, 130 Ala. 126, 30 South. 375; *Rutler v. State*, 130 Ala. 127, 30 South. 338; *Emmonds v. State*, 87 Ala. 12, 6 South. 54. Therefore, if the petitioner, instead of dismissing the appeal to this court which he had sued out from the judgment of conviction, thereby obtaining a suspension of the sentence and bail pending the appeal, had prosecuted that appeal and shown that error intervened, he would have been awarded appropriate relief. *Butler v. State*, supra.

[7] The judgment rendered by the recorder is not void, and, if an appeal is authorized therefrom, is sufficient to support an appeal, as will be instantly shown. Therefore, granting, for the sake of argument, the contention of the petitioner that he did not sue out an appeal therefrom, or that one was not authorized by the statute, and that for this reason the judgment of the circuit court is absolutely void, and will not support an appeal; yet he would not be entitled to the writ of certiorari to quash the judgment. If he is in custody under that judgment, as we must assume that he is, as it was his duty to surrender himself to the proper authorities when he dismissed his appeal to this court, he has an adequate remedy in the writ of habeas corpus to test the validity of the judgment, and if it is void on its face he could be relieved from imprisonment thereunder, and, if shown to be entitled to discharge, an absolute discharge granted; but, if not entitled to an absolute discharge and it should appear that the law required that he be committed to the custody of the public authorities to serve out the sentence imposed upon him by the recorder, this order could be made. *Bray v. State*, 140 Ala. 177, 37 South. 250; *Ex parte Bizzell*, 112 Ala. 210, 21 South. 371; *Ex parte Dickens*, 162 Ala. 277, 50 South. 218; *Easton v. State*, 39 Ala. 551-554, 87 Am. Dec. 49. On the other hand, if this court issues the writ of certiorari and brings the proceedings and judgment of the circuit court here for review, and renders judgment quashing the proceedings, it would likely result in embarrassing the public authorities in enforcing the judgment pronounced against the petitioner by the recorder of the town of Hurtsboro.

[8, 9] There is another reason for denying the writ and dismissing the petition, and that is the proceedings resulting in the judgment of conviction in the circuit court are in all things regular, and that judgment is valid. Jurisdiction concurrent with county

courts and courts of like jurisdiction is conferred by the statute on recorders of cities and towns "of all misdemeanors committed within the city or town, or within the police jurisdiction thereof," with certain limitations not now pertinent. Code 1907, §§ 1215, 1221. The offense for which the petitioner was prosecuted and convicted was of the class falling within the jurisdiction thus conferred, and the complaint or affidavit, the basis for the petitioner's arrest and trial, was in substantial conformity with the statute regulating such prosecutions. Gen. Acts, Sp. Sess. 1909, p. 90, § 29½. The petition, and likewise the authenticated record submitted therewith and in support thereof, shows that the petitioner was duly arraigned before the recorder and entered his plea of not guilty, and on that trial was adjudged guilty; the recorder following the form prescribed by the statute for judgments of the county court. *Driggers v. Cassady*, 71 Ala. 532. Although there is no formal word adjudging the defendant guilty, the findings of the recorder are followed by an appropriate sentence to hard labor for the county, in default of the payment of the fine and costs, which has been repeatedly held sufficient to support an appeal, and as to that matter for all purposes. *Roberson v. State*, 123 Ala. 57, 26 South. 645; *Ex parte Roberson*, 123 Ala. 104, 26 South. 645, 82 Am. St. Rep. 107; *Wilkinson v. State*, 106 Ala. 28, 17 South. 458; *Driggers v. State*, 123 Ala. 46, 26 South. 512; *Stanfield v. State*, 3 Ala. App. 57, 57 South. 402. From that judgment the petitioner had the right of appeal to the circuit court, and a bond of no character was necessary or prerequisite to the exercise of that right, provided the defendant elected to remain in custody. The statute granting this right of appeal may be found in General Acts of 1909, p. 92, § 32, which in part reads:

"If the prosecution is begun before a court or judge as to which or whom no provision is made for a jury trial, the court or judge, if it or he has jurisdiction to try the case and to find the party charged guilty or not guilty, shall proceed with the trial, and if the party charged is convicted, he may appeal to the circuit court or other court of record of like jurisdiction in the county having jurisdiction in cases appealed from the county court, or from a judgment of a justice of the peace in such form and in such manner and subject to such restrictions as govern appeals under the Code of Alabama, from such justices of the peace or county court," etc.

Under these statutory provisions, section 6725 of the Code, regulating the right of appeal from judgments of the county courts, is applicable to the case of petitioner, and all that was necessary to confer jurisdiction on the circuit court was for the petitioner to pray the appeal and have the case certified up to the circuit court. Code, § 6726; *Alford v. State ex rel.*, etc., 170 Ala. 178, 54 South. 213, Ann. Cas. 1912C, 1093; *Lee v. State*, supra.

[10] The purpose of the bail bond author-

ized by the statute is, not to confer jurisdiction on the circuit court, but to enable the defendant to release himself from custody pending the appeal. *Alford v. State ex rel.*, etc., supra. When the case is docketed in the circuit court, the statute provides that the trial in that court shall be de novo, without an indictment or presentment of a grand jury; but the solicitor shall file a brief statement of the cause of complaint, which must be signed by him. Code, § 6730; *Captain v. State*, 10 Ala. App. 167, 64 South. 639; *Lee v. State*, supra.

The circuit court acquired jurisdiction of the case of the petitioner and proceeded to judgment in strict conformity with law, and the petitioner has no right to complain. The writ of certiorari is therefore denied, and the petition dismissed.

Writ denied and petition dismissed.

(12 Ala. App. 507)

McENTIRE et al. v. PAFPE. (No. 515.)

(Court of Appeals of Alabama. Dec. 15, 1914.

Rehearing Denied Jan. 12, 1915.)

1. JUDGMENT ⇐273 — ENTRY NUNC PRO TUNC.

The failure of the court to render judgment can never be made the basis of a nunc pro tunc entry.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 525-541; Dec. Dig. ⇐273.]

2. COURTS ⇐189—MUNICIPAL COURT—TIME FOR ENTRY ON VERDICT.

A judgment of the city court of Birmingham entered more than three months after verdict, but during the same term as that in which the verdict was rendered, is valid.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. ⇐189.]

3. COURTS ⇐189—MUNICIPAL COURT—TIME FOR ENTRY ON VERDICT—STATUTES.

Local Laws 1839, p. 598, § 20, limiting the control of the city court of Birmingham over its judgment to 30 days, has no reference to the right of the court to enter judgment on a verdict.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 409, 412, 413, 429, 458; Dec. Dig. ⇐189.]

4. APPEAL AND ERROR ⇐1074 — HARMLESS ERROR—MOTION TO SET ASIDE JUDGMENT—ADMISSION OF EVIDENCE.

On hearing of motion to set aside a judgment, entered more than three months after verdict, the admission in evidence of a piece of paper containing what purported to be the findings of the jury is harmless; there being no question as to its authenticity, and the record fully identifying the verdict on which judgment was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4248-4252; Dec. Dig. ⇐1074.]

5. APPEAL AND ERROR ⇐664—CONFLICT IN RECORD.

A judgment entry in the record proper will control recitals in the bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859; Dec. Dig. ⇐664.]

Appeal from City Court of Birmingham; C. C. Nesmith, Judge.

Action by Joseph Paffe against R. M. McEntire and others. From a judgment for plaintiff, defendants appeal. Affirmed.

McArthur & Howard, of Birmingham, for appellants. James L. Cole, of Birmingham, for appellee.

PELHAM, P. J. It is shown by the amended record filed pursuant to a written agreement of counsel that this case was tried in the city court of Birmingham on the 29th day of October, 1912, before a jury, who returned a verdict in due and regular form on that day in favor of the plaintiff (appellee) assessing his damages in a trover suit for conversion of certain property at \$200, but that no judgment was entered by the court on the verdict until the 25th day of February, 1913, on which date the court entered up a judgment in proper form.

It is shown by the bill of exceptions that the plaintiff's counsel, on February 25, 1913, called the attention of the court to the failure to enter judgment on the verdict, whereupon the judgment referred to was entered against the objection of the defendants interposed by their counsel, who subsequently made a motion to set aside the judgment as improperly and illegally entered without authority. The term of the city court at which the case was tried commenced on the first Monday in October, 1912, and continued to the last day of September, 1913. Local Acts 1911, p. 58. In fact, it is admitted by appellants' counsel in brief filed that the judgment entered by the court on the 25th day of February, 1913, was during the same term of the court at which the case was tried and verdict returned by the jury on, to wit, the 29th day of October, 1912.

[1] The question presented is not one of authority of the court to make a nunc pro tunc entry, as argued. The failure of a court to act can never be made the basis for such an entry. *A. G. Story Mercantile Co. v. McClellan*, 145 Ala. 629, 40 South. 123, and authorities therein cited. The facts in this case show that the court failed to act—failed to enter judgment of any kind on the verdict returned by the jury on the 29th day of October, 1912—until the 25th day of the following February. No judgment had been previously rendered that was corrected by the judgment entered at that time, and the non-action of the judge during the period shown did not make his delayed act in entering the judgment that of rendering a judgment nunc pro tunc. The proposition that we are to deal with, then, is not the authority of the court to amend or correct a judgment previously rendered by an order nunc pro tunc, but the authority of the court to render in the first instance a correct judgment on a verdict returned during the same term, but some three months prior in point of time to entering the judgment.

[2] From the time the jury returned the verdict until the rendition of the judgment, the case was in fieri, and the court had ample authority to enter a judgment on a verdict returned during the same term when there could have been no discontinuance of the cause. *Charles v. State*, 4 Port. 107; *Clanton v. State*, 96 Ala. 111, 11 South. 299.

[3] Section 20 of the act approved February 28, 1889, relating to the practice and procedure in the city court of Birmingham (*Weakley's Compilation of Local Laws of Jefferson County*, p. 598), and limiting the control of the court over its judgments to 30 days, does not fix any time after verdict returned into court before judgment thereon shall be entered, but has reference only to the time within which the court has control over its judgments after final judgment has been rendered. The only judgment that was rendered in the case at bar is the judgment complained of, that was rendered and entered of record February 25, 1913, and the statute can have no application thereto.

[4, 5] On the hearing of the motion to set aside the judgment as unauthorized, the court admitted in evidence the piece of paper containing what purported to be the finding of the jury. If this was error, as contended by appellants, it would be without injury requiring a reversal. No question was raised with respect to the identity of the paper and its containing the verdict of the jury in the case, upon which the judgment was entered. The amended transcript filed by written agreement of counsel contains the judgment entry of the court identifying the verdict returned in the case on October 29, 1912, sets it out in full, and further recites that issue was joined, and that the case was tried and the verdict returned on that day in that case. This judgment entry filed by agreement of counsel also shows that the judgment rendered on February 25, 1913, was pronounced on "said verdict" set out in the judgment entry as having been returned in that case on October 29, 1912. The bill of exceptions contains nothing to the contrary, and, if it did, the recitals of the judgment entry in the record proper would control.

The assignments of error are not well taken, and the judgment will be affirmed.

Affirmed.

(12 Ala. App. 210)

HALL v. STATE. (No. 158.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. INTOXICATING LIQUORS — 204 — INDICTMENT—SUFFICIENCY.

Under Acts 1909, p. 86, § 24, making it unlawful for any person to accept from another for transportation or delivery certain prohibited beverages, or to carry them over any public street or highway in the state, an indictment charging that defendant, over or along a certain public street or highway, in a certain county and town, carried prohibited liquors, to wit, la-

ger beer, for another, sufficiently charged the offense.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 224; Dec. Dig. ☞204.]

2. INTOXICATING LIQUORS ☞219—OFFENSES—INDICTMENT.

Under such provision, an indictment was sufficient, though it failed to aver the name of the person to whom such prohibited liquors were conveyed, or that his name was unknown.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 237-239; Dec. Dig. ☞219.]

3. INTOXICATING LIQUORS ☞236—PROSECUTIONS—SUFFICIENCY OF EVIDENCE.

In a prosecution under Acts 1909, p. 86, § 24, for handling prohibited liquors, evidence held to sustain a conviction.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 300-322; Dec. Dig. ☞236.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Irvin Hall was convicted of violating the prohibition law, and he appeals. Affirmed.

Omitting formal charging part, the second count of the indictment is:

Irvin Hall did carry or transport over or along a public street or highway in Autauga county, Ala., to wit, the public road leading from Montgomery, Ala., to Prattville, Ala., or over or along a public street in the town of Prattville, prohibited liquors, to wit, lager beer, for another.

The demurrers are: (1) No offense; (2) fails to aver that defendant conveyed the prohibited liquors to another; (3) fails to aver on what road or street the prohibited liquors were conveyed or transported; (4) fails to aver the name of the person for whom said prohibited liquors were conveyed, or to aver that his name was unknown; (5) it was in the alternative that defendant did carry or transport over or along a public street or highway in Autauga county, or over or along a public street in the town of Prattville, but fails to aver that the name of said public street was unknown, or to aver the name of said street.

P. E. Alexander and Gipson & Booth, all of Prattville, and Hill, Hill, Whiting & Stern, of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] The second count of the indictment charges an offense under the provisions of the statutes regulating handling prohibited beverages (Acts 1909, pp. 86, 87, § 24), and demurrers to this count were properly overruled. Williams v. State, 7 Ala. App. 124, 62 South. 294; Williams v. State, 8 Ala. App. 394, 62 South. 371.

[2] In prosecutions for a violation of the liquor laws it is not necessary to set out in the indictment the name of the person to whom a gift or sale of the prohibited liquor was made, or for whom conveyed or transported. Acts 1909, pp. 86, 87, § 24. See Grace v. State, 1 Ala. App. 211, 56 South. 25.

[3] While the evidence as set out in the bill of exceptions contained in the transcript is somewhat confusing in parts, as well as contradictory, there was sufficient evidence of the guilt of the defendant of the offense charged against him to submit that question to the jury. In one part of the bill of exceptions it is recited that the defendant himself testified that, in addition to the barrel of beer, he had whisky in the wagon, and, while specifically claiming the beer as his own, no such claim was made with respect to the whisky; nor did the defendant deny the testimony of the state's witnesses to the effect that the defendant had told them that he was hauling the whisky for another.

Affirmed.

(12 Ala. App. 227)

MASON v. STATE. (No. 332.)

(Court of Appeals of Alabama. Feb. 11, 1915.)

1. INTOXICATING LIQUORS ☞233—VIOLATION OF PROHIBITION LAW—EVIDENCE—ADMISSIBILITY.

On a trial for violating the prohibition law, it was not error to permit a witness to testify that he had seen accused have whisky in his possession, where it did not appear that the event testified to occurred after the swearing to the affidavit, and where that fact was disclosed on cross-examination the testimony was properly stricken out.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. ☞233.]

2. WITNESSES ☞370—CROSS-EXAMINATION—BIAS.

Allowing the state to ask, on the cross-examination of witness for accused, as to whether accused had not worked for the father of the witness, was within the rule permitting cross-examination to show bias.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 1189; Dec. Dig. ☞370.]

Appeal from City Court of Andalusia; Ed T. Albritton, Judge.

King Mason was convicted of violating the prohibition laws, and he appeals. Affirmed.

Baldwin & Murphy, of Andalusia, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The affidavit upon which the defendant was tried contained two counts for violating the prohibition laws, one charging that the defendant sold, offered for sale, kept for sale, or otherwise disposed of, the specified prohibited beverages, and the other count charging simply a sale. There was evidence to support the jury's finding of guilt on both counts.

[1] When it developed from the cross-examination of the state's witness A. J. Ward that the time as testified to by him when the defendant was seen at his (witness') father's house with some whisky in a sack was a subsequent time to the date of the affidavit upon which he was being tried, the court on the defendant's motion promptly excluded this testimony, and it would not

constitute reversible error that this testimony had been admitted against defendant's general objection on the direct examination of the witness, when at that time it had not been made to appear that the event testified to occurred after the swearing out of the affidavit charging the offense.

[2] The court, in permitting the solicitor to ask the defendant's witness G. D. Burns on cross-examination if the defendant did not work for the father of the witness, was clearly within the rule relating to matters that may be inquired into on the cross-examination of a witness for the purpose of showing bias.

The charge refused to the defendant omits the necessary qualification of the witness having willfully sworn falsely, besides being capable of a construction that the jury were authorized to disregard the testimony of one of the named witnesses if they believed the other had sworn falsely.

No reversible error is shown, and an affirmance is ordered.

Affirmed.

(12 Ala. App. 127)

MOYER v. STATE. (No. 186.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. CRIMINAL LAW §789—INSTRUCTIONS—REASONABLE DOUBT.

In a prosecution for larceny, defendant's requested charge that, if the jury under all the evidence had a reasonable doubt as to who took the money, whether a certain third person or defendant, it should give defendant the benefit of such doubt and acquit, was faulty in predicating an acquittal on reasonable doubt as to the guilt of a third person.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. §789.]

2. CRIMINAL LAW §789—TRIAL—MISLEADING INSTRUCTION.

Such instruction was misleading as applied to the evidence, in that defendant could have been guilty of an offense within the terms of the indictment without having been the person who alone actually first took the money.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. §789.]

3. CRIMINAL LAW §829—REQUESTED INSTRUCTION—GIVEN INSTRUCTION.

Where the proposition of a reasonable doubt of guilt authorizing an acquittal was fully covered by the court's charge at the instance of defendant, its refusal of a requested charge thereon was not erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §2011; Dec. Dig. §829.]

4. LARCENY §78—INSTRUCTIONS—PARTICIPATION IN TAKING.

In a prosecution for larceny, defendant's requested charge that, if a third person took the money from the prosecuting witness, the jury should acquit, although such third person, soon after informing defendant of the theft, gave her a part of the money, was properly refused as failing to negative defendant's guilty participation.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §182; Dec. Dig. §78.]

5. CRIMINAL LAW §807—ARGUMENTATIVE INSTRUCTION FOR CHARGE.

A requested charge that, if the jury would not be willing to act on the evidence in the case if it were in relation to matters of the most solemn importance to their own interest, it must find defendant not guilty, was properly refused, as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. §807.]

6. CRIMINAL LAW §741—QUESTION FOR JURY.

Where there was ample evidence to submit to the jury the question of defendant's guilt, the court was not in error in refusing his requested general charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1221, 1706, 1713, 1716, 1717, 1727, 1728; Dec. Dig. §741.]

7. CRIMINAL LAW §412—EVIDENCE—DECLARATIONS AGAINST INTEREST.

In a prosecution for grand larceny, statements in the nature of declarations against interest made by defendant in the presence of a third person connected with the transaction as to which one stole the money, and the contradictions of such third person in the same conversation, were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 894-917, 919-935; Dec. Dig. §412.]

8. CRIMINAL LAW §519—EVIDENCE—CONFESSIONS.

The mere fact that one is under arrest at the time an incriminating statement in the nature of a confession is made does not render it inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. §519.]

9. CRIMINAL LAW §1144—APPEAL—PRESUMPTIONS.

Where it did not affirmatively appear from the record that confessions were not made voluntarily, it would be presumed on appeal that the trial court properly performed its duty in having the proper predicate laid.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §1144.]

10. CRIMINAL LAW §349—EVIDENCE—SUBSEQUENT CONDUCT.

In a prosecution for larceny, where the evidence tended to show that defendant and a third person were accomplices, evidence that they went off and remained together after the commission of the offense was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 778-785; Dec. Dig. §349.]

11. CRIMINAL LAW §1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error, if any, in admitting evidence of defendant's admission as to an accomplice was without prejudice, where she voluntarily testified to all of such matters.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. §1169.]

12. CRIMINAL LAW §456—OPINION EVIDENCE—POWER OF COURT.

In a prosecution for larceny, where a non-expert witness stated to the court that he could not tell whether the attacks he described defendant as having been produced by drinking or some mental condition, as he had never seen defendant when not drinking, and never observed anything peculiar about her actions or words.

except what he thought was produced by drinking, the court properly refused to allow him to express an opinion as to defendant's sanity.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1045; Dec. Dig. ¶456.]

18. CRIMINAL LAW ¶1170—HARMLESS ERROR—CURE.

Where a witness for defendant, after preliminary questions by the court, was allowed to give his opinion as to defendant's sanity, error, if any, in a former refusal to allow the witness to give such opinion was cured.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3145-3153; Dec. Dig. ¶1170.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Mabel Moye was convicted of grand larceny, and she appeals. Affirmed.

The evidence tended to show that defendant and one McQueen were together at the Grand Hotel in the city of Montgomery, and that McQueen lost about \$500. There was evidence tending to show that defendant got the money, and also evidence tending to show that one Peoples, whose room was near by, had an opportunity to get the money, and was seen in or about the room from which the money was taken. The evidence further tended to show that defendant and Peoples went off together to Birmingham, and that defendant was there arrested. The solicitor asked the arresting officer if Peoples "came into your presence and the presence of defendant while you were in Birmingham," which being answered in the affirmative, the solicitor asked, "What did she say and what did Peoples say in the presence of each other?" The witness was permitted to answer that she made the same statement she had made before; that is, that Peoples had taken the money and gave it to her, and she kept it until they got to Birmingham. The witness was further allowed to testify that the couple registered at the Southern Hotel as Mr. and Mrs. Wilson.

The following charges were refused defendant:

(1) If the jury, under all the evidence in this case, have a reasonable doubt as to who took the money, whether Peoples or defendant, then you should give defendant the benefit of such doubt, and acquit her.

(2) The court charges the jury that, if you believe from all the evidence in this case that Peoples took the money from McQueen, then you should acquit defendant, although you may further believe that Peoples soon after that left, informed defendant of same, and gave her a part of the money.

(3) If you would not be willing to act upon the evidence in this case if it were in relation to matters of the most solemn importance to your own interest, then you must find defendant not guilty.

L. A. Sanderson, of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1-3] Charge No. 1 refused to the defendant is faulty in more than one

respect. It predicates an acquittal of the defendant on the reasonable doubt of the guilt of another. It is misleading as applied to the evidence, in that the defendant could have been guilty of an offense within the terms of the indictment without having been the person who alone actually took the money in the first instance. The proposition of a reasonable doubt of guilt authorizing an acquittal was fully covered by the numerous written charges given by the court at the instance of the defendant.

[4] Charge 2 falls to negative the defendant's guilty participation in taking with Peoples. As correctly stated, the proposition is covered by given charge No. 11.

[5] Charge 6 belongs to that class of argumentative charges often condemned.

[6] There was ample evidence to submit to the jury of the defendant's guilt of the crime charged against her, and the court was not in error in refusing the general charge requested in her behalf.

[7-9] The statements in the nature of declarations against interest, or quasi confessions, made by the defendant in the presence of Peoples (who was connected with the transaction), as to which one stole the money, and the contradictions of Peoples in answer thereto in the same conversation, were admissible and properly received in evidence. *Poe v. State*, 155 Ala. 31, 46 South. 521; *Powell v. State*, 5 Ala. App. 75, 80, 59 South. 530. The mere fact that one is under arrest at the time an incriminating statement in the nature of a confession is made does not render it inadmissible. *Raymond v. State*, 154 Ala. 1, 45 South. 895. The circumstances, conditions, and statements all show the quasi confessions to have been made voluntarily. Certainly, the contrary does not affirmatively appear from the record, and it is to be presumed on appeal that the trial court properly performed its duty in having proper predicate laid. *Whatley v. State*, 144 Ala. 68, 39 South. 1014; *Dupree v. State*, 148 Ala. 620, 42 South. 1004.

[10, 11] There was one phase of the evidence tending to show that the defendant and Peoples were accomplices in the commission of the crime, and it was permissible to show that they went off together after the commission of the offense to Birmingham and remained together. The defendant voluntarily testified to all of these matters, and, if there was error in admitting evidence of her admissions, it was without prejudice.

[12] The matter of allowing a nonexpert witness to express an opinion on the sanity of a person is largely in the discretion of the court. *Odom v. State*, 172 Ala. 383, and authorities cited in the opinion at the top of page 385, 55 South. 820. No abuse of that discretion is shown by anything contained in the bill of exceptions. The witness Jones (a nonexpert) stated, in answer to a question

propounded by the court, that he could not tell whether the attacks he had described the defendant as having were produced by drinking or some innate condition of the mind, as he had never seen her at any time when not drinking, and that he had never observed anything peculiar about her actions or words except what he thought was produced by drinking. The court properly refused to allow this witness to express an opinion as to the sanity of the defendant in response to a question seeking to elicit such an opinion.

[13] The defendant's witness Waits, after preliminary questions by the court, was permitted to give his opinion as to the sanity of the defendant, and, if there was any error in at first refusing to allow this witness to give his opinion in answer to a question propounded by defendant's counsel, it was cured by permitting him to subsequently testify on this point and express his opinion.

An examination of the transcript fails to show error requiring reversal, and the judgment of the trial court will be affirmed.

Affirmed.

(12 Ala. App. 36)

BUCKHANON v. STATE. (No. 294.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. CRIMINAL LAW §561 — SUFFICIENCY OF EVIDENCE—REASONABLE DOUBT.

The probability of innocence, which will justify an acquittal, must be a reasonable probability arising involuntarily out of the evidence, or some part thereof, after the jury's consideration of the whole evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. §561.]

2. CRIMINAL LAW §829—TRIAL—GIVEN INSTRUCTIONS—REQUESTED.

A charge requested by defendant, which was an exact duplicate of one given at his instance, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829.]

3. HOMICIDE §300—INSTRUCTIONS—SELF-DEFENSE.

An instruction on self-defense, ignoring the doctrine of freedom from fault, was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. §300.]

4. CRIMINAL LAW §798 — REASONABLE DOUBT—DOUBT OF ONE JUROR.

A requested charge, authorizing an acquittal if any one of the jurors entertained a reasonable doubt of guilt, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1940, 1943; Dec. Dig. §798.]

Appeal from Circuit Court, Randolph County; S. L. Brewer, Judge.

George Buckhanon was convicted of manslaughter, and he appeals. Affirmed.

W. L. Martin, Atty. Gen., for the State.

BROWN, J. The appellant killed Saunt Ragsdale by shooting him with a gun in a

cotton patch near the home of the deceased, and for this he was indicted for murder in the first degree, and was tried and convicted for manslaughter in the first degree and sentenced to the penitentiary for a term of four years. The only questions presented for review here arise from the refusal of the court to give charges numbered 3, 12, 16, 17, 18, 19, and 22.

The evidence on the part of the state tended to show that appellant, a few minutes before the killing, with gun in hand, passed through the yard of the deceased, making threats that he was going to the home of Mattie Philpotts and kill her, because of "something she had told on him, which he said was not true"; that, while defendant was in the yard of deceased, he declared with an oath that he was going to kill "Mat Philpotts" and her husband, and started off through the field in the direction of their house, when the deceased followed him, dissuading him from his declared purpose, and the defendant turned upon the deceased and causelessly shot him to death. On the part of the defendant there was some evidence tending to show that defendant stopped at the house of deceased and inquired for him, and found deceased at the barn, when defendant told deceased that he (defendant) was going hunting; that deceased cursed him, and followed him down into the field, abusing him, and cursing and threatening to kill him; that deceased assaulted defendant with a rock, and then engaged in a scuffle with the defendant over defendant's gun, and in the scuffle the gun was accidentally discharged while the deceased had hold of its muzzle, and thus the wound causing the death of deceased was inflicted.

[1] The only difference between charge 3, refused by the court to defendant, and charge 4, given at his instance, is that charge 4 requires the probability of innocence that would justify an acquittal to arise out of the evidence, while charge 3 does not. The refusal of charge 3 can, therefore, be justified because it authorizes an acquittal on a probability of innocence not arising from the evidence or existing in the face of the whole evidence. McClain v. State, 182 Ala. 81, 62 South. 241. The charge was faulty for another reason. It justifies an acquittal on a probability of innocence, while it must be a reasonable probability of innocence arising involuntarily out of the evidence, or some part thereof, after a consideration of the whole by the jury.

[2] Charge 12 refused to the defendant is an exact duplicate of charge 13 given at defendant's instance, and was correctly refused. McClain v. State, supra; Watkins v. State, 133 Ala. 88, 32 South. 627; Wildman v. State, 139 Ala. 125, 35 South. 995; Smith v. State, 182 Ala. 38, 62 South. 184.

[3] Charges 16, 17, 18, and 19, besides ig-

noring the doctrine of freedom from fault (being properly refused for that reason), are substantial duplicates of charge 20 given at defendant's request, and for this reason were properly refused. *McClain v. State*, supra.

[4] Charge 22 authorized an acquittal if any member of the jury entertained a reasonable doubt of his guilt, and this justified its refusal. The proposition asserted in charge 22, refused to defendant, was given to the jury in charge 6, and no obligation rested on the court to repeat this instruction. *Smith v. State*, supra.

We have carefully considered all questions presented by the record, and find no error therein at which the appellant can complain, and the judgment of the circuit court is affirmed.

Affirmed.

(12 Ala. App. 229)

WALKER v. STATE. (No. 338.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

1. CRIMINAL LAW — 995—JUDGMENT—SUFFICIENCY.

Where the judgment entry shows a judgment for the recovery of a fine and costs in accordance with the verdict and a further judgment of sentence by the court for an additional punishment of six months' hard labor for the county, the recitals are sufficient to imply the necessary judgment of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2528, 2523½, 2530, 2536-2543; Dec. Dig. —995.]

2. COUNTIES — 52—SPECIAL TERM OF COUNTY COURT—JURISDICTION—"SPECIAL DUTY."

The method of providing for the hiring of county convicts imposed on the court of county commissioners by Cr. Code 1907, p. 422 et seq., is a "special duty" under Code 1907, § 3311, conferring authority on the commissioners to perform any special duty at a special term of court that they may be required by law to perform, as such expression is used to distinguish it from the general routine business of such court, provided for by Code 1907, §§ 3306-3323.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 63-65; Dec. Dig. —52.

For other definitions, see Words and Phrases, Second Series, Special Duty.]

Appeal from City Court of Andalusia; Ed. T. Albritton, Judge.

Habeas corpus by Jim T. Walker. From a judgment remanding him to custody, he appeals. Affirmed.

See, also, 10 Ala. App. 205, 64 South. 528.

J. A. Carnley, of Elba, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. [1] The petitioner in the habeas corpus proceedings, who brings this appeal from a judgment of the primary tribunal remanding him to custody, makes the point that he is illegally restrained of his liberty because the original judgment of his conviction for violating the prohibition law entered in the circuit court of Coffee county,

under which he is held on a contract of hire as a county convict, is unauthorized and void for the reason that the judgment entry shows no formal adjudication of guilt. The judgment entry of the circuit court, set out in the transcript as constituting an exhibit to the return to the writ, shows a judgment for the recovery of the fine and costs following and in accordance with the verdict of the jury, and a further judgment of sentence by the court for an additional punishment of six months' hard labor for the county. Although the judgment entry shows no formal adjudication of guilt upon the verdict, yet when, as here, the minute entry does show a judgment for the recovery of the fine and costs as assessed by the verdict of the jury in finding the defendant guilty, also a judgment of sentence for six months' hard labor imposed by the court in the way of additional punishment, the recitals are sufficient to imply a judgment of guilt. *Driggers v. State*, 123 Ala. 46, 26 South. 512; *Shirley v. State*, 144 Ala. 35, 40 South. 269; *Stanfield v. State*, 3 Ala. App. 54, 58, 59, 57 South. 402.

[2] The further point is made by petitioner that the contract of hire under which the defendant is held as a county convict is void because the order of the commissioners' court, authorizing the hard labor agent to hire out county convicts, was entered at a *special* term of the commissioners' court held under the provisions of section 3311 of the Code of 1907, conferring authority upon the commissioners to perform any "special duty" at such term that they may be required by law to perform. The "special duty" referred to in the statute (section 3311) imports no more, in the use of this expression, than to distinguish the duties that may be performed at such a term from those general duties to be performed at regular terms that are declared by the law as relating to the routine business of commissioners' courts as set out and provided for in chapter 65 of the Code of 1907, which embraces the section conferring this authority to hold special terms for the performance of other duties. The matter of providing for the hiring of county convicts is a duty imposed upon courts of county commissioners of each of the counties in the state by the act of the Legislature approved November 30, 1907, to be found on pages 422 et seq. of the Criminal Code of 1907. This is a special duty imposed on the commissioners' court as contradistinguished from those general duties in the transaction of the regular and routine business of the court that are provided for in chapter 65 of the Code, and the contention of the petitioner that the order of the court authorizing making the contract of hire under which he is held is void because made at a special term cannot be upheld. See, also, *Joe F. Thames v. State*, 68 South. 474.

Affirmed.

ALABAMA POWER CO. v. HILYER et al.
(No. 154.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. APPEAL AND ERROR — 485 — SUPERSEDEAS — BOND.

Under Code, 1907, §§ 2872, 3881, a judgment was not superseded by appeal where no bond was executed other than security for the costs of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2223, 2264-2274; Dec. Dig. — 485.]

2. COSTS — 260 — APPEAL — VEXATIOUS PROCEEDINGS — DAMAGES.

Since a judgment was not superseded by appeal where no bond was executed other than security for costs of appeal under Code 1907, §§ 2872, 3881, the appellee was not entitled to damages as penalty for delay on dismissal for want of prosecution, as Code 1907, § 2893, awarding such damages, is limited to judgments superseded on appeal.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 983-996, 1002, 1003; Dec. Dig. — 260.]

Appeal from Circuit Court, Coosa County; S. L. Brewer, Judge.

Proceedings between the Alabama Power Company and T. J. Hilyer and others. From the judgment the Alabama Power Company appeals. Dismissed.

Thomas W. Martin, of Birmingham, for appellant.

THOMAS, J. The appellant moves to dismiss his appeal, which motion is opposed by the appellee, who insists that he is entitled to an affirmation of the judgment appealed from, together with 10 per cent. damages thereon as a penalty for delay.

[1, 2] The section of the Code (section 2893) which authorizes the infliction of such a penalty is limited by its plain terms to judgments that have been "superseded on appeal," whereby the appellee is prevented from the enforcement of the judgment pending the appeal. The judgment here appealed from was not superseded, even if it could be, which is questionable under the statute as now written (Gen. Acts 1911, p. 625), as no bond whatever was executed other than security for the costs of appeal (Code, §§ 2872, 3881). Ex parte Hood, 107 Ala. 520, 18 South. 176; Ex parte Walter Bros., 89 Ala. 237, 7 South. 400, 18 Am. St. Rep. 103.

The motion of appellant to dismiss his appeal is consequently granted.

Dismissed.

(12 Ala. App. 179)

FORTNER v. STATE. (No. 801.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. CRIMINAL LAW — 531 — CONFESSIONS — ADMISSIBILITY — PRELIMINARY PROOF.

Confessions are prima facie involuntary, and the court, before permitting proof thereof, must ascertain that they are voluntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1212-1217; Dec. Dig. — 531.]

2. CRIMINAL LAW — 1144 — APPEAL — PRESUMPTIONS.

Where the record on appeal does not affirmatively show that the trial court did not ascertain that confessions were voluntary before permitting proof thereof, the court on appeal will presume that a proper predicate was laid for the proof of confessions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. — 1144.]

3. CRIMINAL LAW — 517 — CONFESSIONS — EVIDENCE.

A statement by accused on a trial for adultery that he had a wife in a sister state was admissible as a confession of a fact material to his guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. — 517.]

4. ADULTERY — 11 — EVIDENCE — ADMISSIBILITY.

On a trial for adultery, proof of statements imputed to accused as to endearing terms used by him in speaking of the woman with whom the offense was alleged to have been committed was admissible.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 20-23; Dec. Dig. — 11.]

5. ADULTERY — 14 — EVIDENCE — SUFFICIENCY.

Evidence held to sustain a conviction for adultery.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 27, 31, 32; Dec. Dig. — 14.]

6. CRIMINAL LAW — 809 — INSTRUCTIONS — MISLEADING INSTRUCTIONS.

A charge having a tendency to mislead the jury is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1961-1967; Dec. Dig. — 809.]

7. CRIMINAL LAW — 805 — INSTRUCTIONS — REFUSAL OF REQUESTS — GROUNDS.

Refusal of a charge containing the word "beyond" for "beyond" may be justified on that ground.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989; Dec. Dig. — 805.]

8. CRIMINAL LAW — 789 — INSTRUCTIONS — REASONABLE DOUBT.

A charge which asserts that if, after the jury have investigated the evidence and compared it in all its parts, they can say to themselves that they doubt the guilt of accused, they have a reasonable doubt, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. — 789.]

9. CRIMINAL LAW — 561 — EVIDENCE — SUFFICIENCY.

Evidence which excludes every reasonable hypothesis but that of guilt is sufficient.

[Ed. Note.—For other cases, see Criminal Law, § 1267; Dec. Dig. — 561.]

Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge.

Tom Fortner, alias, etc., was convicted of crime, and he appeals. Affirmed.

J. R. Barker and T. H. Shackleford, both of Heflin, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

BROWN, J. [1, 2] Inculpatory confessions, voluntarily made, are admissible as evidence

tending to show guilt; and while such confessions are prima facie involuntary, and therefore inadmissible, it is the duty of the trial court, in all cases, before permitting such confessions to be shown, to ascertain that they are voluntary, and on appeal, unless the record affirmatively shows that this duty was not performed by the court, the presumption will be indulged that a proper predicate was laid for the admission of the evidence. *Whitley v. State*, 144 Ala. 75, 39 South. 1014; *Price v. State*, 117 Ala. 113, 23 South. 691; *Gilmore v. State*, 126 Ala. 20, 28 South. 595.

[3] The statement of the defendant to the witness Willie Robinson that he (defendant) had a wife about Whitesburg, Ga., was an inculpatory admission or confession of a fact material to the defendant's guilt of the offense of adultery, and it was proper to allow the state to offer this evidence. *Williams v. State*, 54 Ala. 131, 25 Am. Rep. 665; *Buchanan v. State*, 55 Ala. 154; *Cameron v. State*, 14 Ala. 546, 48 Am. Dec. 111; *Banks v. State*, 96 Ala. 80, 11 South. 404; *Moore v. Heineke*, 119 Ala. 637, 24 South. 374; *Bynon v. State*, 117 Ala. 82, 23 South. 640, 67 Am. St. Rep. 163.

[4] The statements imputed to the defendant by the testimony of the witness Otwell, as to the endearing terms used by the defendant in speaking of Martha Steel, the woman with whom defendant was charged with living in adultery, and as to defendant's having a wife, were of the same class, and was admissible, as the court correctly held.

[5] There was evidence tending to show that the defendant, a man, and Martha Steel, a woman, lived together in a house rented by the defendant and situated a quarter of a mile from the residence of any other person; that no one else lived with them; that they were seen together often; that they worked together and slept in the same bed, and on several occasions were seen lying close together on the same pallet; that the defendant referred to Martha as his darling; and that the defendant had a wife living in the state of Georgia. While there was no positive proof that the defendant and Martha engaged in acts of sexual intercourse, the evidence was sufficient to afford an inference that such was the case, and that there was an agreement or understanding that this relation would be and was continued. On this evidence, the defendant was not entitled to the affirmative charge.

[6, 7] Charge 2 had a tendency to mislead the jury to the conclusion that, although there was an agreement or understanding between the defendant and the woman that they would live together and have occasional acts of sexual intercourse together, still they would not be guilty; and this misleading tendency justified the refusal of this charge. In addition to this, the word "beyond" is

used for "beyond," and the refusal of the charge may be justified for this reason.

[8] Charge 3 is argumentative, and does not properly define a reasonable doubt. The charge asserts that if, after "you have investigated the evidence and compared it in all of its parts, you say to yourselves, 'I doubt if he is guilty,' then you have a reasonable doubt." In other words, any kind of a doubt, after consideration of the evidence, is a reasonable doubt.

[9] Charge 6 was properly refused, for the reason that it requires the evidence to exclude to a moral certainty "every hypothesis" but that of guilt. The rule is that, if the evidence excludes every reasonable hypothesis but that of guilt, it is sufficient.

We find no error in the record, and the judgment of the circuit court must be affirmed.

Affirmed.

(12 Ala. App. 611)

HOOD et al. v. COMMERCIAL GERMANIA TRUST & SAVINGS BANK OF NEW ORLEANS. (No. 147.)

(Court of Appeals of Alabama. Nov. 26, 1914. Rehearing Denied Dec. 17, 1914.)

1. CARRIERS \S 58 — TRANSFER OF BILL OF LADING—TITLE TO GOODS.

Where the consignor draws upon the consignee, and the draft with bill of lading attached is indorsed or transferred to one who discounts the draft, a special property in the goods passes to the transferee, subject to divestiture by acceptance and payment of the draft, but absolute if the consignee refuses to accept.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. \S 58.]

2. CARRIERS \S 58—BILL OF LADING—ASSIGNMENT—LEVY AND SEIZURE—TRESPASS.

In such case, where the consignee refused to accept the goods or pay the draft, the sheriff's levy on and seizure of the goods in the consignee's suit against the consignor was a trespass as against the party discounting the consignor's draft, who as the transferee of the bill of lading had title to the goods.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. \S 58.]

3. CARRIERS \S 58—TRANSFEREE OF BILL OF LADING—ACTION AGAINST CONSIGNEE.

An action of trespass against the consignee of goods and the sheriff, who levied upon and seized them in the consignee's suit against the consignor, could not be brought in any other name than that of the party who had discounted the consignor's draft with bill of lading attached and become the owner of the goods at the time of the trespass, even though the consignor had repaid the amount paid for the draft; and such owner could not, either by a sale, or a transfer or a surrender of the bill of lading, or of the property represented by it, or of the draft, confer upon another its right of action for the trespass, but, at most, could confer only a right to prosecute such action in its own name.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 179-190; Dec. Dig. \S 58.]

4. ATTACHMENT \S 217—JUDGMENT IN REM—JUDGMENT IN PERSONAM—PROPERTY SUBJECT.

Where a consignee of goods refused to accept them, or to pay the consignor's draft, and

in a suit against the nonresident consignor sued out an attachment, under which the goods were seized and sold for \$85, which was applied on the consignee's judgment for \$750, the judgment was a judgment in rem and not in personam, and had no effect except to subject the property seized under the attachment, and beyond that furnished no evidence that the consignor was indebted to the consignee.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 735-752; Dec. Dig. ¶217.]

5. ATTACHMENT ¶379—LIABILITY OF OFFICER—DAMAGE.

In trespass against a sheriff and the party plaintiff in the action in which he had attached the goods of plaintiff herein, where the law and the evidence entitled plaintiff to at least nominal damages, the general affirmative charge for plaintiff was properly given.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 1376, 1377; Dec. Dig. ¶379.]

Appeal from City Court of Montgomery; Gaston Gunter, Judge.

Action by the Commercial Germania Trust & Savings Bank of New Orleans against Horace Hood and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Walton H. Hill and Ball & Samford, all of of Montgomery, for appellants. Steiner, Crum & Well, of Montgomery, for appellee.

THOMAS, J. The Stafolife Feed & Milling Company, who are located and engaged in business at New Orleans, La., shipped to Belser Grocery Company at Montgomery, Ala., a car load of feed, drawing a draft on the latter for the purchase price thereof, payable on arrival of the goods. Accompanying the draft was a railroad bill of lading, consigning the shipment "to the order of Stafolife Feed & Milling Company; destination, Montgomery, Ala.; notify Belser Grocery Company." The draft was drawn in favor of, and the bill of lading was indorsed to, the appellee (the Commercial Germania Trust & Savings Bank), a banking institution at New Orleans, who discounted the draft by placing the amount of it, less discount and exchange, to the credit of said Stafolife Feed & Milling Company, who checked it out in the usual course of business. The appellee, after so discounting it, forwarded the draft with the bill of lading attached to a Montgomery bank for collection. Upon presentation of same by the latter to the drawee (the said Belser Grocery Company), payment was refused, and the last-named company thereupon, before the car of feed could leave Montgomery, sued out a writ of attachment against the nonresident shipper, the said Stafolife Feed & Milling Company, for an alleged indebtedness growing out of a previous transaction between them, and caused said writ to be levied upon said car load of feed, which was subsequently sold by order of the court and proceeds applied in part payment of the judgment obtained in the suit. The appellee, said Commercial Germania Trust & Savings Bank, interposed no claim to the property, but brings

the present action in trespass against the sheriff, who seized it, and against the plaintiff in that suit, who directed its seizure, and the sureties on his indemnity bond. *Lienkauf v. Morris*, 66 Ala. 406.

[1] If the matter rested here, the plaintiff's right to recover is clearly settled by the decisions of the Supreme Court, which hold that "when the consignor draws upon the consignee for the purchase money, and the draft, the bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be divested by the acceptance and payment of the draft"; but, if the consignee refuses to accept, the title of such transferee becomes absolute. *American Nat. Bank v. Henderson*, 123 Ala. 614, 26 South. 498, 82 Am. St. Rep. 147; *Tishomingo Savings Bank v. Johnson*, 40 South. 503;¹ *Cosmos Co. v. First Nat. Bank*, 171 Ala. 395, 54 South. 621, 39 L. R. A. (N. S.) 1173, Ann. Cas. 1913B, 42; *Veitch v. Atkins Gro. & Com. Co.*, 5 Ala. App. 454, 59 South. 746.

[2] It was not so divested in this case, as seen; and, consequently, the levy upon and seizure of the property was unquestionably a trespass as against the appellee, in whom, as the transferee of the bill of lading, reposed the title. Authorities supra. It appears, however, that after the commission by the defendants here of the mentioned tort, but before the appellee brought this action for its redress, the Stafolife Feed & Milling Company, the drawers of the draft, did, in recognition of their liability as such drawers, reimburse the appellee upon demand the amount it paid them for the draft, with an understanding that the appellee was to bring this suit at their expense and pay to them whatever sum was recovered and collected. These last-named facts form the basis of the defendants' (appellants') insistence here, which is as follows:

(1) That as a result of the repayment by the drawer to the appellee of the amount the latter paid for the draft, the latter's title to and interest in the bill of lading and the property which it represented, and all rights of action with respect to it, held as security for such repayment, ceased and terminated eo instante upon such repayment, and that consequently such repayment destroyed, before this suit was brought, appellee's right to maintain the action.

(2) That, even if this contention be not true, and even if it be true that the appellee has the right to prosecute this action, it does so, under the facts as stated, merely as a nominal plaintiff—the real plaintiff being the Stafolife Feed & Milling Company, for whose benefit the suit was in fact brought—

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 691.

and that, consequently, the defendants have a right to set off against the action all claims and demands that they could under the law have set off against the Stafolife Feed & Milling Company in the event the suit had been brought in the latter's name.

[3] Answering these contentions in the order as stated, it may be said with respect to the first that the rules of the common law designed to prevent champerty and maintenance, and which have not been modified here in the particular now under consideration, forbid that this action, which, as seen, is for a trespass in taking personal property, should be brought in any other name than that of appellee, its owner at the time of the commission of the trespass. The appellee could not, by either a sale, a transfer, or a surrender of the bill of lading, or of the property represented by it, or of the draft, confer upon another its right of action for the mentioned tort, but at most could confer only a right to prosecute such action in its own name. *Dunklin v. Wilkins*, 5 Ala. 199; *Pearson v. King*, 99 Ala. 125, 10 South. 919; *Hinton v. Nelms*, 13 Ala. 222; *Foy v. Cochran*, 88 Ala. 353, 6 South. 685; *Long v. Kansas City, M. & B. R. Co.*, 170 Ala. 638, 54 South. 62. Hence, however the case be, the suit was properly brought in the name of appellee.

As to whether or not a set-off, if one existed in favor of the defendants against the Stafolife Feed & Milling Company at the commencement of this suit, would be allowable in defense of the action (as bearing on which question, see *Bird v. Womack*, 69 Ala. 390; *Keith v. Ham*, 89 Ala. 590; *Smith v. Hilton*, 147 Ala. 642, 41 South. 747; Code, § 5858, and cases cited), we need not and do not consider, for the reason that there is no evidence, and none was offered, showing or tending to show the existence at such time or at any other time of any claim, debt, or demand of any character on the part of either of the defendants against said milling company.

[4] It is true that from the agreed statement of the facts it appears that there was in evidence the whole of the record and proceedings in the attachment case hereinbefore mentioned, which record showed, among other things, a judgment rendered in that suit against said milling company for \$750 in favor of the Belser Grocery Company, one of the defendants here, and showed the return of the sheriff disclosing that the proceeds of the said property so seized and sold under the attachment paid only \$85.75 on that judgment, thereby leaving a large balance unpaid; yet the record further showed that this judgment was predicated upon said attachment against a nonresident, who was not served with process and was brought in only by publication. The judgment was, therefore, one in rem, and not one in personam,

and had no efficacy beyond its power to bind and subject the property seized under the attachment, and beyond this it furnished no evidence that said milling company was indebted to said Belser Grocery Company. *Exchange Nat. Bank v. Clement*, 109 Ala. 270, 19 South. 814; *Reynolds v. Williams*, 152 Ala. 488, 44 South. 406; *Palace Car Co. v. Harrison*, 122 Ala. 149, 25 South. 697, 82 Am. St. Rep. 68.

[5] We are consequently of opinion that the court did not err in giving the general affirmative charge for appellee, as under the law and the undisputed evidence the appellee, as plaintiff below, was entitled to recover at least nominal damages. Whether more or not, we need not consider, since the appellants agreed in open court for the court to charge the jury that, if plaintiff was entitled to recover at all, it was entitled to recover \$592, the amount for which the jury returned a verdict.

It follows that the judgment appealed from is affirmed.

Affirmed.

(12 Ala. App. 133)

PETERS v. STATE. (No. 619.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

1. EMBEZZLEMENT — OWNERSHIP — PERSONAL PROPERTY — AGENTS.

An unincorporated voluntary association of persons, though not a legal entity, and not capable of suing or being sued in their common name, may yet as individuals jointly own personal property and jointly have an agent, bailee, or trustee with respect to that common property.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 6; Dec. Dig. § 8.]

2. EMBEZZLEMENT — INDICTMENT — OWNERSHIP OF PROPERTY — ASSOCIATION.

Under Code 1907, § 7147, providing that in an indictment for embezzlement it is sufficient to lay the ownership of the property in a voluntary association by giving its common name, without setting out the individuals composing it, an indictment charging that defendant was the agent, bailee, or trustee of a named Sunday school, is sufficient.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 44, 45; Dec. Dig. § 30.]

3. EMBEZZLEMENT — INDICTMENT — OWNERSHIP.

An indictment alleging that defendant, as agent, trustee, or bailee of a certain Sunday school, came into possession of money and embezzled it, is not subject to the objection that it fails to allege that the money embezzled belonged to or was owned by the school.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. §§ 44, 45; Dec. Dig. § 30.]

4. EMBEZZLEMENT — INDICTMENT — DESCRIPTION OF MONEY.

Under Code 1907, § 6843, an indictment charging the embezzlement of about \$15 is sufficient.

[Ed. Note.—For other cases, see *Embezzlement*, Cent. Dig. § 43; Dec. Dig. § 29.]

5. EMBEZZLEMENT — FUNDS OF SUNDAY SCHOOL — MEMBER — AGENT.

Under Code 1907, § 6831, providing that any bailee or other agent or trustee who con-

verts to his own use money which may have come into his hands by virtue of any bailment for any purpose, it is no defense to the embezzlement of funds of a Sunday school that defendant was a member having an equal right with the other members to ownership of the funds, if the school as such gave the possession of the funds to defendant as agent, bailee, or trustee.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. § 8; Dec. Dig. ¶10.]

6. EMBEZZLEMENT ¶35—INDICTMENT—VARIANCE.

Where, under an indictment for embezzlement by the agent, bailee, or trustee of a Sunday school, the evidence showed that on resignation of the treasurer the superintendent took the money turned in and gave it to defendant, who was the secretary, to hold until a treasurer was appointed, and it was converted before any action by the Sunday school, constitutes a fatal variance, as defendant was the agent of the superintendent.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 55-59; Dec. Dig. ¶35.]

7. CRIMINAL LAW ¶381—INSTRUCTIONS—CHARACTER.

An instruction that proof of good character of defendant alone may be sufficient to generate in the minds of the jury such doubt of the guilt of defendant as to authorize an acquittal is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 846; Dec. Dig. ¶381.]

8. EMBEZZLEMENT ¶48—MISLEADING INSTRUCTIONS.

In a prosecution for embezzlement of funds of a Sunday school, an instruction that the jury must believe beyond a reasonable doubt that the Sunday school as a body placed the money in defendant's hands is properly refused, as misleading the jury to think that it was necessary to a conviction that they believe that the Sunday school physically placed the money in defendant's hands.

[Ed. Note.—For other cases, see Embezzlement, Cent. Dig. §§ 72-75; Dec. Dig. ¶48.]

9. CRIMINAL LAW ¶814—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where there was no evidence that the money claimed to have been embezzled was placed in defendant's hands by any committee of the Sunday school owning the funds, instructions on that issue were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. ¶814.]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Isaac Peters was convicted of embezzlement, and he appeals. Reversed and remanded.

The indictment appears in the opinion, and the points raised by demurrer also sufficiently appear. The following charges were refused to defendant:

2. I charge you that proof of good character of defendant alone may be sufficient to generate in the mind of the jury such doubt of the guilt of defendant as to authorize an acquittal.

5. Before you are authorized to convict this defendant, you must believe beyond a reasonable doubt that the Sunday school as a body placed the money alleged to have been embezzled in the hands of this defendant.

6. If you believe from the evidence that the money which is alleged to have been embezzled

came into defendant's possession as agent of the superintendent of the New Bethel Sabbath school, you should find defendant not guilty.

A. If you believe the money alleged to have been embezzled was placed in the hands of an attorney by an agent, committee, superintendent, or bailee of the New Bethel Sabbath school, to keep for such agent, committee, superintendent, or bailee, you should find defendant not guilty.

Finch & Pennington, of Jasper, and W. L. Acuff, of Columbiana, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. The indictment charges:

"That before the finding of the indictment Isaac Peters, whose name is to the grand jury otherwise unknown, a bailee, or agent, or trustee of the New Bethel Baptist Sunday school, embezzled or fraudulently converted to his own use money to the amount of about fifteen dollars, which came into his possession as such bailee, or agent, or trustee of the New Bethel Baptist Sunday school, against the peace and dignity," etc.

It was demurred to upon several grounds, one of which is to the effect that the indictment shows on its face that the New Bethel Baptist Sunday school, the alleged principal, as whose alleged agent, or trustee, or bailee, defendant is alleged to have come into the possession of the money alleged to have been embezzled, is neither a person, a partnership, nor a corporation, and consequently is not a legal entity, and is therefore incapable in law of having an agent, trustee, or bailee, or of owning property.

[1] An unincorporated or voluntary association of persons, though not a legal entity, and not capable of suing by or of being sued in their common name, may yet as individuals jointly own personal property and jointly have an agent, bailee, or trustee with respect to that common property (*Conklin v. Davis*, 63 Conn. 377, 28 Atl. 537; *Allison v. Little*, 85 Ala. 512, 5 South. 221; *Stewart v. White*, 128 Ala. 202, 30 South. 526, 55 L. R. A. 211; 34 Cyc. 1112 et seq.; 24 Am. & Eng. Ency. Law [2d Ed.] 323 et seq.; *Burke v. Roper*, 79 Ala. 138); and in an indictment for the larceny or embezzlement of such property it is entirely sufficient to lay the ownership of it in such association by giving its common name, without setting out the individuals composing or constituting it (*Code*, § 7147). By reason of this statute, the cases of *Burrow v. State*, 147 Ala. 114, 41 South. 987, and *Emmonds v. State*, 87 Ala. 12, 6 South. 54, clearly have no application here, as they lay down the rule for alleging ownership in a partnership or corporation.

[2] Likewise it was sufficient to allege, as the indictment here did, that the person charged with embezzling the property came into possession of it as the agent, bailee, or trustee of such association, giving its common name without setting out the individuals composing or constituting it. 25 Cyc. 96. This latter doctrine, if otherwise it did not

obtain, is a necessary corollary to the doctrine established by the section (7147) of the Code cited, allowing the ownership to be alleged in the way as before mentioned. The statute is remedial, and is to be liberally construed, so as to effectuate the apparent legislative intent, which was to relieve the necessity of incumbering the pleadings with long averments of individual names in cases where, as here, the property concerned belonged to a voluntary association of numerous persons, having a common name, but which was neither a partnership (*Burke v. Roper*, 79 Ala. 138), nor a corporation (*Prelist v. State*, 5 Ala. App. 171, 59 South. 318).

[3] There is likewise no merit in that ground of the demurrer which raises the point that the indictment failed to allege that the money embezzled belonged to or was owned by said "New Bethel Baptist Sunday school." Whether they or some other person or persons owned it is immaterial to the charge, provided the defendant, as was alleged, came into possession of it as their agent, bailee, or trustee and while so in possession embezzled it or fraudulently converted it to his own use. *Barr v. State*, 10 Ala. App. 111, 65 South. 197; *Reeves v. State*, 95 Ala. 31, 11 South. 158; *Willis v. State*, 134 Ala. 429, 449, 33 South. 226; *Washington v. State*, 72 Ala. 272.

[4] The description of the money alleged to have been embezzled was sufficient. Code, § 6843; *Walker v. State*, 117 Ala. 42, 23 South. 149; *Huffman's Case*, 89 Ala. 33, 8 South. 28.

It was not necessary for the indictment to allege in what county the offense was committed. Code, § 7140.

The indictment also met every ground of attack raised by the demurrers as to the question of the capacity in which the defendant came into the possession of the money alleged to have been embezzled. *Wall v. State*, 2 Ala. App. 157, 56 South. 57; *Gleason v. State*, 6 Ala. App. 49, 60 South. 518; *Willis v. State*, 134 Ala. 429, 449, 33 South. 226.

[5] The demurrer to the indictment on the ground that it fails to show but what defendant was a member of said "New Bethel Baptist Sunday school," and consequently but what he as such was a joint owner of the money alleged to have been embezzled, and the insistence of the defendant that he was entitled to the affirmative charge because the evidence showed without dispute that he in fact was a member and consequently did as such have a joint interest in the property, are, we think, equally without merit. The defendant's interest in the money by virtue of his membership in the Sunday school was not such as would give him the right, without the consent of the Sunday school, to withdraw and appropriate even that interest to his personal and private uses, although he may have from his own purse, as contended, contributed from time to time to the fund. The title to the property rests in the several members of the Sunday school, not

for their personal and individual use and benefit, but in trust—as the result of an implied, if not express, agreement between such members—for the promotion of the altruistic or religious ends and objects for which they had formed themselves into and associated themselves together as a Sunday school and upon which they as a Sunday school might determine; and, while it is no doubt true that any member of the Sunday school might, by virtue of such joint ownership of the funds and in order to conserve and protect them for the benefit of the Sunday school, take possession of and hold the same in the absence of any action by the Sunday school as a body providing for the keeping of the funds, yet, even such right of a member even so to hold the funds is superseded whenever the Sunday school as a body chooses to exercise its authority over the possession of the funds and to resolve and direct that they be kept by a particular person. Whenever the members of the Sunday school in their collective capacity as such see fit to say how and by whom the funds shall be kept, the right of any individual member to the possession of such funds as a joint owner is certainly suspended, he having fully exercised his individual authority with respect to them by his participation in the deliberations of the Sunday school or by his opportunity to do so, and thereafter he cannot, as against any person so chosen by the majority of the Sunday school to keep the funds, assert any individual rights to the possession of them which he might, as a joint owner, for the benefit of the Sunday school have asserted against a stranger at any time before the Sunday school acted. Consequently, although a person be a member of the Sunday school and by reason thereof hold jointly with the other members the legal title to its funds, yet when he receives and accepts the exclusive possession of the funds, by authority of the Sunday school as a body, to hold for them and to disburse as they may direct, he receives and accepts and holds such exclusive possession of such funds, not in any individual right as a joint owner, but as the "agent, bailee, or trustee" of the Sunday school, and may, we think, under the statute, be guilty of embezzlement with respect to them if he fraudulently converts them to his own use. The statute (Code, § 6831) provides in this particular that:

"Any * * * bailee, or other agent, or any trustee * * * who embezzles or fraudulently converts to his own use any money, property, or effects deposited with him, or *which may have come into his possession by virtue of any bailment for any purpose*, * * * must be punished, on conviction, as if he had stolen it." Code, § 6831.

The Supreme Court of Ohio have, in support of our position here, held, in construing a statute on embezzlement which is probably not so broad as ours, that an agent and cashier of an unincorporated banking association is guilty of embezzlement, although himself

a joint owner of the assets of such unincorporated association, where, having, by virtue of his employment as such agent and cashier, exclusive custody of the assets of the association, he fraudulently converts them to his own use. *State v. Kusnick*, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 564.

With respect to the cases of *Watson v. State*, 70 Ala. 13, 45 Am. Rep. 70, and *Lang v. State*, 97 Ala. 41 et seq., 12 South. 183, relied on by appellant, and which hold that where defendant has an interest in the property he is charged with embezzling he cannot be convicted (if ever an authority on the proposition here involved), it may be said, were decided before said section 6831 of the Code was amended by the act of the Legislature approved February 4, 1903 (Laws 1903, p. 40) which is now embodied in that section as before quoted from. The code commissioner of the Code of 1907, Judge Mayfield, now of the Supreme Court, in a note under said section 6831 of the said Code, states that as a result of the amendment mentioned the effect of these decisions was destroyed or cured. While this statement of the commissioner is not authoritative, as would be a decision, yet it is entitled to much weight, and is in line with the holding in the Ohio case which we have cited. It is not necessary, and it is not our intention, to go any further in the approval of that statement than is essential to the disposition of the case here. Certainly, as seems to us clear, the embezzlement statute, if not before, is, since the amendment mentioned, amply broad and comprehensive enough in its terms to cover this case, and we so hold.

[8] Of course, in order to convict the defendant under the indictment as here framed, it must appear, among other things, to the satisfaction of the jury beyond a reasonable doubt, that the defendant received, or came into the possession of, the money alleged to have been embezzled "as the agent, trustee, or bailee" of the Sunday school, and not as the "agent, trustee, or bailee" of some other "agent, trustee, or bailee" of the Sunday school. For instance, if the Sunday school, in its capacity as such, intrusted the custody and keeping of the funds to a particular officer or agent of the Sunday school, and that officer or agent, without authority of the Sunday school, then intrusts that custody and keeping to some other person, that person, if he embezzles them, must be charged, in order to avoid a variance between allegation and proof, to have done so as the "agent, bailee, or trustee" of such Sunday school officer or agent that may have committed them to his charge, and not as the agent, bailee, or trustee of the Sunday school. *Washington v. State*, 72 Ala. 272. However, although in the first instance the Sunday school did not authorize its officer or agent to commit the funds to the custody or keeping of another, yet, if subsequently, before such funds are embezzled by that other, it

ratifies the act of its officer or agent in so committing them, then that other becomes and is the "agent, bailee, or trustee" of the Sunday school, the same as if it had originally authorized his appointment as such. *Washington v. State*, supra.

It appears here that the Sunday school in question has three standing officers, a superintendent, a secretary, and a treasurer; the latter being, of course, as the name imports, the regular custodian of its funds. At the time in question, the defendant was secretary, and the person who was treasurer did, on the Sunday that defendant came into possession of the funds, send in to the Sunday school his resignation, together with the funds that had been in his custody, as such treasurer. No new treasurer was then, nor for some time thereafter, elected; and the superintendent did then, by virtue of his general management and control of the property and affairs of the Sunday school, take possession, as was no doubt his right and duty as such officer, of the funds so sent in by the said treasurer that had resigned. Instead of keeping them himself, however, he turned them over to the defendant, who was secretary, as said, to hold until a new treasurer had been elected by the Sunday school, and during such time it appears that the defendant embezzled the funds. There is no evidence whatever that the Sunday school authorized this action on the part of the superintendent in turning over the funds to the defendant, or that they knew of it until after the money was embezzled; hence they could not have ratified such action before the money was embezzled. So far as appears, the first information the Sunday school had of it was when on one Sunday they passed an appropriation for certain purposes, when defendant then announced that he had the Sunday school money at home, which, it appears, was not the truth, but only a ruse, and that he had already embezzled it. Nor is there any evidence in the case tending in any wise to show that, in case of a vacancy in the office of treasurer, the duty of keeping the Sunday school funds is upon the secretary, which defendant was. For aught appearing, therefore, defendant did not come into the possession of the funds by virtue of his office as secretary, nor by virtue of any special appointment of the Sunday school for this purpose, but solely as a bailee, agent, or trustee of the superintendent of the Sunday school, whose action was never ratified by the Sunday school. Defendant was, consequently, entitled to the affirmative charge on account of the variance between allegation and proof. *Washington v. State*, supra; *Brewer v. State*, 83 Ala. 113, 3 South. 816, 3 Am. St. Rep. 693.

An additional count in the indictment, charging that defendant came into possession of the money as "the agent, bailee, or trustee" of such superintendent, naming him, would, it seems to us, meet and relieve on an-

other trial any possible variance that might otherwise arise.

[7] Charge 2 was properly refused. *Allen v. State*, 8 Ala. App. 228, 62 South. 971; *Axelrod v. State*, 7 Ala. App. 61, 60 South. 959; *Taylor v. State*, 149 Ala. 32, 42 South. 996.

[8] Charge 5, as worded, was misleading, in that from it the jury might be led to think that it was necessary to a conviction of defendant that they believe that the Sunday school, assembled as a body and as such, physically placed the money in defendant's hands.

[9] Charges 6 and A were abstract, as there was no evidence tending to show that the money was placed in defendant's hands by any committee.

For the errors pointed out, the judgment is reversed.

Reversed and remanded.

(12 Ala. App. 232)

Ex parte LANE. (No. 838.)

(Court of Appeals of Alabama. Dec. 17, 1914.
On Rehearing, Jan. 12, 1915.)

1. JUDGES ⇐6—HABEAS CORPUS ⇐27—DE FACTO OFFICERS—RECORDER—VALIDITY OF ACTS.

One who is acting as city recorder under an appointment by the president of the board of city commissioners, and who held court as such at the regular time and place, is a de facto recorder, though his appointment was invalid, and a judgment of conviction rendered by him cannot be collaterally attacked by habeas corpus proceedings.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 11, 12; *Dec. Dig.* ⇐6; *Habeas Corpus*, Cent. Dig. § 22; *Dec. Dig.* ⇐27.]

On Rehearing.

2. HABEAS CORPUS ⇐32—DETERMINATION OF VALIDITY OF ORDINANCE.

A judgment of conviction rendered by a city recorder, valid on its face and not subject to collateral attack, is conclusive between parties in habeas corpus proceedings as to the validity of the ordinance for the violation of which defendant was convicted.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. § 29; *Dec. Dig.* ⇐32.]

3. HABEAS CORPUS ⇐53—PETITION—MATTERS OUTSIDE OF RECORD.

A petition for habeas corpus by one convicted of the violation of a city ordinance cannot allege matters outside of the record to show the invalidity of the judgment, if it is regular on its face.

[Ed. Note.—For other cases, see *Habeas Corpus*, Cent. Dig. §§ 50, 50½; *Dec. Dig.* ⇐53.]

Appeal from Tuscaloosa County Court; Henry B. Foster, Judge.

Habeas corpus by Charlie Lane to secure his discharge from custody under a judgment of conviction for the violation of a city ordinance. From an order denying his petition, he appeals. Affirmed.

Charlie Lane was convicted and sentenced for a violation of the prohibition ordinances of the city of Tuscaloosa, and brings habeas corpus for his discharge on the ground that

he is illegally restrained of his liberty under a void sentence and judgment, in that the acting recorder was without authority of law to hold said court and pronounce the judgment under which he is serving.

Wright & Fite, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

BROWN, J. [1] The statement of facts on which the case was disposed of by the judge of the county court shows that Traweek, the acting city recorder, was acting by authority of an appointment made by the president of the board of city commissioners, under an ordinance authorizing any one of the commissioners to appoint a temporary recorder, pending the election by the commission of a regular recorder; that the court presided over by Traweek was held at the usual time and place of holding the recorder's court of the city of Tuscaloosa; and that the proceedings in the recorder's court were regular, resulting in the defendant's conviction of the violation of a city ordinance. It is insisted, however: (1) That Traweek's appointment as recorder was without authority of law, and therefore the judgment of the recorder's court presided over by him is void and subject to collateral attack; and (2) that the ordinance under which the defendant was convicted is void, because the ordaining clause did not follow the form prescribed by section 1252 of the Code, which prescribes the form as follows: "Be it ordained by the city (or town) council of — as follows." The question of the validity of Traweek's appointment as recorder is one not necessarily presented in this case. The authorities are practically unanimous in holding that, where there is a legal office and the duties of that office are exercised by a person under color of authority, he is a de facto officer, and his acts are valid in so far as they concern the public or third persons having an interest in the thing done; and it has been expressly held in this state that, where a de facto judge acting under a void appointment holds a court at the time and place prescribed by the statute, the judgments of that court are valid, and not subject to collateral attack. *Ex parte State*, ex rel. Attorney General, 142 Ala. 88, 38 South. 835, 110 Am. St. Rep. 20. On this authority, we are bound to hold that Traweek was a de facto recorder, and, the recorder's court having been held by him at the time and place provided by law, the judgment of that court is valid, and not subject to collateral attack.

The judgment of the recorder's court, not being subject to collateral attack, is conclusive as between the parties thereto, as to the validity of the ordinance, and its validity cannot be brought into question in this case. *Drinkard v. Oden*, 150 Ala. 475, 43

South. 578; Cooley on Constitutional Limitations, 80, 81; Wood v. Wood, 134 Ala. 557, 33 South. 347; Bray v. State, 140 Ala. 172, 37 South. 250.

The order of the trial judge is affirmed. Affirmed.

On Rehearing.

[2, 3] In disposing of the case on the original consideration, in so far as it concerned the right of the appellant to attack the judgment of the recorder on the ground that the ordinance for the violation of which he was convicted was void, we were content to merely cite the case of Drinkard v. Oden, 150 Ala. 477, 43 South. 578, and other authorities, holding that the judgment of a court of competent jurisdiction is conclusive as between the parties, not only as to the facts involved in the issues litigated, but as to the validity of the law under which the proceedings were conducted, and that this is true notwithstanding the universal holding that an unconstitutional statute is not law.

The case of Drinkard v. Oden, supra, is a striking illustration of this principle. That was an action of detinue to recover certain specific personal property, and the defendant in that case pleaded, as a bar to the plaintiff's action, a proceeding before a justice of the peace under the stock-law statute (Gen. Acts 1903, p. 431), wherein the defendant had impounded the property sued for, and had it condemned for sale, and the plaintiff undertook to overturn that defense on the ground that the act (Gen. Acts 1903, p. 431) was unconstitutional and void, and therefore that the justice of the peace had no jurisdiction to render the judgment set up as a bar to plaintiff's action. The Supreme Court, in disposing of the plaintiff's contention that the act under which the justice assumed jurisdiction was unconstitutional, and therefore not a law (the same contention in principle made by appellant), said:

"It is manifest that the purpose of this action is to assail collaterally the proceedings above referred to [the proceedings before the justice under the stock-law statute]; and to this end an assault is made on the constitutionality of the act under which it was had. 'A judgment or decree of a court of competent jurisdiction is conclusive, and becomes res adjudicata as to a subsequent suit, when it is ascertained that the subject-matter of the two suits is the same and the issues in the former suit were broad enough to have comprehended all that is involved in the issues in the second suit.' * * * And this principle applies as well to the question involving the validity or existence of a statute under which proceedings are conducted, or upon which a cause of action is founded, as to any other issue in the case."

A copy of the judgment of conviction, the basis of appellant's complaint, is attached to his petition for the writ of habeas corpus, and is made a part of the return to the writ. An inspection of that judgment fails to disclose any inherent infirmity that renders it void. On the other hand, it appears in proper form

and regular on its face, but the petition undertakes to set up matters dehors the record of the recorder's court to disclose an absence of jurisdiction on the part of the recorder to render that judgment. This is clearly not permissible on collateral attack. Ex parte Bizzell, 112 Ala. 210, 20 South. 511; Roman v. Morgan, 162 Ala. 133, 50 South. 273; Black on Judgments (2d Ed.) § 273; Cooley on Const. Lim. 80, 81.

The rule is different where the infirmity that renders the judgment void appears on the face of the proceedings. In such a case it is not necessary to go outside of the record to develop the infirmity, and it can be pronounced "void on its face," and is subject to collateral attack. Ex parte Dickens, 162 Ala. 277, 50 South. 218; Bray v. State, 140 Ala. 177, 37 South. 250; Ex parte Bizzell, 112 Ala. 210, 21 South. 371; Sweeney v. Tritsch, 151 Ala. 242, 44 South. 184.

The only ground on which the appellant assails the judgment is, as stated in his petition:

"That the said P. B. Traweck was wholly without power or authority to act as recorder; that he was a usurper and an intruder."

This being true, the holding of the court, which appellant now concedes to be sound, that Traweck was a de facto recorder, and that his authority to act could not be inquired into, disposes of the only question presented for review.

We still entertain the opinion that the validity of the ordinance is not presented for consideration in this case, and that the court cannot pass upon that question without disregarding and trampling down fixed rules of law evolved to sustain the stability of judicial determination, and this we decline to do.

The application for rehearing must be overruled.

Application overruled.

(12 Ala. App. 527)

ALBANY WAREHOUSE CO. v. F. B. FISK COTTON CO. (No. 148.)

(Court of Appeals of Alabama. Nov. 26, 1914. On Rehearing, Dec. 17, 1914.)

1. SALES — 234 — TRANSFER OF TITLE — LAW GOVERNING.

A Georgia statute (Civ. Code 1910, § 4126), providing that cotton and other produce therein specified sold by planters or commission merchants on cash sale shall not be considered the property of the buyer until fully paid for, though delivered, under which the buyer under the conditions specified, obtains no title and can confer none upon a purchaser in good faith for value and without notice, applies in an action in this state against a citizen of this state who personally or through an agent purchased cotton in Georgia from one who under the statute mentioned had not acquired title, and thereafter converted it by selling it to a bona fide purchaser, and he was liable to the original seller for the value thereof, though under the common-law rule obtaining in this state a sale of goods for cash vests title in the buyer who has not paid the purchase price, if the goods are

delivered unconditionally to him without fraud on his part, as the public policy of the state in this respect has reference to such property as is within its jurisdiction and control, and not to property within the jurisdiction and control of another state.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 645, 657-677, 679, 680; Dec. Dig. ☞ 234.]

2. ACTION ☞ 28—FORM OF ACTION—WAITING TORT.

An action *ex contractu* as for money had and received will lie for the value of property belonging to plaintiff and converted into money by defendant prior to suit.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 196-215; Dec. Dig. ☞ 28.]

3. APPEAL AND ERROR ☞ 105—DECISIONS APPEALABLE—VOLUNTARY NONSUIT—NECESSITY OF NONSUIT.

A judgment entry which, after reciting that demurrers to the complaint were sustained, further recited that thereupon plaintiff stated that by such ruling it had become necessary for him to suffer a nonsuit for the purpose of appealing from such ruling, and that thereupon it was considered and was the judgment of the court that plaintiff be nonsuited, and judgment was thereby rendered against him, sufficiently showed that a nonsuit was necessitated by the sustaining of the demurrers, within Code 1906, § 3017, providing that if from any ruling or decision of the court it may become necessary for plaintiff to suffer a nonsuit, the facts, point, rule, or decision may be reserved for the decision of the Supreme Court by bill of exceptions, or appeal on the record as in other cases.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. ☞ 105.]

4. APPEAL AND ERROR ☞ 105 — DECISIONS APPEALABLE—JUDGMENT OF NONSUIT.

Such judgment entry was sufficient as a judgment of nonsuit to support an appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 717-723; Dec. Dig. ☞ 105.]

5. JUDGMENT ☞ 329—CORRECTION OR AMENDMENT.

Where a motion to amend the judgment *nunc pro tunc* set out in full the entry in the form in which it was desired and prayed that the original entry should read when amended, and the court rendered judgment "that said motion be granted, and that said judgment as amended be and is made the judgment of this court," the judgment entry as set out in the motion became the judgment of the court.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 631; Dec. Dig. ☞ 329.]

Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

Assumpsit by the Albany Warehouse Company against the F. B. Fisk Cotton Company. Judgment for defendant on demurrer, and plaintiff appeals. Reversed and remanded.

Count 2 of the complaint is as follows:

Plaintiff claims of the defendant for that heretofore, in the month of September, 1911, while the plaintiff was a commission merchant doing business in Albany in the state of Georgia, he sold to S. H. Tift at Albany, Ga., 11 bales of cotton, for which said Tift was to pay in cash on the delivery of said cotton the sum of, to wit, \$532.11. That although said cotton was delivered to said Tift, and payment therefor was to be made on delivery of said cotton, and such payment demanded, said Tift failed and still fails and refuses to pay therefor. That said

cotton was delivered by plaintiff for said Tift, and on his instructions, to the Atlantic Compress Company, at Albany, Ga., and said Tift sold and delivered the same to the defendant, in the state of Georgia, and although demand has been made upon said defendant for payment of the amount of the value of said cotton at the time it was sold, together with the interest thereon, it has failed and refused to pay the same. That at the time of said sale, and at present, there is in force in the state of Georgia a statute which reads as follows, to wit: "Cotton, corn, rice, crude turpentine, spirits of turpentine, rosin, pitch, tar, and other products sold by planters or commission merchants, on cash sale, shall not be considered the property of the buyer until fully paid for, although it may have been delivered to the buyer; provided, that in cases where the whole or any part of the property has been delivered to the buyer, the right of the seller to collect the purchase money shall not be affected by its subsequent loss or destruction." Civ. Code 1910, § 4126. The Supreme Court of Georgia has decided, and said decision is in full force and effect still, that under said statute cotton sold by a planter or commission merchant on cash sale does not become the property of the buyer until the same shall have been fully paid for, although it may have been delivered into the possession of the buyer. This being so, the seller may, until payment has been made, assert his ownership against the buyer, or the innocent purchaser obtaining the cotton from the latter for value. That before the commencement of this suit the defendant had disposed of the cotton.

Ball & Samford, of Montgomery, for appellant. Steiner, Crum & Well and Horace Stringfellow, all of Montgomery, for appellee.

THOMAS, J. The appeal is on the record proper and seeks to review the action of the trial court in sustaining a demurrer to the complaint, as a result whereof it became necessary for the appellant (plaintiff below) to take a nonsuit, which it did under the provisions of section 3017 of the Code.

[1] Count 2 of the complaint will appear in the report of the case; and, while there are numerous grounds of alleged insufficiency stated in the demurrer filed to it, only one of such grounds need claim our attention and consideration, since appellee seems to concede the lack of merit in all the others. This one goes to the very gist of the complaint, and raises the question as to whether or not comity between states requires or permits the enforcement in this state of the statute of the state of Georgia that is pleaded in the count and upon which plaintiff's right of action is therein predicated, it being insisted by the demurrant that it does not so require or permit, because, as urged, such statute is in conflict with the rule of decision and the public policy obtaining in this state as to such matters, and its enforcement here would operate to the injury of the defendant as a citizen of this state, in that it would impose upon him a liability which would not have existed had the alleged sale occurred in this state rather than, as is alleged in the complaint, in the state of Georgia.

In the Code of 1867, as section 1164 thereof, we had in this state a statute similar to the mentioned statute of the state of Georgia that is so set out in the complaint. This statute of ours was carried also into our Code of 1876 as section 1415, and received a construction by our Supreme Court in the case of *Lehman, Durr & Co. v. Warren & Burk*, 53 Ala. 535. It does not appear, however, in any subsequent Code, and by its repeal—it being in abrogation of common law—the common-law rule was restored, and has ever since obtained in this jurisdiction, which is to the effect that a sale of goods, even for cash, if the possession is delivered unconditionally to the buyer, without any fraud on his part, vests the title at once in him, although the purchase money is not paid. *Blackshear v. Burke*, 74 Ala. 239; *Pelham v. Grocery Co.*, 146 Ala. 216, 41 South. 12, 8 L. R. A. (N. S.) 448, 119 Am. St. Rep. 19.

The Georgia statute, as will be seen from it as copied into the complaint, provides that "cotton [and other produce therein named] * * * sold by planters and commission merchants, on cash sale, shall not be considered as the property of the buyer until fully paid for, although it may have been delivered to the buyer," etc., and the Supreme Court of Georgia, in construing and applying this statute, have held that since, under the conditions named in the statute, the buyer could acquire no title to the property, he could not confer any upon a purchaser from him, although the purchaser bought in good faith, for value, and without any knowledge that the purchase price had not been paid by the buyer to the seller, and that consequently the seller could assert his title and ownership to the property against either the buyer or the innocent purchaser found in possession. *Savannah C. P. A. v. MacIntyre*, 92 Ga. 166, 17 S. E. 1023.

[2] The action here, as will be seen from a reading of the complaint, is against the defendant as such a purchaser—not, however, in detinue for the recovery of the property, which, the complaint avers, had been disposed of by defendant before the bringing of the suit, nor in trover for its conversion, but (waiving the tort) *ex contractu*, on a special count for money had and received, for the value of the cotton belonging to plaintiff that had been so disposed of by defendant, which form of action for the wrong complained of is entirely permissible, under our system of pleading, when the property has been sold and converted into money before the bringing of the suit. *Miller v. King*, 67 Ala. 575; *Pike v. Bright*, 29 Ala. 332; *Bettis v. McNider*, 137 Ala. 588, 34 South. 813, 97 Am. St. Rep. 59; *Potts v. First Nat. Bank*, 102 Ala. 286, 14 South. 663; *Steiner v. Clisby*, 103 Ala. 181, 15 South. 612; *Stafford v. Sibley*, 106 Ala. 189, 17 South. 324.

The complaint (said count 2) brings plaintiff's case clearly within the purview of the

Georgia statute, as so construed by the Supreme Court of that state, in that it alleges that the plaintiff was, at the time of the sale, a commission merchant in that state; that the cotton, the subject-matter of the sale, was at the time of the sale in that state and was sold by plaintiff to one Tift in that state, to be paid for on delivery; that it was delivered to him in that state in pursuance of the contract of sale, but that, without paying for it, said Tift sold and delivered it in that state to the defendant, who had disposed of it before the bringing of the suit. It is plain, therefore, from the averments of the complaint, that, under the laws of the state of Georgia (in which state the property was situated, where its owner was domiciled, and where the defendant went and purchased and received it), the defendant acquired no title to the property; and it seems to us it would be a strange comity that we would show our sister state were we to say that, because the defendant is a citizen of Alabama, where different laws prevail as to the purchase and acquisition of title to personal property that is within its jurisdiction, these laws should follow defendant and measure his rights when he goes into the state of Georgia and purchases personal property there that is within and is subject to the jurisdiction and control of that state. If the property had been brought or shipped into this state by the original buyer, Tift, and purchased here by defendant in good faith for value, there would be more show of reason for contending that defendant's rights should be governed by the laws of Alabama; but when he goes into the state of Georgia and buys and receives there personal property that is subject to its jurisdiction, then the fact that he is a citizen of Alabama, or that he subsequently removes the property to this jurisdiction, will not, under the rules of either comity or public policy, confer title when title was not acquired under the laws of the state where the purchase was made.

The specific public policy of this state, as expressed in its laws, before pointed out, regulating the sale, transfer, and acquisition of title to personal property, has reference to such property as is within its jurisdiction and control, and not to property that is within the jurisdiction and control of another state. With reference to the latter, the public policy of this state is to enforce the general rule of comity existing between states by giving operation and effect to the laws of the state that had such jurisdiction and control at the time of the sale; and if this course results in what appellee incorrectly terms "an injury to a resident of this state," it is a *legal or lawful injury*—if such a self-contradictory expression may be used—of which he cannot complain; and which, it may be added, he voluntarily brought upon himself by going into and submitting himself, in the making of the purchase, to the laws of the foreign state, the

existence of which he is conclusively presumed to have known at the time of the purchase, since at such time he was within said state. The rules of comity with respect to the sales of personal property are thus succinctly stated in 9 Cyc. 682, par. 8:

"Where the subject of and the parties to a sale of personal property are within the jurisdiction of another state, and the contract of sale is made and executed according to the laws of that state; the sale and the rights growing out of it must be tested by the laws of the place where the contract of sale is made, and no subsequent removal of the property even for lawful purposes divests jurisdiction. Where an order is given and accepted in a certain place and the goods there delivered to the carrier for shipment, the contract is governed by the law of the place of shipment, and it makes no difference that they are not to be paid for until they arrive in the state to which they are shipped, unless the title is not to pass until they are received and paid for. Where goods are ordered from one state to be sent from another state to the purchaser 'C. O. D.,' there is a difference of opinion as to where the sale is made. Some courts hold that it is made in the state of the seller when the goods are delivered to the carrier (citing, among other cases, *Pilgreen v. State*, 71 Ala. 368); and others that there is no sale until the goods arrive at their destination and the price is collected by the carrier and the property actually delivered to the purchaser." 9 Cyc. 682, 683.

Of course, we are not here concerned with these latter questions, since the complaint in this case shows affirmatively, as before pointed out, that both the subject of the sale and the parties to it were in the state of Georgia at the time of the sale—whether the defendant was there in person or by agent being immaterial—and consequently the laws of Georgia must prevail as to the propositions here involved. *Weinstein v. Freyer*, 93 Ala. 257, 9 South. 285, 12 L. R. A. 700; *Ensley Lumber Co. v. Lewis*, 121 Ala. 99, 25 South. 729; *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 South. 42; *Marsh's Adm'r v. Elsworth*, 37 Ala. 85; *Donald & Co. v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Newcombe v. Leavitt*, 22 Ala. 631; *Turner v. Fenner*, 19 Ala. 355; *McMahan v. Green*, 12 Ala. 71, 46 Am. Dec. 242; *Cubbedge, etc., v. Napier*, 62 Ala. 518, *Díether v. Ferguson Lumber Co.*, 9 Ind. App. 173, 35 N. E. 843, 36 N. E. 765; *Born v. Shaw*, 29 Pa. 288, 72 Am. Dec. 633; *Lewis v. McCabe*, 49 Conn. 141, 44 Am. Rep. 217; *Weil v. Golden*, 141 Mass. 364, 6 N. E. 229; *Marvin Safe Co. v. Norton*, 48 N. J. Law, 410, 7 Atl. 418, 57 Am. Rep. 568.

In the first of the cases above cited (*Weinstein v. Freyer*), which is directly in point and controlling here, our Supreme Court, in an opinion written by Clopton, J., held that the vendor of personal property which has been sold by him to a buyer in Georgia, under a contract retaining title in the vendor until the payment of the purchase money, may recover the property in this state (Alabama), to which it had been subsequently removed from Georgia by the buyer and sold after removal to a purchaser here for value, who had no knowledge of the retention of

title by such original vendor. This decision was before the passage of our statute (Code, §§ 3393, 3394), requiring the recording of conditional sales contracts (which, if it had then been in existence, would probably have protected any person who purchased the property after its removal here, unless the contract was before such purchase recorded here). But this fact in no wise alters the decisive character of the opinion as to the point here involved, where the facts are that the subsequent purchaser purchased, not in this state, but in the state of Georgia, under whose laws he acquired no title by such purchase; for, as bearing on this proposition, we quote from such opinion as follows:

"The general rule is that when the state where a contract [of sale] is made is also the place of performance and the situs of the property, the laws of that state become a part of the contract, and the sufficiency of its execution, its validity, interpretation, and legal effect—the rights of the parties to the contract—will be governed by the laws of that state, wherever its enforcement may be sought. * * * The statute of Georgia affirms the validity of the reservation of title as between the parties [the original vendor and the original purchaser], whether or not the contract is recorded. By the law of that state, the title was in the original vendors when Franklin [the original purchaser] brought the property into this state, of which they could not be divested except by their voluntary act, or due process of law."

So, in the present case, under the laws of Georgia, as pointed out, the title to the cotton was still in the plaintiff at the time that the original buyer, Tift, sold it to the defendant; nor was it divested by such latter sale for the reason that such sale, like the first, took place in and was governed by the laws of the state of Georgia; hence the defendant could not acquire any title by subsequently removing the property to this or to another state; and, though after removal here he could, by a sale of it here, confer upon a bona fide purchaser a good title, yet the defendant would be liable in trover to the original vendor for a conversion in so doing, and such vendor might, as here, waive the tort and sue in assumpsit for money had and received.

The complaint alleges that before the bringing of the suit the property had been disposed of by defendant. Whether or not this averment is sufficient to show that the property had been converted into money is a question not raised by the demurrer, and that need not be considered.

[3, 4] We find nothing in any of the many cases cited by appellee in his brief which conflicts with the view we entertain that the rights of the parties are to be determined by the laws of Georgia. Nor do we think there is any merit in the contention of appellee, to the effect that, under the ruling of our Supreme Court in the case of *Long v. Holley*, 157 Ala. 514, 47 South. 655, the judgment entry here fails to clearly show that the sufficiency of the nonsuit by appellant, from which the appeal is taken, was necessitated,

as is required by section 3017 of the Code, by the adverse ruling of the court on the said demurrer. The judgment entry, immediately after reciting that it was the judgment of the court that said demurrers be sustained, further recites, which is a complete answer to appellee's contention, that:

"Thereupon the plaintiff stated to the court that by said ruling of the court, sustaining the demurrers to the complaint as amended and to the second count of the complaint, it has become necessary for the plaintiff to suffer a nonsuit for the purpose of appealing from said ruling to the Court of Appeals; and thereupon it is considered by the court and it is the judgment of the court that the plaintiff and this cause be and the same is nonsuited, and judgment is hereby rendered against plaintiff for all costs in this behalf expended, for which," etc.

Bush v. Russell, 180 Ala. 593, 61 South. 373; *Ex parte Martin*, 180 Ala. 620, 61 South. 905.

The judgment is likewise sufficient as a judgment of nonsuit to support an appeal. *Wood v. Coman*, 58 Ala. 283.

[5] It appears from the record that the original judgment was, after its entry, amended *nunc pro tunc* on motion of appellant; and contention is here made by appellee that the amended entry, from which we have just quoted, never became the judgment of the court on account of an alleged want of formal words so adjudging. We are equally clear that this contention is without merit. The said motion to amend *nunc pro tunc* set out in full the entry in the form in which it was desired, and prayed that the original entry should read, when amended, and the court rendered judgment granting this motion, in words as follows:

"And said motion is understood by the court, and it is considered by the court, and it is the judgment of the court that said motion be granted, and that said judgment as amended be and * * * is made the judgment of this court in said cause, and to be entered of record as such judgment as of date," etc.

We have discussed all questions urged. For the error of the court in sustaining the demurrer to count 2 of the complaint, the judgment is reversed.

Reversed and remanded.

On Rehearing.

The case of *Comer v. Cunningham*, 77 N. Y. 391, 33 Am. Rep. 626, cited on rehearing, wherein the Georgia statute mentioned in our opinion was under consideration by the New York court, has no application here by reason of the difference between the state of facts there and those here; consequently we do not regard our opinion as in any wise in conflict with that. If here, as was the case there, the original purchaser had shipped the cotton out of the state of Georgia into the foreign state, indorsing or making the bill of lading therefor payable to a purchaser in the foreign state and to be delivered to him in the foreign state upon his there paying the

draft drawn on him for the purchase price, or a part of it, that is attached to the bill of lading, then clearly the later purchaser, if bona fide, would be protected as such by whatever may be the laws of his state, because the purchase took place in his state and would be governed by its laws, and there would be no occasion for the application of the rule of comity which we have here enforced. 9 Cyc. 682, par. 3. It was not applied or considered in the New York case cited, and we think, for reasons stated, it was properly not; but in that case the rights of the purchaser were determined, as they should have been, under the laws of the state of New York. Here, however, the defendant, as shown by the allegations of the complaint, goes into the state of Georgia and makes the purchase. Under the laws of Georgia, when he so purchased, he acquired no title, and for us to hold that the plaintiff cannot recover is to hold that the defendant acquired a title by removing the property or himself into Alabama. When in Georgia, he was charged with a knowledge of its laws regulating the transfer and acquisition of title to the property he sought there to purchase, and it was his duty, therefore, to then inquire and ascertain whether the person (Tift) who offered to sell him the cotton had paid the purchase price and acquired title. He having failed so to do, comity, we think, clearly forbids that he should withdraw himself and the property across the state line into this jurisdiction and then say to the original owner of the cotton:

"Although it was your property in Georgia, and although the person from whom I went over there and bought it had no title and could not, under the laws of your state, where I bought it, confer any on me, and although I knew of those laws and was therefore under duty to inquire and ascertain, before I purchased, as to whether the person from whom I bought had acquired title by paying to you the purchase price, and although, therefore, as a matter of law, I knew he had not paid the purchase price and had not acquired title, yet I have since then removed myself and the property into Alabama and have, by reason of its laws governing similar transactions, if they had taken place here, thereby divested you of your title to the property and relieved myself of any liability for its conversion."

We find no reason for departing from our former holding as expressed in the original opinion, and the application for rehearing is consequently overruled.

(12 Ala. App. 143)

HICKEY v. STATE. (No. 825.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. BURGLARY ⇐42— PROSECUTION — PRIMA FACIE CASE.

Proof that accused sold a ham recently stolen from the smokehouse of the prosecuting witness makes out a prima facie case of burglary.

[Ed. Note.—For other cases, see *Burglary*. Cent. Dig. §§ 80, 104-107; Dec. Dig. ⇐42.]

2. WITNESSES ¶337—EXAMINATION—CROSS-EXAMINATION.

In a prosecution for burglary, where accused, in explaining his possession of the alleged stolen ham which he sold to a merchant, testified that it was one of four hams which he had cured himself and that he had sold two of the others to another merchant, the state may, to impeach him, show that the two hams, referred to, were also stolen; for, while the state could not impeach accused by proof of the falsity of statements as to immaterial matters drawn out by itself on cross-examination, it was entitled to impeach him as it might any other witness by proof of the falsity of statements made on his direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1113, 1129-1132, 1140-1142, 1146-1148; Dec. Dig. ¶337.]

8. CRIMINAL LAW ¶711—TRIAL—ARGUMENT OF COUNSEL.

In a simple case it was not an abuse of discretion for the court to limit counsels' argument to 35 minutes a side.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1657; Dec. Dig. ¶711.]

Appeal from Clay County Court; E. J. Garrison, Judge.

Elbert Hickey was convicted of burglary, and he appeals. Affirmed.

Lackey & Rowland, of Ashland, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

THOMAS, J. [1] The appellant was charged with and convicted of burglary. It appeared from the state's evidence that the smokehouse of one Williams had been broken into, and that from it had been stolen, among other things, one home-cured ham; that immediately thereafter Williams commenced a search for the stolen property and found that a ham corresponding in certain peculiarities and distinguishing features with his, and which he and other witnesses identified as his, and which was introduced in evidence, had been sold by the defendant to a merchant in the nearby town of Goodwater, who surrendered it to Williams, and who testified at the trial that it had been sold to him by defendant shortly after the alleged burglary. This made out a prima facie case for the state; since, if the jury believed beyond a reasonable doubt that the ham that was sold by defendant was the ham that had been recently stolen, as the state's evidence tended, as seen, to show, they would be authorized in finding defendant guilty, unless he offered satisfactory explanation of his possession. 1 Mayf. Dig. 582, § 36.

[2] The evidence for defendant tended, however, to dispute one of the predicates upon which the state's prima facie case was rested and to show that the ham in evidence, and which he (defendant) admittedly sold to the mentioned merchant at Goodwater, was not the stolen ham, but a ham which belonged to defendant himself and which he had saved or cured from hogs that he had raised. He and his witnesses further testified, at the

instance of his own counsel, that he had saved or cured, not only the ham in question, but three others at the same time, and that he had disposed of all four of them—one to the merchant at Goodwater, as shown, two to a certain named merchant at Ashland, and that he (defendant) had eaten the remaining one.

In rebuttal, the state was permitted to show, over the objection of defendant, and solely for the purpose of impeaching him, that the two hams which he swore that he sold to the merchant at Ashland were not, as he had sworn, hams that had been saved or cured by him, but were hams that had also been stolen from the smokehouse of another party in that community. The defendant insists that the court was in error in admitting this impeaching testimony, because it related to a matter that was entirely immaterial to the issue on trial and involved proof of another and different crime from that under investigation.

If the state had itself drawn out on cross-examination of defendant these immaterial facts, then it is clear that the law would have forbidden it from offering any evidence contradicting the statement of the defendant as to those facts (Crawford v. State, 112 Ala. 19, 21 South. 214); but where, as here, the defendant himself, by his own evidence, brought out those facts, with the view and for the evident purpose of corroborating his testimony on the real issue, he is in no position to complain that the state was permitted to afterwards contradict and rebut the evidence of those facts. Dozier v. Joyce, 8 Port. 303; Bartlett v. State, 7 Ala. App. 87, 60 South. 958; Wall v. State, 2 Ala. App. 170, 56 South. 57.

The rule on the subject, as obtaining in this state, is that a witness, even though he is a party to the action, or the defendant in a criminal prosecution, cannot be contradicted for the purpose of impeachment as to collateral, irrelevant, or immaterial matters, when drawn out on cross-examination by the opposing party, but that he may be contradicted for the purpose of impeachment, even as to such facts, when they are drawn out on his direct examination; since in the latter case he voluntarily opens the door to the illegal evidence and invites his adversary in. Authorities, supra; Crawford v. State, 112 Ala. 19, 21 South. 214; Dozier v. Joyce, 8 Port. 303; 40 Cyc. 2769.

[3] Complaint is made of the action of the court in limiting the argument of counsel on either side to 35 minutes. This was a matter resting within the sound discretion of the trial court, and will not be reviewed unless shown to have been abused. It does not so appear in this case, where the facts were few and simple and the law plain and familiar, and where the only material issue was: "Whose ham was it that the defendant sold the merchant at Goodwater—defendant's or

prosecutor's?" *Yeldell v. State*, 100 Ala. 26, 14 South. 570, 46 Am. St. Rep. 20.

We have discussed all questions urged in brief. We find no error after an examination of the entire record, and the judgment appealed from is consequently affirmed.

Affirmed.

(12 Ala. App. 632)

STATE ex rel. CITY OF BIRMINGHAM v. FORT, Judge. (No. 847.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

CRIMINAL LAW §260 — APPEAL FROM RECORDER'S COURT — FORFEITURE OF BOND — RIGHT TO ARREST DEFENDANT.

Under Code 1907, §§ 6234, 6287, authorizing issuance of alias and pluries writs of arrest for defendant in criminal cases after any forfeiture taken, and in view of Code 1907, § 1217, making the trial of a case on appeal from a conviction in recorder's court de novo, and section 1218, authorizing default to be taken against sureties on the appeal bond as in criminal cases, and section 1451, providing that rules of law regulating the trial of criminal cases appeal from justices of the peace courts shall govern in trial of appeals from recorder's court, and Code 1907, §§ 6354-6360, authorizing the criminal court to enter up forfeiture proceedings as in criminal cases, and Code, § 6354, making it the essence of all undertakings of bail in criminal cases that the presence of defendant in court be obtained, the criminal court of Birmingham, on appeal from a conviction for violation of an ordinance in recorder's court after final forfeiture has been taken on the bond for default of defendant, has power to award an alias or a pluries writ to secure the presence of defendant, and hence mandamus and procedendo will not lie to send the judgment back to recorder's court for enforcement.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 567-609; Dec. Dig. § 260.]

Mandamus proceedings by the State, on the relation of the City of Birmingham, against W. E. Fort, Judge, etc. Mandamus denied.

Romaine Boyd and J. P. Mudd, both of Birmingham, for appellant. R. D. Coffman, of Birmingham, for appellee.

PELHAM, P. J. A municipal corporation, the city of Birmingham, seeks by mandamus proceedings to compel the judge of the criminal court of Jefferson county to dismiss a case pending on appeal in that court from a judgment of conviction rendered in the recorder's court of the municipality against a defendant charged with the violation of one of the ordinances of said city, and to order a procedendo to the recorder's court requiring that court to enforce the judgment there rendered, because the defendant had not prosecuted his appeal, but had made default and allowed a forfeiture to be taken against him and his bondsmen in criminal court. The petitioner shows in its petition that one Ed York was tried and convicted in the recorder's court of the city of Birmingham, and perfected an appeal to the criminal court of Jefferson county; that he failed to appear

and prosecute the appeal, and in consequence of this default a conditional forfeiture was taken against the defendant and his bondsmen, with the usual notice that unless the defendant appeared at the next term of the court it would be made final. The defendant appeared at the next term, offered no excuse why the forfeiture should not be made final, but consented that that course be taken. Whereupon, the forfeiture having been made final, the petitioner filed a motion in the criminal court asking that the case be dismissed out of that court and an order of procedendo be directed by the court to the recorder's court commanding it to enforce the judgment theretofore rendered by it, from which the defendant had perfected an appeal by giving an appeal bond under the statute providing for appeals from that court to the criminal court of Jefferson county. The court refused to dismiss the appeal out of the criminal court and grant the order for a procedendo to the recorder's court, and the petitioner brings this mandamus proceeding to compel that action.

The right of appeal in such matters is purely statutory and regulated by the provisions of the statutes relating thereto. *Brighton v. Miles*, 153 Ala. 673, 45 South. 160. Looking to the enactments germane to the proposition, it will be found that, in that compilation of laws embraced in chapter 32 of the Political Code of 1907 and commonly referred to as the Municipal Code, it is provided in article 14 that appeals of this kind from the recorder's court shall be tried de novo in the court to which the appeal is taken (Code, § 1217), and that if the defendant fails to appear, but makes default, the court shall enter up a judgment of forfeiture on the appeal bond against the defendant and his sureties "as is authorized or provided by law in criminal cases" (Code, § 1218). It is also provided by section 1451 that the rules of law regulating the trial of criminal cases appealed from justice of the peace courts shall govern on the trial of appeals from recorder's courts.

While the appeal bond or undertaking by which the judgment of the recorder's court was vacated and the appeal perfected was in the nature of civil contract to which the statutory provisions of the criminal law authorizing the surrender of principals in criminal cases do not apply (*House v. Anniston*, 5 Ala. App. 357, 59 South. 686), the proceedings had upon a forfeiture being taken in case of default are specifically authorized to be the same in cases of appeal from recorder's courts as provided by law for forfeiture proceedings in criminal cases (Code, § 1218). To quote from a recent opinion of the Supreme Court:

"In section 1218, it is provided that in case of default in appearing, on such appeal, forfeiture on the bond shall be entered up 'as is authorized or provided by law in criminal cases,'

which provision would be unnecessary if it were already a criminal case under the laws of the state." *State ex rel. City of Birmingham v. Fort*, 164 Ala. 578, 581, 51 South. 317, 318.

The duty and authority of the court in entering up forfeiture proceedings in criminal proceedings aside from the inherent power reposed in all courts in such matters is clearly defined by statute (article 6 of the Criminal Code), and as the essence of all undertakings of bail in criminal cases at common law, as well as by statutory declaration in this state (Code, § 6354), is to obtain the presence of the defendant in court, we doubt not the inherent power, yea, the duty of the court in the exercise of its inherent power in a case where the defendant failed to appear and made default would require, not that it dismiss the case and enter an order to the court from which the defendant had appealed his case and thereby completely put to an end the further jurisdiction of that court over the case the same as if it had never existed (*House v. Anniston*, supra, and authorities there cited), but that the court retain jurisdiction and control over the case and order an alias or pluries writ for the arrest of the defendant after taking the forfeiture. Certainly, when the defendant was, as is shown to have been the case here, in the actual presence of the court, the court was clothed with the inherent authority to order his arrest after taking forfeiture against him. But, however that may be, the court is not thrown upon its inherent powers for its authority under the circumstances of such a condition, for there is a statutory provision authorizing the issuance of alias and pluries writs of arrest for defendants in criminal cases after any forfeiture taken, even without a formal order of the court. Code, §§ 6284, 6287. See, also, sections 1451, 6744, and 6728, which, construed together, would also seem to authorize issuance of a writ of arrest in a case like this after forfeiture taken.

The cases cited by counsel stating rules applicable to the dismissal of appeals by a reviewing court where the trial is not de novo are not in point and have no application to the dismissal of cases by a trial court charged with the duty of trying the case de novo.

From what we have said, it follows that we are of the opinion that the issuance of the writ of mandamus is not authorized and will be denied.

Mandamus denied.

(12 Ala. App. 92)

McWILLIAMS v. STATE. (No. 752.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. INDICTMENT AND INFORMATION \S 189—OFFENSES INCLUDED IN INDICTMENT.

Where, on a trial under an indictment charging murder in the first degree, the evidence showed that accused shot a third person,

but there was no evidence that the latter died in consequence of the wounds inflicted, accused could be convicted of assault with intent to murder, for that offense was included in the offense charged, within Code 1907, § 7315, authorizing the conviction of one of an offense necessarily included in the offense charged in the indictment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. \S 189.]

2. HOMICIDE \S 187—SELF-DEFENSE—EVIDENCE—ADMISSIBILITY.

Where accused on trial for murder in the first degree relied on self-defense, a photograph of decedent taken some time before the difficulty showing him with a drawn pistol was properly excluded.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 390, 390½; Dec. Dig. \S 187.]

3. HOMICIDE \S 300—ASSAULT WITH INTENT TO MURDER—SELF-DEFENSE.

An instruction on self-defense which ignores the element of retreat, necessary to the defense of one seeking to excuse a homicide or an attempt to commit one, is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

4. ASSAULT AND BATTERY \S 67—CRIMINAL RESPONSIBILITY—SELF-DEFENSE.

The defense of self-defense to an assault and battery is not complete, though accused did not provoke the difficulty, if he fought willingly.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 125; Dec. Dig. \S 67.]

5. HOMICIDE \S 300—SELF-DEFENSE—INSTRUCTIONS.

An instruction on self-defense which fails to hypothesize accused's freedom from fault in bringing on the difficulty is properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

6. CRIMINAL LAW \S 811—INSTRUCTIONS—GIVING UNDUE PROMINENCE TO EVIDENCE.

A requested instruction which singles out, and gives undue prominence to, part of the evidence, and predicates an acquittal on a consideration of the isolated fact singled out, is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. \S 811.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Tom McWilliams was convicted of assault with intent to murder, and he appeals. Affirmed.

The indictment charged that defendant unlawfully and with malice aforethought killed Robert C. De Wees by shooting him with a pistol. The tendency of the state's evidence was to show that defendant shot De Wees with a pistol, but it does not appear from the evidence that De Wees is dead, or that, if dead, he died from the wounds inflicted, although it was shown that he was shot in several places; the wounds being made in various parts of the body. After the evidence for the state was closed defendant's counsel moved to exclude all the testimony offered by the state on the ground that the corpus delicti had not been proven, in that

the state had failed to prove the death of De Wees. The state admitted failure to prove death, and the court sustained defendant's motion as to murder or manslaughter in either degree, but overruled the motion as to assault with intent to murder, and as to assault with a pistol, and to this ruling defendant excepted. The defendant's evidence tended to show self-defense. The following charges were refused defendant:

(25) If you have a reasonable doubt of the guilt of defendant of any offense or of any grade of any offense charged or included in this case, then I charge you that you must find defendant not guilty in this case of any offense charged in the indictment.

(26) If you believe from the evidence that the purpose of defendant in returning to the barber shop the night after he had left his coat and hat there was to get his hat and coat, and not for the purpose of bringing on or engaging in a difficulty with De Wees, then the fact of his return to the barber shop was not an unlawful act on his part from which you can infer guilt on the part of defendant, and you cannot convict him.

The opinion sufficiently indicates the infirmities in the other charges named.

Bowman & Vaughan and S. J. Stiggins, all of Birmingham, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. No brief has been filed on behalf of the defendant going to the merits of any question presented by the transcript, but the main proposition which seems to have been insisted upon by the defendant in the trial court, and which is presented for review on the record in several forms, goes to the ruling of the trial court that it was within the province of the jury to find the defendant guilty of an assault with intent to murder, or an assault and battery, although the indictment against him and upon which he was being tried charged murder in the first degree.

[1] The lesser charge was included in the greater, and, although it might be true that, where the uncontradicted evidence shows a homicide to have been the result of the blow struck or wound inflicted, the lesser would be merged in the greater, yet, in a case like this, where the evidence failed to show that death resulted from the pistol shot wound inflicted by the defendant on the person alleged to have been slain, and the court instructed the jury at the request of the defendant that they could not find the defendant guilty of any degree of unlawful homicide, there can be no question of a merger, and, if the evidence, as in this case, is sufficient to support a finding of guilt of felonious assault, then the indictment, including the lesser offense, would authorize a conviction of assault with intent to murder. On a similar principle, it has been held that a conviction for assault and battery may be had under an indictment for rape (Richardson's Case, 54 Ala. 153); for, although there are no degrees of the of-

fense charged, yet included in it is the lesser charge of assault or assault and battery (Hutto v. State, 169 Ala. 19, 53 South. 809). Under the statute (Code, § 7315), a defendant may be found guilty of any offense necessarily included in that which is charged, whether it be a felony or a misdemeanor. Sankey v. State, 128 Ala. 51, 29 South. 578.

[2] The photograph of the person alleged to have been slain, taken some time before the difficulty in question, showing him with a drawn pistol, that was offered in evidence by the defendant, could have had no legitimate tendency to prove or disprove any issue before the court, and the court properly sustained the solicitor's objection to its introduction in evidence. Other rulings of the court on the evidence are manifestly without error and require no particular mention or discussion.

The general charge requested by the defendant was properly refused, and the question of the defendant's guilt of an assault with a weapon, or assault with intent to murder, submitted to the jury on the evidence, which was ample to support a conviction of the offense for which he was convicted.

Charge 13 requested by the defendant in writing was covered by written charge 12 given at his request.

[3, 4] The evidence without conflict shows that the defendant shot and inflicted serious bodily harm on the person alleged in the indictment to have been slain, and, if the evidence fell short of showing death as a result of the wound, there was an abundance of evidence to support a finding that the act was committed in an attempt to commit murder with an intent to do so. The reliance of the defendant was based on showing that he acted in self-defense. Refused charges 14, 18, 19, and 27 each ignore the indispensable element of retreat necessary to the defense of one who would seek to excuse a homicide or an attempt to commit one. As applied to a nonfelonious assault, these charges, under the evidence of this case, are abstract, and bad in failing to negative that the defendant fought willingly at the inception of the difficulty. The defense in an assault and battery case would not be complete, although the defendant did not provoke the difficulty, if he fought willingly. Howell v. State, 79 Ala. 283; Harris v. State, 123 Ala. 69, 26 South. 515.

[5] Charge 15 fails to hypothesize defendant's freedom from fault in bringing on the difficulty. Gilmore v. State, 126 Ala. 38, 28 South. 595; Rose v. State, 144 Ala. 114, 42 South. 21. Besides, it is otherwise faulty.

Charge 25 is patently bad. Under its instruction, if the jury did not believe the defendant guilty of murder in the second degree, or manslaughter, they could not find him guilty of an assault with intent to murder.

[6] Charge 26 singles out, and gives undue prominence to, a part of the evidence, and

predicates an acquittal on a consideration of the isolated fact singled out.

From what has been said, it will appear without further discussion that there was no error committed in the refusal of the other written charges set out in the bill of exceptions as refused to the defendant.

We find no error in the record, and the judgment appealed from will be affirmed.

Affirmed.

(12 Ala. App. 193)

POSEY v. STATE. (No. 268.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

1. RAILROADS \Leftrightarrow 255—OFFENSES — INDICTMENT.

Under Code 1907, § 7675, an indictment, charging that defendant wantonly and maliciously threw or cast a bottle, calculated to produce death or great bodily harm, into a locomotive or passenger train of a railroad, in or on which locomotive there was a human being, was sufficient.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 773-788; Dec. Dig. \Leftrightarrow 255.]

2. CRIMINAL LAW \Leftrightarrow 1167—HARMLESS ERROR — RULING ON PLEADING.

Error, if any, in overruling a demurrer to certain counts was without injury, where the defendant was convicted upon another sufficient count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3101, 3103-3106; Dec. Dig. \Leftrightarrow 1167.]

3. CRIMINAL LAW \Leftrightarrow 419, 420—EVIDENCE—HEARSAY.

In a prosecution for maliciously throwing a missile at a locomotive or passenger train, striking the engineer, evidence that the negro fireman had a rock and said it was what the engineer was hit with, not made in the presence of the engineer, or under oath, was hearsay, and incompetent to show that the engineer was in fact hit with the rock.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 973-983; Dec. Dig. \Leftrightarrow 419, 420.]

4. WITNESSES \Leftrightarrow 398—IMPEACHMENT.

Such testimony was inadmissible to impeach the fireman as he had not then and was not afterwards introduced as a witness for the state.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1267, 1274, 1275; Dec. Dig. \Leftrightarrow 398.]

5. CRIMINAL LAW \Leftrightarrow 1170½—HARMLESS ERROR.

Exclusion of impeaching evidence is not ground for reversal, where the witness sought to be impeached is impeached by his own testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. \Leftrightarrow 1170½.]

Appeal from Circuit Court, Cleburne County; Hugh D. Merrill, Judge.

Tom Posey was convicted of throwing missiles at a train, and he appeals. **Affirmed.**

Omitting formal charging part, the said count is as follows:

Tom Posey wantonly or maliciously threw or cast a bottle, calculated to produce death or great bodily harm, into a locomotive or a passenger train of a railroad train of the Sea-

board Air Line Railway, a railroad, in or on which locomotive there was a human being, etc.

Merrill & Walker, of Anniston, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

THOMAS, J. [1] The defendant was found guilty under count 3 of the indictment, which the reporter will set out, and which was a good count, the indictment being predicated on section 7675 of the Code of 1907.

[2] Whether, therefore, the other two counts, 1 and 2, were sufficiently specific in their allegations to prevail against the demurrer, we need not and do not consider; since if the court was in error in overruling the demurrer to these counts it was error without injury, as the defendant was, as stated, convicted under the said third count.

In support of the count there was evidence tending to show that the defendant threw a bottle, as alleged in the count, into a passing train, which struck the engineer, Kennedy, while in his cab, inflicting serious injuries; that the engineer did not himself know what kind of a missile it was with which he was struck, as it did not fall in the cab, but rebounded to the ground after it struck him; and that at the next stop, Borden Springs, he got off for treatment, and surrendered there the engine to another engineer.

[3, 4] The defendant was allowed without objection to prove by one of his witnesses that when the engineer disembarked at the station mentioned he, in reply then to a question there propounded by some one, answered that he had been hit on the shoulder with a rock. Immediately following this statement of the witness the bill of exceptions contains this recital:

"Thereupon defendant's counsel asked the witness this question: Q. Did he exhibit the rock? A. No, sir; the negro fireman had a rock, and said it was what he was hit with. Q. Was Mr. Kennedy [the engineer] present when the negro fireman said it was the rock he was hit with? A. Yes, sir."

The court ruled out, on motion of the solicitor, this evidence as to what the negro fireman said and did, which action of the court was not improper. Such evidence was certainly not competent, either for the purpose of showing that the engineer was in fact hit with a rock, as the fireman's statement to this effect at the time and not made under oath was pure hearsay on this trial, or for the purpose of impeaching the fireman, as the fireman had not then, nor even afterwards, been introduced as a witness by the state. If it may be said, which we need not decide, that it tended negatively to impeach the engineer himself, in that he failed to deny the statement of the fireman, made in his presence, to the effect that he, the engineer, had been hit with a rock, it may be answered that the testimony of the witness had already shown, if believed, and which

went in and remained in without objection, that the engineer had positively impeached himself by affirmatively stating at that time, in reply to a direct question from some one, that he had been hit with a rock. However viewed, therefore, the action of the court in the particular mentioned constitutes no cause for reversal.

The three other rulings of the court on evidence, made the basis of several exceptions, are deemed by counsel of such little importance as to have called forth no brief from them, and as they are so clearly free from error upon principles and precedents long settled and often discussed, it could serve no valuable purpose to prolong this opinion by discussing them here. There were no written charges refused, and none, therefore, presented for review.

We find no error in the record, and the judgment of conviction is affirmed.

Affirmed.

(12 Ala. App. 630)

STATE v. LOVEJOY. (No. 136.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

APPEAL AND ERROR \S 671 — **SCOPE OF REVIEW—DETERMINATION BY RECORD—BILL OF EXCEPTIONS — AFFIRMANCE OF FAILURE TO SET OUT EVIDENCE.**

Where, though the judgment of the Court of Appeals in affirmance of the judgment below was reversed by the Supreme Court as to the proposition of law involved, yet, on it appearing that the bill of exceptions, which undertook to set out the evidence on which the trial court based its judgment, did not purport to set out all of the evidence, the Court of Appeals would affirm the judgment below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2867-2872; Dec. Dig. \S 671.]

Appeal from Circuit Court, Montgomery County.

Complaint by the state against T. E. Lovejoy. From a judgment in his favor (64 South. 1021), the State appeals. Affirmed.

R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State. John R. Tyson, of Montgomery, for appellee.

PELHAM, P. J. The Supreme Court in this case has reversed itself, and in doing so has ex necessitate legis reversed the holding of this court based on the former holding of that court in a case which it has in the opinion in this case expressly overruled. *Ex parte State*, 66 South. 1; *State v. Lovejoy*, 64 South. 1021. The point, made by the appellee for the first time in the Supreme Court (which seems to have been overlooked there), that this court's judgment of affirmance should not be disturbed, notwithstanding the cardinal proposition of law involved, because the bill of exceptions which undertakes to set out the evidence on which the trial court based its judgment does not purport to set out all of the evidence, is well taken (*Evansville Pkt. Co. v. Slater*, 101 Ala.

245, 15 South. 241; *Prine v. A. C. I. Co.*, 171 Ala. 343, 54 South. 547), and a judgment, as heretofore rendered, affirming the judgment of the lower court, it seems to us, is proper.

Affirmed.

(12 Ala. App. 72)

RUDDER v. STATE. (No. 316.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

1. CRIMINAL LAW \S 829—**TRIAL—INSTRUCTIONS.**

The refusal of requests covered by the charges given is not error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

2. CRIMINAL LAW \S 874—**TRIAL—VERDICT.**

As Code 1907, \S 7315, only authorizes the jury to be sent out for further deliberation when one or more of the jurors denies that the verdict is his, it was not error for the court to receive a verdict where a juror stated that he agreed to it, but that it was not what he wanted, as he desired lighter punishment.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2085-2088; Dec. Dig. \S 874.]

Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Oscar Rudder was convicted of manslaughter in the first degree, and he appeals. Affirmed.

John B. Tally, of Scottsboro, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PELHAM, J. The defendant was tried on an indictment charging murder in the second degree, and convicted of manslaughter in the first degree, and his punishment fixed at ten years' imprisonment in the penitentiary.

[1] The bill of exceptions recites that it contains, "in substance, all the tendencies of the evidence." The evidence set out is sufficient to show the commission of the grade of the offense as ascertained by the jury and the defendant's guilty agency as the person criminally responsible. No ruling of the court on the admission or rejection of evidence is shown by the bill. The only written charge refused to the defendant, and numbered 10 in the transcript, is fully covered by given charges Nos. 2 and 8.

[2] The objection made by the defendant to the court's receiving the verdict is without merit. The statement made by the juror Hees upon the polling of the jury that he agreed to the verdict, but that it was not what he wanted, as he did not approve of the penalty being placed so high, was no more than a statement that, while he had preferred fixing a lighter sentence, he submitted to it and acquiesced in and agreed to the verdict. Even though a juror at first answers evasively, if he finally acquiesces in and agrees to it, this is sufficient to show that it is his verdict. *McAlpine v. State*, 117 Ala. 93, 23 South. 130. In answer to the court's questions, this juror stated without qualification

that he agreed to the verdict. The answer of the juror, expressing an agreement to the verdict, showed it to be his verdict, and thus it became the joint verdict of the entire jury. The statute (Code, § 7315) only authorizes the jury to be sent out for further deliberation when one or more of the jurors answers in the negative, and an answer by the juror that he agrees to the verdict is sufficient to make it appear that it was his verdict. *Winalow v. State*, 76 Ala. 42.

Affirmed.

(12 Ala. App. 42)

HALL v. STATE. (No. 164.)

(Court of Appeals of Alabama. Dec. 15, 1914.
Rehearing Denied Feb. 13, 1915.)

1. HOMICIDE \Leftrightarrow 203—DYING DECLARATIONS—
BELIEF IN IMPENDING DEATH.

The fact that the physician attending deceased expressed to him a hope and belief that he would recover did not render his dying declaration inadmissible; deceased being and believing himself to be in extremis.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. \Leftrightarrow 203.]

2. CRIMINAL LAW \Leftrightarrow 193½—FORMER JEOPARDY—CORRECTION OF VERDICT.

Where there was no evidence in the case warranting conviction of as low a degree as manslaughter in the second degree, and the court did not instruct thereon, but the jury returned a verdict for such degree, the court could not decline to receive it and send the jury back for further deliberations on the higher degrees, without violating Const. 1901, § 9, relating to former jeopardy; the verdict being an acquittal of the higher degrees.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 366, 387, 389, 394; Dec. Dig. \Leftrightarrow 193½.]

Appeal from Circuit Court, Macon County;
S. L. Brewer, Judge.

George Hall was convicted of manslaughter in the first degree, and appeals. Reversed and remanded.

O. S. Lewis, of Tuskegee, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. [1] There is no merit in defendant's objection to the dying declarations of deceased introduced by the state. A sufficient predicate therefor was, we think, laid. 1 Mayf. Dig. 284 et seq. The fact that the physician attending deceased expressed to him a hope and belief that he would recover does not render the dying declaration inadmissible; provided the deceased believed himself to be in extremis, which he in fact was. The evidence without dispute shows, too, that he so believed, and that he properly understood and interpreted the words of the doctor as being intended merely as an encouragement to him. *Hussey v. State*, 87 Ala. 121, 6 South. 420.

[2] Only one other question is presented by the record in this case. It arises upon an objection and exception taken by defendant to the action of the trial court in declin-

ing to receive from the jury the first verdict returned by them, which was a verdict finding defendant guilty of manslaughter in the second degree and fixing his punishment at a fine of \$25 and 30 days' imprisonment at hard labor. The bill of exceptions, after reciting that the court refused to accept this verdict, then continues as follows:

"Whereupon the court instructed the jury that if they found defendant guilty, they could not find him guilty of less than manslaughter in the first degree; that they had not been instructed upon the offense of manslaughter in the second degree. And the court then instructed them to retire and further consider their verdict, giving them again the forms of verdict, including a form for the verdict of not guilty."

The jury thereupon again retired and later returned with a verdict finding defendant guilty of manslaughter in the first degree and fixing his punishment at imprisonment in the penitentiary for one year and one day, upon which verdict judgment and sentence were regularly pronounced.

There is in the record no evidence whatever tending to reduce the homicide committed to involuntary manslaughter; therefore under the law the court in originally instructing the jury was not required to charge on this degree of homicide, which he rightfully refrained from doing. *Compton v. State*, 110 Ala. 24, 20 South. 119; *Williams v. State*, 130 Ala. 113, 30 South. 484; *Gafford v. State*, 125 Ala. 1, 28 South. 406. He might, also, in view of this state of the evidence, have at that time positively stated, *ex mero motu*, to the jury that there was no evidence in the case applicable to involuntary manslaughter (*Thomas v. State*, 150 Ala. 31, 43 South. 371); and perhaps he might have, of his own motion at that time, instructed them that, if they believed from the evidence beyond a reasonable doubt that the defendant was guilty of the homicide charged, they could not find him guilty of a less degree than voluntary manslaughter. This seems to be the effect of the holding of our Supreme Court in the *Thomas Case*, last cited, but see *Gafford v. State*, *supra*, which appears to be to the contrary. However, whether the court could have given of his own motion such an instruction or not in originally submitting the case to the jury, and whether if he had then done so he would have been authorized in subsequently declining to accept the verdict of the jury rendered in positive violation of such instruction as to the law of the case, are questions we need not and do not decide, since the fact is that the court did not give such instructions in originally submitting the case to the jury, but did so only after they had returned a verdict of guilty of involuntary manslaughter, which was not, therefore, in violation of any positive instruction as to the law that had been given them by the court, and which was an acquittal of all higher degrees of the homicide charged. Can the

court, not having previously instructed the jury that under the law as applicable to the facts of the case they would not be authorized in returning such a verdict, decline to receive it and send the jury back for further deliberation on the higher degrees of the homicide, when the verdict had acquitted the defendant of those degrees, and when it was not in violation of any positive instruction of the court? We think not. It is our opinion that the court had no more right to decline to receive the verdict than it would have had the right to decline to receive a verdict of not guilty, because the verdict, as seen, was a verdict of not guilty as to manslaughter in the first degree and of murder in both the first and second degree. *Burton v. State*, 115 Ala. 1, 22 South. 585.

The receiving of a verdict by the court is a ministerial, and not a judicial, act. *U. S. v. Ball*, 163 Ala. 662, 16 Sup. Ct. 1192, 41 L. Ed. 300. Consequently, the refusal of the court to receive the verdict, when it should have done so, cannot deprive that verdict of its effect as an acquittal of all higher degrees of the homicide of which it found defendant guilty in the lowest degree. *State v. Norvell*, 2 Yerg. (Tenn.) 24, 24 Am. Dec. 458; *People v. Hunckeler*, 48 Cal. 331; *People v. Ny Sam Chung*, 94 Cal. 304, 29 Pac. 642, 28 Am. St. Rep. 129; *U. S. v. Ball*, supra. The action of the court in declining to receive it and in sending the jury back for further deliberations amounted, in practical operation and effect, to setting aside a verdict of not guilty of murder and of manslaughter in the first degree and of awarding the state a new trial on these issues. This cannot be done without violating section 9 of the Constitution of 1901.

The judgment of conviction of manslaughter in the first degree is reversed on the authorities supra, and the case will be remanded for a new trial (*Waller v. State*, 40 Ala. 325), when if defendant pleads the first verdict as an acquittal of all higher degrees of the homicide than manslaughter in the second degree, he cannot, on the new trial, be convicted of any higher degree. *Rigell v. State*, 8 Ala. App. 46, 62 South. 977; *Con. 1901*, § 9.

Reversed and remanded.

(12 Ala. App. 375)

MOBILE & O. R. CO. v. SPENNY. (No. 138.)

(Court of Appeals of Alabama. Dec. 15, 1914.
Rehearing Denied Jan. 12, 1915.)

1. CONSTITUTIONAL LAW §218—RAILROADS
§226—PUBLIC CONVEYANCES—SEPARATE
TRAVELING ACCOMMODATIONS.

Code 1907, § 5487, providing that all railroads carrying passengers in the state, shall provide equal but separate accommodations for white and colored races by providing separate cars or by partitions securing separate accommodations; section 5488, authorizing and requiring the conductor of each passenger train to assign each passenger to the car or the division of the

car designated for his race, and providing that if any passenger refuses to take the place assigned the conductor may refuse to carry him, and that for such refusal neither the conductor nor the carrier shall be liable in damages, and excepting passengers entering the state under transportation contracts made in another state; and section 7684, providing that any person who, in violation of the provisions for equal and separate accommodations for the white and negro races, rides or attempts to ride in a coach or partition designated for the other race must, on conviction, be fined not more than \$100—are a valid exercise of the police power to preserve peace and order and to prevent race contacts and collisions, and do not deny the equal protection of the laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 715; Dec. Dig. §218; Railroads, Cent. Dig. § 740; Dec. Dig. §226.]

2. CARRIERS §350—PASSENGERS—SEGREGATION OF RACES—WHITE OFFICERS WITH NEGRO PRISONER—DAMAGES FOR EJECTION.

Under such provisions there is no exception in favor of prisoners, and a white sheriff with a negro prisoner, and responsible for his safe-keeping, and, under Code 1907, § 6858 et seq., criminally liable for permitting him to escape, although having two regular tickets, was not entitled to have the prisoner ride with him in the compartment for white passengers, and, on his refusal to go with his prisoner into the compartment for negro passengers or to send the prisoner there and remain in the compartment for white passengers if he chose, the conductor was authorized and required to eject him, and, where that was done without violence or indignity, the carrier was not liable to the sheriff in damages.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1409; Dec. Dig. §350.]

3. CONSTITUTIONAL LAW §64—LEGISLATIVE POWERS—DELEGATION OF POWER TO SUSPEND LAWS.

Such provisions, if construed as conferring on conductors the discretion to assign passengers to their accommodations, would amount to authority outside the Legislature to suspend the laws, in violation of Const. 1901, § 21, declaring that no power of suspending law shall be exercised except by the Legislature.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 91, 92; Dec. Dig. §64.]

Thomas, J., dissenting in part.

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Action by V. A. Spenny against the Mobile & Ohio Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Steiner, Crum & Well, of Montgomery, for appellant. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

THOMAS, J. The action is by the appellee, Spenny, against appellant railroad company for damages for ejecting him from one of the latter's passenger trains. The facts of the case are practically without dispute and may, so far as material to the consideration here, be briefly stated as follows: The appellee is a white man, and was, at the time of such ejection, sheriff of Autauga county, Ala., and had then in his custody a negro prisoner, with whom he had boarded said

train at Montgomery, Ala., for transportation to Prattville, Ala., having then in his possession, for which he had paid full fare, two regular tickets for the journey over appellant's line of railway, one for himself and one for the prisoner. Upon boarding the train he went with his prisoner into the smoking compartment thereof that was set aside as such for white passengers; and where he and the negro prisoner were each seated when the conductor of the train came through and, upon informing appellee that, under his (the conductor's) understanding of the requirements of the law and of the rules of the company, he (the appellee) was not permitted to keep the negro prisoner in such smoking compartment provided for white people, directed that appellee carry the prisoner into the adjoining compartment provided for passengers of the negro race, and left it optional with the appellee whether he would remain in there with the prisoner or return and be seated in the compartment for white people. Appellee refused to comply with the order, but asserted a right to keep the negro prisoner in the white smoking compartment with him (appellee); whereupon, for disobedience to the order of the conductor, the appellee with his prisoner was ejected from the train at Montgomery, no violence having been used, nor indignity offered, nor abuse indulged in, in doing so.

Whether or not, therefore, the appellee has a case depends, of course, upon the question as to whether the ejection was rightful or wrongful. There can be no question as to the authority of a conductor to eject any passenger for disobedience to any lawful order, direction, or requirement made and rendered necessary in the proper and lawful management and conduct of the train of which the conductor has charge. 5 Am. & Eng. Ency. Law, 594 et seq.; Code, § 5492. Was the order or requirement made by the conductor on the appellee in this case a lawful one? The answer to this question depends upon what construction should be and is given to sections 5487, 5488, and 7684 of the Code, which read as follows:

"(5487) All railroads carrying passengers in this state, other than street railroads, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger cars for each passenger train, or by dividing the passenger cars by partitions, so as to secure separate accommodations."

"(5488) The conductor of each passenger train is authorized and required to assign each passenger to the car or the division of the car when it is divided by a partition, designated for the race to which such passenger belongs; and if any passenger refuses to occupy the car, or the division of the car, to which he is assigned by the conductor, such conductor may refuse to carry such passenger on the train, and for such refusal neither the conductor nor the railroad company shall be liable in damages. But this section shall not apply to cases of white or colored passengers entering this state upon railroads under contracts for their transportation made in another state where like laws do not prevail."

"(7684) Any person who, contrary to the provision of the statute providing for equal and separate accommodations for the white and negro races on railroad passenger trains, rides, or attempts to ride, in a coach, or division of a coach, designated for the race to which he does not belong, must, on conviction, be fined not more than one hundred dollars."

The validity of these statutes as constitutional enactments in the exercise by the Legislature of the police power of the state is not at all, and could not successfully be, questioned. Like ones in other states have run the gauntlet of the Supreme Court of the United States, and their constitutionality there tested by the federal Constitution and upheld. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256. See, also, *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948, 18 L. R. A. 639; *So. Ry. Co. v. Thurman*, 121 Ky. 716, 90 S. W. 240, 2 L. R. A. (N. S.) 1108; *Bowie v. Birmingham Ry. Co.*, 125 Ala. 397, 27 South. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247; *Childs v. Chesapeake & Ohio R. Co.*, 125 Ky. 299, 101 S. W. 386, 11 L. R. A. (N. S.) 268, affirmed by U. S. Sup. Ct. in 218 U. S. 71, 30 Sup. Ct. 667, 54 L. Ed. 936.

The reasoning upon which all these cases proceed and are founded is perhaps most tersely expressed in the case of *Westchester, etc., R. Co. v. Mills*, 55 Pa. 209, 93 Am. Dec. 744, decided by the Supreme Court of Pennsylvania as far back as the year 1867, cited by the Supreme Court of the United States in *Plessy v. Ferguson*, supra, and by the Supreme Court of Alabama in *Bowie v. Birmingham Ry. Co.*, supra, and where, in upholding the reasonableness of rules adopted by a carrier that were of purport similar to the statute here, it was said:

"The right of the carrier to separate his passengers is founded upon two grounds—his right of private property * * * and the public interest. The private means he uses belongs wholly to himself, and imply the right of control for the protection of his own interest, as well as for the performance of his public duty. He may use his property, therefore, in a reasonable manner. It is not an unreasonable regulation to seat passengers so as to preserve order and decorum, and to prevent contacts and collisions arising from natural or well-known customary repugnances, which are likely to breed disturbances from promiscuous sitting. * * * It is much easier to prevent difficulties among passengers by regulations for their proper separation than it is to quell them. The danger to the peace engendered by the feeling of aversion between individuals of the different races cannot be denied. It is the fact with which the company must deal. If a negro takes his seat beside a white man, his wife, or his daughter, the law cannot repress the anger, or conquer the aversion which some will feel. However unwise it may be to indulge the feeling, human infirmity is not always proof against it. It is much wiser to avert the consequences of this repulsion of race by separation, than to punish afterwards the breach of the peace it may have caused."

These considerations—a desire to promote the public peace by preventing and removing conditions which would likely, if not assuredly, endanger it, if persons of the white and negro races were permitted to be brought

into such intimate contact, relationship, and association as they would be when occupying as fellow passengers with equal rights the same passenger car or compartment on a railroad train—led to the enactment of the statute here under consideration, providing, as seen, for “equal but separate accommodations” for each and prohibiting, under penalty, the member of either race from riding in the car or compartment designated and set aside by the carrier for members of the other race, and authorizing the conductor to eject any passenger not complying with the requirements of the statute when directed to do so.

What, then, are we to do with the case here, where a sheriff of one race (the white race) boards a train with a prisoner in his custody of a different race (the negro race)? Must the officer, who is responsible under the law for the custody and safe-keeping of his prisoner and criminally liable if he permits him to escape (Code, § 6858 et seq.), abandon him, after he boards a train with him for the purpose of removing or transferring him in pursuance of the law’s requirements from one point to another, by leaving him in one coach and keeping himself in another coach, or compartment, during the journey; or must he, in order to avoid such absurdity, and whenever necessity arises for such removal or transfer, adopt other modes or means of conveyance than that of railroads; or can we so construe the statute cited as to permit a white officer with a colored prisoner (or, what is the same proposition, a colored officer with a white prisoner—should that condition ever again happen) to ride in the same coach; if so, which coach shall it be, the white coach or the negro coach; and which coach shall they occupy when the officer is of one or the other race and has two prisoners, one white and the other a negro?

The field of investigation and research for authorities in aid of an answer to these pertinent questions seems to have been exhausted by the learned and zealous counsel representing opposing views, and we are cited to but two cases—these in the briefs of appellant’s counsel—which appear to have any direct bearing on the proposition.

The first of these, however (*L. & N. R. R. Co. v. Catron*, 102 Ky. 323, 43 S. W. 443), while analogous to the case here as to the facts which evoked or occasioned the decision there, is yet so different, by reason of a provision found in the statute there under consideration, and not found in ours, as to the legal propositions involved, that we do not regard that case as really furnishing any authority for the contention of the appellant here that the action of its conductor was authorized and justified by our statute. The mentioned case was decided by the Supreme Court of Kentucky, in which state a statute exists practically identical with ours, except that at its end is found the following clause,

which does not, as seen, appear in ours, to wit:

“The provisions of this act shall not apply to employes of railroads or persons employed as nurses, or officers in charge of prisoners.”

In that case a deputy sheriff got on a train with a negro prisoner and was told by the conductor that the negro would have to be taken into the negro coach, but that he, the officer, himself could occupy the white or the negro coach, either, as he might choose. The officer insisted that he had the right to keep the prisoner in the white coach with him; but finally submitted, under protest, to the order of the conductor, carried the prisoner into the negro coach, where he remained with him during the journey, and afterwards sued the railroad company for damages for humiliation. The Kentucky court, in denial of his right of action, had this to say with respect to the statute and the quoted exception to it:

“The precise question to be here determined is the effect of the clause in section 801 reading, ‘The provisions of this act shall not apply to * * * officers in charge of prisoners.’ The evident intention of the Legislature in the enactment of this law was to separate the two races in their travel on the railroads throughout the state, as is likewise the policy in the schools, and at the same time providing that colored passengers should have equal rights. But it was recognized that to make this separation of the races absolute, and in all cases, would be impracticable as to the railroad employes. If the white man must keep out of the colored coach, and the colored man keep out of the white coach, in all cases, there would have to be two sets of trainmen on one train. So the exception was made in behalf of the employes. They may, of course, go in either coach. Again, recognizing the necessity in a great many cases that persons traveling should be accompanied by a nurse, this nurse was included in the excepting clause. The law not applying to the nurse, she may go with her charge. This was, of course, done in order that the child or invalid might have the services of the nurse on the journey. This nurse can occupy the car assigned to her race, or to the one of the child or invalid. But there is a third class of persons who are also excepted from the provisions of the act, viz., ‘officers in charge of prisoners.’ The exception is not to the prisoner, but to the officer; and being connected in the same sentence with the exception in favor of the employes and of nurses, we conclude that the same rule applies to the officer in charge of a prisoner. * * * He may occupy the car assigned to his race, or he may occupy the car of the race of the prisoner, but the prisoner must in all cases occupy the car assigned to his race. The exception is not made to the prisoner or for his benefit, but to the officer, that he may accompany the prisoner and detain him. * * * We are of opinion that under the law the conductor was compelled to assign the negro lunatic to the car set apart for colored persons, and if appellee refused to separate from his prisoner he had a right to ride in that car, or he had the right to ride in the other car (the car for white persons), as the conductor informed him he could do.”

The conclusion was that upon the undisputed evidence the officer there had no case, but, as before said, and what is clear from the excerpt given, the opinion is rested solely upon the language of the excepting clause to

the statute and sheds no light that we can see on the problem here confronting us as to the proper construction of a statute that makes no exceptions.

The other case referred to as cited by appellant is that of *Gulf, C., etc., Ry. Co. v. Sharman* (Tex. Civ. App.) 158 S. W. 1045, recently decided by the Court of Appeals of Texas, and which is, it must be conceded, practically on all fours with the case here, both as to the character of the facts and of the statute involved. In that case, the sheriff of Liberty county, Tex., a white man, boarded the train with a negro prisoner for transportation from one point in the state of Texas to another, taking a seat with his prisoner in the smoking compartment provided for white people, and was forced, under protest, to carry him into the negro coach, where he was forced to remain with him out of fear that if he left the prisoner the latter might escape. In reviewing on appeal a judgment rendered in his favor against the carrier, the said Court of Appeals disposed of the question here involved in the following language:

"The laws of this state [citing the statutes] require railway companies to furnish separate coaches for white and negro passengers, and prohibits either race from riding in the car provided for the other race, and provides that conductors 'shall have the authority to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this law; and the conductor in charge of the train * * * shall have authority, and it shall be his duty, to remove from a coach * * * any passenger not entitled to ride therein under the provisions of this chapter, and upon his refusal to do so knowingly shall be punished as provided in the Penal Code of this state.' It is the contention of appellant that, under the provisions of this law, the conductor was required to remove said negro from the coach provided for whites. Such is the imperative command of the statute; but there is another statute which requires peace officers to safely keep and guard their prisoners. These statutes must be taken together. Like the oft quoted instance of the surgeon who bled the man that fell down in the street with a fit, and was prosecuted for violating the law against drawing blood in the street, we think 'the rule of reason' should apply to this statute, and that the circumstances of a sheriff having a prisoner in charge creates an exception to the law. If a conductor should strictly enforce this law, he could neither allow the prisoner to ride with the sheriff in the coach for whites, nor allow the sheriff to ride with the prisoner in the coach for blacks; the sheriff being a white man and the prisoner a negro. Nevertheless the law does intend that the races be separated where practicable; and in this instance, we think the conductor had the discretion to determine whether the negro should ride with the officer in the coach for whites, or the officer with his prisoner in the coach for negroes, and that in determining that the latter course should be pursued he was in the exercise of his legal discretion, which, under the facts of this case, was not abused. While the statute, in terms, equally protects whites from the presence of negroes, and negroes from the presence of whites in their respective coaches, yet it is well known that the leading purpose of this statute was to protect the white race from the presence of negroes while traveling on trains."

Black's Law of Judicial Precedents, p. 400, has, as appropriate here, this to say:

"On questions of general jurisprudence and the constructions of domestic statutes, decisions made under a legal system prevailing in another state may be cited as persuasive authority, respected for their reasoning and judgment and followed, if approved, but are not binding as precedents."

We have great respect for the learning and ability of the Texas court, but we cannot follow them in the case cited, for the reason that two of the propositions upon which the conclusion there reached is based, if adopted by us, would bring the act here in conflict with both the state and the national Constitution, if it did not also do so there. In the first place, if we construed the statute here, as they did there, as impliedly conferring on the conductor of the train a discretion and right, when a white officer boarded a train with a negro prisoner, to assign them jointly to either coach he chooses (either to the one provided for whites or to the one provided for colored passengers), it would amount to holding that the act conferred upon the conductor the power of suspending the law in certain cases and would render it repugnant to section 21 of the state Constitution of 1901, which declares: "That no power of suspending laws shall be exercised except by the Legislature." *Mitchell, etc., v. Florence Dispensary, etc.*, 134 Ala. 392, 32 South. 687; *Harlan v. Clarke*, 136 Ala. 150, 33 South. 858.

We are to avoid such a construction as will make the act unconstitutional, and adopt such only as will harmonize it with the Constitution, unless the language of the act, in plain and unambiguous terms, is such as to forbid, which certainly is not the case here. 26 Am. & Eng. Ency. Law, 640; *Zeller v. S. & N., etc.*, R. R. Co., 58 Ala. 594; *S. & N. R. R. Co. v. Morris*, 65 Ala. 193; *Edwards v. Williamson*, 70 Ala. 145; *Quartlebaum v. State*, 79 Ala. 1.

In the next place, if, as was done by the Texas court, we hold that the "leading purpose of this statute was to protect the white race from the presence of negroes while riding on trains," it will result in the condemnation of the statute in toto as being in the teeth of the Fourteenth amendment to the federal Constitution, designed, as it was, to prevent discriminations between races in state laws and guaranteeing to each and all "equal protection of the laws."

The only basis upon which statutes like the one here have been sustained by the United States Supreme Court as not being in conflict with the said Fourteenth amendment to the United States Constitution—as will appear from reading the cases hereinbefore cited in that connection—is that such statutes afford equal accommodations for and like protection to each race and were designed as police regulations to prevent breaches of the peace. Whatever private or secret reasons may have actuated the Legis-

lature in the passage of the statute, if any, are not to be considered in construing the statute. We are not permitted to ascribe to them, as did the Texas court, unconstitutional purposes not disclosed in the act; but, the act being consistent in its terms with constitutional purposes, we shall presume that these and these only led to its passage, which was a desire, as we have before said, to promote the public peace by preventing clashes and conflicts between the two races, which would result if it was permitted that they be brought together as fellow travelers in the same railroad car or compartment, and with equal rights therein as such, both as to the matter of sitting and as to all other privileges of passengers.

Can these purposes be subserved without violating the act, if a white sheriff with a negro prisoner is permitted to ride on the train and occupy with him the same car or compartment? If not, then it must follow that the Legislature intended by the act either to deny to officers of the one race in charge of prisoners of the other race this mode of travel, or to relieve them of the responsibility for the custody and safe-keeping of the prisoner whenever such mode was adopted by the officer in the expeditious removal and transfer of such prisoner, legal occasion and necessity for which often arise; for certainly the impossible could not be required of the officer—that is, that he successfully detain his prisoner in the car for colored people and stay himself in the car for white people. *Wynn v. McCraney*, 156 Ala. 630, 46 South. 854. We do not think that it can be rationally claimed that the Legislature intended either to deny to the officer such mode of travel or to relieve him, when it was adopted, of responsibility for his prisoner.

In what car, or compartment, then, are they to ride together? In the one provided for colored passengers or in the one provided for whites? The answer to the question depends, we think, on the race to which the officer belongs, and not on the race to which the prisoner belongs; for the reason that the identity and volition of the prisoner is, in legal contemplation, lost and merged into that of the officer who controls his conduct and locomotion. He is, in a sense, no more than bag or baggage, animate, it is true, but he goes only when the officer says "go" and comes only when the officer says "come," and sits where the officer says he must sit. If he is a negro and is carried by a white officer in charge to sit in the coach or compartment set aside for whites, or if he is a white man and is carried by a negro officer to sit in the coach or compartment provided for colored people, then no one could contend that he could be prosecuted and fined for a violation of section 7684 of the Criminal Code hereinbefore quoted, prohibiting, under penalty, persons of one race from riding or attempting to ride in coaches or compart-

ments designated for the other race, because the action of the prisoner in doing so was not voluntary, but done under duress; whereas, if the officer in charge, being of the one race, carries his prisoner, being of the other race, into and remains with the prisoner in the car or compartment designated for the prisoner's race, the officer voluntarily, and not under compulsion, as did the prisoner in the other case, violates the mentioned penal statute and is subject to punishment therefor. Consequently, it is the officer's duty to take his prisoner, whatever be the latter's race, into the car or compartment provided for members of the officer's race. This conclusion violates neither the letter nor the spirit of the statute, since the statute was designed to operate upon persons who are free to act, and not upon prisoners, who are regarded as mere automatons, moving only in response to another's controlling will. Nor will such operation of the statute destroy, or lessen the effectuation of, its purpose to prevent personal clashes and conflicts between members of different races; and this for the reason that the prisoner is in charge of an officer of the race predominating in the car, sworn to conserve the peace, whose duty it would be, as well as his natural desire, to so direct the sitting and locomotion of the prisoner in the car and otherwise control his actions as to obviate every cause or occasion for friction between him and some member of the other race. Besides, it is our observation and opinion that race antipathy rarely, if ever, results in conflict or difficulty between members of opposing races except where each is free to act. A prisoner of one race in the car or compartment of the other race, forced there by the officer, would not likely by his presence, under such circumstances, arouse in members of the other race any personal animosity towards himself or a desire in them to attack him in his defenseless condition.

Appellee here, as before said, had the prisoner in the smoking car for whites, and appellant contends that, if we construe the law so as to permit this, then it must follow that appellee could carry and keep the prisoner with him in any other car provided for whites, even the white ladies' car. So far as any provision to the contrary in the statute here is concerned, this is true. If it is to be prevented, then it must be done either by future legislation or by rules which the company itself may adopt. Such rules, so long, as they do not require a separation on the train of the officer and his prisoner, and so long as they permit the officer to ride with the prisoner in a coach or compartment provided for members of the race to which the officer belongs, would not, we think, conflict with the statutes and would be reasonable, although such rules did forbid the officer to carry and keep such prisoner in the ladies' coach. *Bass v. Chicago & N. W.*, 36 Wis. 450, 17 Am. Rep. 495; 5 Am. & Eng. Ency.

Law, §600. Ordinarily, however, even without such rule, a white officer would not inflict the presence of a prisoner in the coach provided for ladies.

The fact that in this case it also appears that the conductor, upon requiring plaintiff officer to remove the prisoner into the negro compartment, offered to leave and keep open the door dividing such negro compartment from the smoking compartment for whites, in which, as said, the officer was at that time, does not alter the case. While such an arrangement might, as urged, have, in this particular instance, kept the prisoner within the view of the officer and so near to him as to have afforded him opportunity to prevent the prisoner's escape, if the latter had attempted such, yet, such an arrangement is entirely impracticable as a rule, and, besides, would, it seems to us, result in a violation itself of said law requiring the separation of the races into separate compartments, since by keeping open the door dividing such compartments the partition between them would be practically removed, and thereby the two races would be brought in closer contact than the statute intended. At any rate, if the plaintiff officer had the right, as we think he did for reasons pointed out, to detain the prisoner in the white coach with him, then the conductor had no right to require him to remove such prisoner into the negro coach, although such conductor did offer to keep open the dividing door. If, as appellant contends, a white officer, in order to be and remain with his negro prisoner during the journey on a train, must sit in the negro coach or compartment, then it follows that a negro officer in charge of a white prisoner must, when riding on a train with his white prisoner, be permitted to sit with him in the coach provided for whites, although the officer is a free agent and the prisoner is not. He, the negro officer, being free and in a coach or compartment set aside for the white race, would, by his very presence, more likely engender race animosity in the white occupants, resulting in a disturbance of the peace, than would the white prisoner in the negro coach or compartment, who is there restrained, to the knowledge of the black occupants, against his will. And, if appellant's construction of the statute is to obtain, and the officer must, if he would not be separated from his prisoner, stay with him in the coach provided for the race of the prisoner, what are we to do with a case where the officer is white and has two prisoners, the one black and the other white, or where the officer is black and has two prisoners, the one white and the other black? The officer certainly cannot sit and be and remain in both coaches. Should not he, as we hold, be permitted to detain them all in the coach or compartment provided for the officer's race? Or must he, as has been suggested, if he is a white officer, appoint a negro deputy to take charge of and sit with

and guard the negro prisoner on the train, and vice versa? Did the Legislature contemplate this? If so, then to the corps of state transfer agents, who were at the time of the passage of the statute and are now appointed and hold office for the purpose of going to the several counties of the state and receiving there and removing to the penitentiary prisoners who have been convicted of crime in the courts of those counties, must be added a force of negro state transfer agents, and the appropriations for the expense of such transfer and removal of prisoners must be largely increased; for under this construction of the law it would take two transfer agents to remove two prisoners, where one is white and the other black, whereas before the statute one transfer man could remove not only two, but a dozen, although of divergent races.

Under the political conditions known to have existed at the time the statute was passed, and which it was, no doubt, then contemplated would continue to exist, and which do now exist, it is hardly to be supposed that the Legislature contemplated or intended, when passing the statute, that it was to operate so as to occasion the necessity for the appointment of negro deputies, and to entail additional burdens on the state treasury and on the several sheriffs of the state in paying the salaries and traveling expenses of the additional deputies which before was unnecessary. Nor do we think, as before said, that it can rationally be contended that the Legislature intended that the only way to avoid such appointments and such additional expense would be for the officers to adopt other means than railroad trains for transporting prisoners. The statute was passed in the year 1887, long before automobiles came into use, even before they were heard of as a practical means of conveyance, and at a time when railroad trains were the only agencies employed for quick transportation. Emergencies then, as they do now, frequently arose requiring the quick and fast removal of a prisoner to prevent him from being lynched, or to carry him to answer the summons of a court elsewhere in the state and at a long distance from the place where the prisoner might be detained. Is it to be supposed, then, that the Legislature intended to deny to sheriffs and state transfer agents this means of conveyances for prisoners, and to relegate them to the necessity of using horse teams or ox carts? If so, it would take weeks to do what otherwise could have been done in a day, and would unnecessarily hamper officers in the discharge of their duties, and delay the administration of justice and the enforcement of law.

Another suggestion is that, since the statute makes no express exceptions to, or express exemptions from, the rule it lays down to the effect that the persons of one race must not ride in coaches or compartments

provided for the other, it must be so enforced until amended by the Legislature. This suggestion, when analyzed, is but another way of stating that by the statute, containing as it does, no express exceptions or exemptions from its provisions, the Legislature intended (the very things we have endeavored to explode) that officers of the white race having in charge a prisoner of the negro race must, until the law is amended by the Legislature, either abandon railroad travel in removing the prisoner, or must appoint and employ a negro deputy to take charge of the prisoner when on the train, or must, if he does not do so, leave the prisoner on the coach to himself and take chances of his escaping or being rescued. The Legislature, we are bound to say, intended that some construction of the law be given as to its operation with respect to officers of one race having in charge on trains prisoners of another; for certainly it is more reasonable to suppose that in passing the law the Legislature had in mind this condition, which is now and was then so common and of such frequent occurrence, than to suppose that they did not. If they did, then what did they intend as to this matter? It seems to us that the only logical and rational answer is that which we have given, to the effect that the law was not at all intended to operate on a prisoner, who has no free agency, and cannot make any choice as to what car he shall sit in. There was no need or occasion to except or exempt him by any express terms from the operation of the law, since basic principles of the law in general, and outside of this statute, exempt him, in that they forbid any imputation of crime to a person who acts under compulsion. Nor does the officer who compels the prisoner to sit in the car provided for persons of the officer's race offend in doing so, either expressly or impliedly, the provisions of the statute or of any other law, since it cannot be said that he is aiding and abetting the prisoner to violate the law, because, as seen, the prisoner is not violating the law as it does not operate on him. An aider or abettor in crime cannot in law or in the nature of things exist without a principal in crime; the one presupposes the other.

The statute here merely provides that it shall be unlawful for a person of one race, himself, to "ride, or attempt to ride, in a coach, or division of a coach, designated for the race to which he does not belong"; hence, it creates a crime of such a nature that it cannot be committed without the free agency of the person who actually does the riding or makes the attempt thereto. If so, then it is a logical absurdity to say that such person can be aided and abetted in committing or attempting to commit a crime which he neither committed nor attempted. If the statute had not only prohibited, as it did, any person from "riding or attempting to ride," etc., but had also prohibited any person from

forcing another so to ride, etc., then the case would be different.

We feel clear that the statute does not apply, and was not intended to apply, to prisoners, who are impliedly excepted from its operation.

As to employes who are engaged in the management of the train, it seems to us likewise clear that the statute does not and was not intended to apply. Certainly, it cannot be reasonably supposed that the Legislature intended by the law to require railroad companies to have two sets of train employes—white conductors and white porters for the coaches for white passengers, and negro conductors and negro porters for the coaches for negro passengers. Yet, in this case, as in the case of prisoners, no exception is written in the law. Why? The only sensible answer, we think, is because the Legislature contemplated and intended that the law should apply only to passengers and not to train employes engaged in the management of the train, who, it was expected, were still left free to ride in any coach where their duties might call them.

As to nurses, while it would violate the terms, it would not violate the spirit, of the statute, for them to ride in the coach or compartment designated for the race to which the child or patient they may have in charge belongs; for the statute, as before pointed out, was grounded solely in a purpose to prevent race conflicts, which conflicts, it was no doubt contemplated, would not likely arise or be occasioned by the conditions named.

However, these matters are not before us and it will be time enough to deal with these questions when they arise. We have adverted to them merely for the purpose of demonstrating the integrity of our position that the statute was not intended to apply to prisoners.

The foregoing, however, expresses only the views of the writer, which, if they had been concurred in by this court, would have resulted in an affirmance of the judgment appealed from, which was in favor of the plaintiff. The majority of the court differ with the writer and are of opinion, for reasons which each of the judges has respectively stated in opinions hereto appended, that the judgment should be reversed. It is consequently reversed, and the cause remanded.

Reversed and remanded.

PELHAM, P. J. I am unable to agree with the reasoning adopted, or concur in the conclusion reached, by my Brother THOMAS in writing to an affirmance in this case, and think the record presents matters showing error requiring a reversal of the judgment of the lower court.

The result of the opinion, and in fact the direct holding, is that, in so far as the provisions of the statutes requiring a separation of the races of passengers of a common car-

rier are concerned (Code, §§ 5487, 5488, 7684), it is left within the discretion or caprice of a white officer in charge of a negro prisoner charged with murder, to carry such negro prisoner into a separate coach provided for the accommodation of white ladies only. If so, then any petty white officer having in charge a most desperate and repulsive negro criminal or lunatic would have the right, following only his own whim or caprice, and notwithstanding these segregation laws enacted by our law-making body, to intrude any negro prisoner in his custody into a separate coach or compartment of a train provided for the accommodation of white ladies. And if this be the proper construction of these statutes for the separation of the races, there is no limit to the number, and several deputies in charge of a score or more of negro prisoners (as we know not infrequently happens in transferring prisoners) would have the right to crowd their charges into the white ladies' coach, where, perhaps, there might be, and it is not unlikely to believe there would be, delicate, nervous white women seeking the comforts and seclusion of travel in a coach provided by the carrier either for their exclusive use as passengers or for the use of white persons only.

I cannot concur in a process of reasoning reaching a conclusion that operates to construe, or to ingraft an exception on, these statutes, so as to give to every petty white officer the lawful right and authority, upon his own volition, so to intrude his negro charge into a coach or compartment of a train set apart for white passengers. It is not at all impossible to suppose, if this right to force negro prisoners into coaches designated for the travel of white people is given to every petty white officer in charge of a negro prisoner or prisoners within the state, by ingrafting an exception by construction as to them on these segregation laws, that sometimes it would be taken advantage of and resorted to by inferior deputy officers to exhibit or vaunt their superior authority and parade their importance, with the result that the very evil the statutes were enacted to remove or prevent would almost certainly follow as a consequence of judicially ingrafting upon them this exception. The construction given to these laws by my Associate, it seems to me, would be to authorize, and to clothe a certain class with the lawful right to do, that which would result in producing one of the mischiefs intended by the Legislature in the enactment of the laws to prevent, and would be violative of the spirit and contravene the very policy of the statutes.

Even if it should be conceded that the law cannot be literally enforced, and necessitates the inclusion of an exception, ingrafted under the "rule of reason," due to the fact that a conflict or ambiguity is said to arise in the law with respect to its application to this case because of the duty imposed by law on an officer to safely guard his prisoner while

transferring him from one place to another, then the ruling in the Texas case (*Gulf, etc., Ry. Co. v. Sharman* [Tex. Civ. App.] 158 S. W. 1045) seems to dispose of the question very satisfactorily along those lines. While it is true that that case is not binding as a precedent on this court, the reasoning upon which it proceeds is in the main sound, and, if it is permissible at all to consider the question from the standpoint from which it is there considered, the conclusion is correct, as I view it. Perhaps the opinion goes too far in what is said of the discretion reposed in a conductor as a matter of law, but it is not necessary to adopt that holding under the facts in this case in passing on the rights of the parties and in arriving at the conclusion reached.

[1] It does not seem to me that enactments of the nature under consideration would be affected and held to be void as violating the provisions of the fourteenth amendment of the federal Constitution, guaranteeing to all persons equal protection of the laws, because we are aware of the history and cause for their enactment as a matter of common knowledge, and use this knowledge in applying them to concrete cases, and keep in view the object of the enactment—so long as no discrimination is made in the enforcement of the statutes, and equal protection of the law is accorded to all. It has been held to be a reasonable regulation for a carrier to have on its train a coach to be occupied exclusively by ladies. *Bass v. Chicago, etc., Ry.*, 36 Wis. 450, 17 Am. Rep. 495. And it was held to be proper in enforcing the regulation to regard and observe the object and purpose in making it in the application and enforcement of the law. It was not to keep ladies out of other cars, but to prevent men from obtruding on ladies. We know that as a matter of common knowledge, and keeping the purpose for its enactment in mind and giving it effect, in applying the law to a concrete case, does not vitiate the law as discriminatory and unconstitutional. We also know as a matter of common knowledge that the object and purpose, as well as the legislative intent, in passing the statutes for the segregation of the races in jails and schools and on the trains and other places, was not to prevent an undesirable and unwelcome intrusion of the white people upon the colored people; and, merely having regard to the purpose and object of the enactment, in applying the law to a case in hand should not make the statute unconstitutional as violative of the guaranty of equal protection under the laws. It is not a question of the law's making a preference or distinction, or its application in denial of equal protection under the laws, to construe an enactment in its application to a concrete case in the light of the known evil it was designed to remove or prevent. In construing these statutes and applying them, are we to be required to throw away common knowl-

edge and common sense and blind ourselves to the universal knowledge that they were enacted by a dominant white race with a view to the preservation of peace and good order and the promotion of that race's quiet enjoyment of these places without the association of the negro race, and to prevent the evil and disturbances that are likely to result as the consequence of an undesired intrusion by negroes upon white persons in those places where a commingling of the races is provided against? The Supreme Court of the United States, in passing upon similar statutes and upholding their constitutionality, have discussed and recognized, in effect, the consideration of these matters in applying the law. Mr. Justice Brown, in delivering the opinion of the court in passing on a similar statute in *Plessy v. Ferguson*, 163 U. S. 537, 551, 16 Sup. Ct. 1138, 1143, 41 L. Ed. 256, 260, said:

"If the two races are to meet on terms of social equality, it must be the result of natural affinities, * * * a voluntary consent of the individuals."

And further:

"Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences."

See, also, *West Chester, etc., R. R. Co. v. Mills*, 55 Pa. 209, 93 Am. Dec. 744, approvingly cited in the *Plessy Case* by Mr. Justice Brown. We are supposed to have, and do have, a knowledge common to us all as to these racial instincts and social equality of the races, and historically know that the enactment of these laws grew out of no purpose to meet an objection of the negro race against association with the white race, nor to prevent the white people from attending negro schools or riding in cars, or compartments of cars, set apart for negroes. With this knowledge, if it is permissible to graft an exception on the law so that it may be enforced and applied under the facts and circumstances presented by this case, it seems to me that the rule of the company enforced by the conductor requiring the officer to leave the negro prisoner in the coach or compartment for that race and remain there with him, if he saw proper, was a more reasonable rule within the spirit of the law, and could be more properly ingrafted as an exception to the statutes under "the rule of reason" than the holding which ingrafts an exception which permits the negro prisoner to be intruded by the officer into a coach or compartment exclusively for white persons. If common sense is, as it is said to be (*Wright's Case*, 69 Ind. 163, 35 Am. Rep. 212), an important, if not an indispensable, element in the successful administration of the law, then does not this question naturally suggest itself: If it should be a fact that the negro race claims no right as against the intrusion upon it of the white race, how can it then be said to be a denial of any right, equal or otherwise, of that

race for a white person to occupy a compartment on a car set apart for the occupancy of the negro race? I propound this only as a query, but I call attention to the late case (*January 19, 1914*) of *Patson v. Commonwealth of Pennsylvania*, 232 U. S. 138, 144, 34 Sup. Ct. 281, 282 (58 L. Ed. 539), in which the Supreme Court of the United States, in passing on the provisions of a state statute and the object of its passage as not being unconstitutional under the equal protection provisions of the fourteenth amendment, in an opinion by Mr. Justice Holmes, has said:

"But we start with the general consideration that a state may classify with reference to *the evil to be prevented*, and that if the class discriminated against is or reasonably might be considered to define those from whom *the evil mainly is to be feared*, it properly may be picked out. A lack of abstract symmetry does not matter. *The question is a practical one, dependent upon experience.* The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, *as a matter of fact*, it is found that *the danger is characteristic of the class named.*" (Italics supplied.)

The opinion further quotes approvingly:

"The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'" *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 160, 33 Sup. Ct. 68, 67 (57 L. Ed. 164); *Rosenthal v. New York*, 226 U. S. 260, 33 Sup. Ct. 27, 57 L. Ed. 212, Ann. Cas. 1914B, 71; *L'Hote v. New Orleans*, 177 U. S. 587, 20 Sup. Ct. 788, 44 L. Ed. 899.

[2] Referring to the facts in this case, we find that, with full knowledge of the law and surrounding circumstances, a white officer having in charge a negro prisoner boarded one of the appellant's regular passenger trains and insisted upon intruding his negro prisoner into a coach or compartment set apart for, and occupied exclusively by, white persons. The conductor informed the officer that it was against the law and the rules of the company for the negro prisoner to occupy a compartment set apart for the exclusive use of white passengers, and upon the officer's insisting upon having the prisoner in his charge occupy the white compartment as a passenger, and refusing to accept one or more proffers made by the conductor as to where the prisoner would be permitted to ride, but insisting upon his right to keep the negro in the white coach, he (the officer), together with the negro prisoner in his charge, was ejected from the train without violence or unnecessary force being used, or indignity offered. In this the conductor was complying with the letter of the law and the rules of the company, and, if so, can his action be made the basis of a suit for damages against the carrier by the officer for not permitting him, in violation of the letter of the law and rules of the company, to keep a negro prisoner in a coach or compartment of the train set apart exclusively for white people? It

does not seem to me that under any aspect of the case a cause of action against the carrier for recoverable damages is shown.

If it be conceded that an exception must be recognized in the case of a white officer in charge of a negro prisoner, because of the right of the officer to use the public carrier in the discharge of his public duty in removing the negro prisoner and safeguarding him while en route, then it seems to me that a due regard for the legislative intent and object to be obtained in passing these segregation statutes, that I have above discussed, would leave the door of construction, in applying the "rule of reason" to ingrafting an exception on the statutes and making an application to the case in hand, open to but one conclusion; and that is that the rule of the company, having reference to the separation of the races in conformity with the segregation statutes, requiring a white officer having in charge a negro prisoner either to leave the prisoner in the compartment set apart for his race or to remain, if he so desires for the safe-keeping of his prisoner, in that compartment, is more reasonable as referred to and authorized by a construction of the statutes than the opposed view which ingrafts an exception giving an officer the right to intrude a negro prisoner in a car or compartment set apart for the exclusive use of passengers of the white race. It follows that the enforcement of such a rule by the conductor would not afford the appellee legal cause for an action for damages against the appellant. And this would be true whether the statutes be literally enforced, or it be conceded that an exception can properly be ingrafted to meet the conditions presented and discussed.

It does not seem to me to be at all necessary in disposing of the issues presented on this appeal to imagine fanciful cases with respect to negro deputies in charge of white prisoners or white and negro prisoners, etc., and speculate upon the various questions and propositions that might possibly arise in the presentation of some improbable case. If complications of this nature arise in the application of the segregation statutes and rules made by common carriers in pursuance of them, in other and different cases arising out of different facts and conditions, it will be time enough to dispose of the propositions presented in such cases when they arise. In the meantime, the Legislature, it is not unreasonable to suppose, may amend the statutes and provide for exceptions (as is the case with respect to similar statutes in other states) and remove even the possibility of the supposed imagined cases. But I do not believe it can be rationally contended with any support of reason that a Legislature of this state will ever pass an amendment to these statutes providing as an exception to them that every arresting officer of the state and their horde of deputies and subordinates

shall have the right to intrude negro prisoners in their charge into cars or compartments set aside for white women passengers, and I cannot but think that a judicial construction or ingrafting of the present laws on that subject, which makes this a right conferred or not inhibited by them, is departing from the spirit of the law as given us by the law-making body and is going too far afield and to an unauthorized extent in judicial construction from the legislative meaning and intent, for I feel a moral conviction that the Legislature could not have intended such results.

BROWN, J. This is an action by the appellee against the appellant to recover damages for the breach of a contract under which, as plaintiff alleges, he was entitled to be carried as a passenger from Montgomery to Prattville on one of the defendant's trains, the defendant being engaged in the operation of a railroad as a common carrier of passengers. Some of the counts of the complaint aver that this breach consists in willfully or wantonly ejecting the plaintiff by the agents and servants of the defendant, while acting within the scope of their employment; while others set up as the breach that the ejection was unlawful or wrongful. Two of the counts of the complaint (the fourth and fifth), which set out the substantial facts as developed on the trial, aver in substance that the plaintiff was sheriff of Autauga county and was at Montgomery, Ala., having in his custody a prisoner of the negro race, whom it was his duty to carry to Prattville, in Autauga county; that, with a view of discharging this duty, he purchased from the defendant's agent at Montgomery two first-class tickets, for which he paid 35 cents each, which entitled plaintiff and his prisoner to be carried as passengers on defendant's train from Montgomery to Prattville; that plaintiff and said prisoner boarded the train as passengers, and plaintiff selected seats for himself and his charge in a car or compartment of the train set apart and maintained exclusively for persons of the white race; that the conductor in charge of the train directed the plaintiff to go with his prisoner into the coach or compartment provided for persons belonging to the negro race, when the plaintiff refused, and thereupon the conductor refused to permit plaintiff to continue his journey, and required him and his prisoner to leave the train at the Union Station in Montgomery, a long distance for plaintiff's destination. The defendant, by its pleadings and also its evidence, insists that it should not be held liable: (1) Because the plaintiff, who had in his custody a negro prisoner, carried his prisoner into a compartment of the train set apart for the exclusive use of white passengers, and refused to obey the order of the conductor assigning the negro to the compartment set apart for use of persons be-

longing to the negro race, and insisted on keeping his said prisoner in said compartment provided for white passengers, and for this the conductor, under the provisions of section 5488 of the Code of 1907, had the right to eject the plaintiff and his prisoner from the train; and, (2) that the defendant had a rule, which it had promulgated, of which the plaintiff had knowledge, prohibiting the carrying of negro prisoners in cars or compartments of the train set apart for the accommodation of white passengers, and that the plaintiff insisted on keeping his prisoner in the white compartment in violation of this rule, and, in the exercise of the authority conferred upon him as conductor of the train by the rule, he had the right to eject plaintiff and his prisoner from the train.

There is a slight conflict in the evidence on one point; the evidence on the part of the plaintiff tending to show that the conductor refused to allow the negro prisoner to ride in the compartment set apart for the accommodation of white passengers, and insisted that the plaintiff carry the prisoner into the compartment set apart for negro passengers and that he (plaintiff) go into and remain in said compartment with said prisoner, while that on the part of the defendant tended to show that the conductor denied the right of the negro prisoner to remain in the white compartment, but left it optional with the plaintiff to place his prisoner just inside the door of the compartment provided for passengers of the negro race, and himself remain in the compartment provided for white passengers (the evidence showing that the two compartments were separated by a very thin partition and that the plaintiff would be as close to his prisoner thus situated as they would have been had they both remained in the compartment for white passengers, the conductor proposing to allow the door between the two compartments to remain open so that plaintiff could watch the prisoner), or, if he preferred, it was left optional with the plaintiff to go into the negro compartment with his prisoner. The plaintiff insisted that he would ride where he was and retain his prisoner with him, or he would have to be put off of the train. The evidence is without conflict that the ejection of the plaintiff was effected without violence, no more force being used than was necessary to accomplish the purpose.

In the first three counts of the complaint, there is nothing to indicate that the plaintiff was an officer of the law and had any more right than an ordinary citizen who had purchased a first-class ticket and was a passenger on the train, and therefore, on the undisputed evidence in the case, the plaintiff was not entitled to recover under these counts, because the conductor of the train, in the exercise of lawful authority and in compliance with the strict letter of the statute,

had a right to expel him if he, in his ordinary relation as a citizen, and not as an officer of the law, undertook to impose upon the carrier and the passengers in its care the presence of a person of different race and color, in violation of the spirit, if not the letter, of the law. And in such a case, the conductor having complied with the statute and acted within its strict letter, it cannot be insisted with any degree of seriousness that the carrier should be held liable.

A more serious question is presented by the case stated in the fourth and fifth counts of the complaint, and it is conceded by the opinion of my Brother THOMAS, and by counsel on both sides, that, in order to justify recovery under those counts, an exception must be interpolated into or grafted upon the statute by judicial construction, so as to prevent its application to a negro prisoner in charge of an officer. Determining whether the court has this power, or should exercise this authority, is the delicate and vital question in this case. The manifest purpose of the statute, and the only theory upon which it can escape condemnation under the fourteenth amendment of the federal Constitution, is that it purposes to afford equal but separate accommodations on railway passenger trains to passengers belonging to the different races. *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; *C. & O. Co. v. Kentucky*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244; *Brannon on Fourteenth Amendment*, 87. And by express provision, in order to avoid a conflict with the power of Congress to regulate interstate commerce, the statute declares:

"This section shall not apply to cases of white or colored passengers entering this state upon railroads under contracts for their transportation made in another state where like laws to this do not prevail."

The question of construing this statute is a delicate one, because embodied in it is a sentiment that is sacred to the people of this state, their social institutions and customs, and to place a construction thereon that would operate to offend against the federal Constitution is a result the court must avoid. It is a settled rule that the federal Supreme Court in determining the constitutionality of a state statute will do so in the light of the established construction placed upon it by the courts of the state; and, although the letter of the statute may not offend, if it is accorded a construction by the highest court of the state that makes it offensive to the federal Constitution, it will be stricken down. *Louisville, New Orleans & Tex. Ry. Co. v. Miss.*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; *Chesapeake & Ohio Ry. Co. v. Ky.*, 179 U. S. 388, 21 Sup. Ct. 101, 45 L. Ed. 244; *Black on Interpretation of Laws* (Hornbook Series) § 144. In *Austin v. Tennessee*, the United States Supreme Court, speaking by Mr. Justice Brown on a kindred subject, approved the following utterances:

"Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Austin v. Tennessee*, 179 U. S. 350, 21 Sup. Ct. 132, 45 L. Ed. 224; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

In the light of these settled rules of construction and the history of this state and its political conditions, showing that its policies have been shaped, its laws enforced, and its offices committed entirely to the white race for the last half century, is there not, at least, an element of doubt in the wisdom of the construction placed upon this statute in the opinion of my Brother THOMAS? Can it be said that the construction which he places upon the statute allowing a white sheriff to carry a negro prisoner into a coach or compartment set apart and designed for use exclusively of passengers of the white race, is not an infringement upon the right of those white passengers and in violation of the federal Constitution, and that, if indorsed by the highest court of the state, it would endanger the safety of these statutes? And likewise, is there not at least an element of doubt as to the wisdom of the construction which he places upon this statute, which would allow a negro sheriff to take a white prisoner into a coach or compartment set apart and designed for the exclusive use of passengers of the negro race? Would not this be an infringement of the rights of negro passengers to separate and equal accommodation? Indeed, I am convinced that, if the construction which he places upon this statute should be adopted as the settled construction, the constitutional integrity of the statute would be destroyed.

There is no ambiguity in the language of the statute under consideration, and it is a settled rule of construction—

"that the meaning and intention of the Legislature must be sought first of all in the language of the statute itself. For it must be presumed that the means employed by the Legislature to express its will are adequate to the purpose and do express that will correctly. If the language of the statute is plain and free from ambiguity, and expresses a single, definite, and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended to convey. In other words, the statute must be interpreted literally. Even though the court should be convinced that some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the Legislature is the law, and the courts must not depart from it." *Black on Interpretation of Laws*, 35, 36; *Ex parte Pittsburg, etc., Co.*, (Sup.) 66 South. 489; *U. S. v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869; *Little v. Foster*, 130 Ala. 163, 30 South. 477; *Bozeman v. State*, 7 Ala. App. 151, 61 South. 604.

In the case last cited, this language is approved by this court:

"When the language as used by the lawmakers is plain, it is the duty of the courts to obey; no discretion is left, and the court should not stray into bypaths or search for reasons outside of the plain letter of the law upon which to rely for the purpose of giving a different meaning or interpretation, for 'when the language is plain, it should be considered to mean exactly what it says.'" *Bozeman v. State*, 7 Ala. App. 151, 61 South. 604.

In such a case, questions of expediency or the consequences that may result from such a construction cannot be considered by the courts.

"If there be any unwisdom in the law, it is for the Legislature to remedy; for the courts the only rule is, *ita lex scripta est*." *Black on Interpretation of Laws* (Hornbook Series) 38; *Horton v. Mobile School Commission*, 43 Ala. 598; *Ex parte Pittsburg Life Ins. Co.* (Sup.) 66 South. 489.

Construing section 5488 of the Code in the light of these settled rules of statutory interpretation, it can have but one meaning—that is, the conductor of a passenger train is authorized and required to assign each passenger to a car, or the division of a car when it is divided by a partition, designated for the race to which such passenger belongs, and if any passenger refuses to occupy the car, or the division of the car, to which he is assigned by the conductor, such conductor may refuse to carry such passenger on the train, and for such refusal neither the conductor nor the railroad company shall be liable in damages; and to read into this statute a proviso in substance, "provided, however, that this shall not apply to a sheriff who has in his custody a prisoner, or shall not apply to a prisoner who is in the custody of a sheriff," such as is contained in the Kentucky statute referred to in the opinion of my Brother THOMAS, would, in my opinion, be nothing short of "judicial legislation." The fact that inconvenience in the transportation of prisoners may be the consequence of such construction is no excuse for refusing to give effect to the expressed will of the Legislature, the co-ordinate branch of the government in which, under our system, the power to create law resides.

However, I anticipate no such inconvenience, as it is clear to me that the sheriff may obey this statute both in letter and in spirit, and at the same time enjoy all the conveniences of the modern means of transportation afforded by railways. And, although he may not be possessed of an aversion toward the members of a different race, or may be able to suppress it in himself, his duties as a citizen and an officer should prompt him to avoid endangering the peace by such feelings engendered in others, that might possibly result from thrusting his prisoner upon them in violation of the statute. I am convinced, therefore, that this court has no power to ingraft upon this statute any such exception; and if such exception can be ingrafted at all, it is a matter for the Legislature, and not for the courts.

But it is insisted that the sheriff is the chief executive officer of his county, upon whom there is imposed the duty of apprehending, transporting, and committing to jail, offenders of the law, and is not amenable to the statute. I cannot consent to this contention. The law is supreme, and the sheriff is as amenable to the laws of the land as the most humble citizen; and, of all men, he should avoid the least semblance of an infraction of the law, because he, as the chief executive officer of his county, should be a walking personification of the law itself.

[3] Statutes of this class, designed for the good of society, have been sustained as wholesome legislation, and a legitimate exercise of the police powers of the state for reasons which it is not here necessary to elaborate, but which are set forth in the opinion of the Supreme Court of the United States in the case of *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256, and there is no authority outside of the Legislature to suspend these laws. Any attempt to place such power elsewhere would offend section 21 of the Constitution, which provides: "That no power of suspending law shall be exercised except by the Legislature." Const. 1901, § 21; *Mitchell, etc., v. Florence Dispensary*, 134 Ala. 392, 32 South. 687; *Harlan, etc., v. State ex rel. Clark*, 136 Ala. 150, 33 South. 858.

I cannot assent to the conclusion that the ordinary railway employes, assisting in the operation of trains, are within the purview of the statute. Such persons are on the train, not as passengers, but as employes and servants of the railroad company to protect its property, operate its trains, and guard the safety and look after the comfort and convenience of the passengers committed to their care; the statute by its very terms has no application to such employes: "The conductor of each passenger train is authorized and required to assign each passenger to the car or the division of the car," etc. This language can be applied only to a person occupying the relation of passenger.

Neither can I concur in the conclusion that the negro prisoner was nothing but baggage. In the first place, this is right in the face of the plaintiff's contention, as set forth in the complaint, that the negro was a passenger, and entitled to be carried on the ticket which the plaintiff had procured for him; and, whether he was baggage or not, the fact remains that he was a negro and belonged to a different race from that of the passengers who had a right to occupy the compartment of the car where the plaintiff placed him, and that his presence in that compartment was an infringement upon the right of the white persons who were entitled to occupy it without his presence, and a violation of the spirit that relieves this statute from constitutional objection.

Neither do I agree that the carrier has any authority to make rules contrary to the statutory provisions which would allow persons belonging to one race to occupy a coach or compartment set apart and designed for the use of the other race and under which a sheriff or any one else, in violation of the letter and spirit of the statute, could intrude a prisoner belonging to the opposite race into such compartment. This, in effect, would be giving the carrier the right to suspend the operation of this statute, and such authority would be repugnant to the letter and spirit of section 21 of the Constitution. It may be that the carrier could adopt a rule, not in conflict, but in accord with the statute, requiring a sheriff to place a prisoner in the car or compartment set apart to passengers belonging to the prisoner's race (*West Chester R. R. Co. v. Mills*, 55 Pa. 209, 93 Am. Dec. 744; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256; *Bowie v. Birmingham Ry. & Electric Co.*, 125 Ala. 397, 27 South. 1016, 50 L. R. A. 632, 82 Am. St. Rep. 247); and if so, the violation of that rule by the officer would justify his ejection and would be a complete answer in a suit for such ejection, provided unnecessary force was not used in expelling the passenger violating the rule. Such was one of defendant's contentions.

These views lead to the conclusion that the trial court erred in denying to the defendant the defenses afforded by the statute and such rule, and the judgment should be reversed. For these reasons, I concur in the conclusion reached by Presiding Judge PELHAM, that the judgment of the circuit court should be reversed and the cause remanded.

(13 Ala. App. 64)

NAIL v. STATE. (No. 818.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. JURY §107—COMPETENCY OF JUROR—PREJUDICE AGAINST CIRCUMSTANTIAL EVIDENCE.

Code 1907, § 7278, providing that, on the trial for an offense punishable capitally or by penitentiary sentence, it is a good cause of challenge by the state that a juror thinks that a conviction should not be had on circumstantial evidence, a juror who on voir dire stated that he would not convict on circumstantial evidence unless it was so strong as to remove all possible doubt of guilt was properly rejected on the state's challenge.

[Ed. Note.—For other cases, see *Jury*, Cent. Dig. §§ 486-488, 495; Dec. Dig. §107.]

2. CRIMINAL LAW §552—WEIGHT AND SUFFICIENCY OF EVIDENCE—POSITIVE AND CIRCUMSTANTIAL EVIDENCE.

Circumstantial, like positive, evidence, need only be strong enough to convince beyond all reasonable doubt.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1257, 1259-1262; Dec. Dig. §552.]

3. HOMICIDE §166—EVIDENCE—MOTIVE.

In a trial for homicide, where there was evidence that, while defendant and others were

walking and drinking together, he had a difficulty with a companion and knocked him down with a pistol and shoved him down a high embankment, and as he was falling shot at him several times, that nothing more was heard of such companion, and that no one went to see about him, that after proceeding awhile deceased said he was going back to hunt for their companion, which he did without success, and that, when he overtook defendant and the others, defendant and his brother killed him without provocation or excuse, proof of the difficulty between defendant and the one assaulted and the character, violence, and circumstances of that assault and the apparent condition in which he was left was admissible to show that defendants desired to conceal such assault by killing deceased, who knew of it, and hence a motive for the killing.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 320, 331; Dec. Dig. ¶¶ 166.]

4. CRIMINAL LAW ¶789—INSTRUCTIONS—REASONABLE DOUBT.

In a trial for homicide, charge that, if there was one single fact proven to the jury's satisfaction which was inconsistent with guilt, it raised a reasonable doubt and the jury should acquit, was improper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. ¶¶ 789.]

5. HOMICIDE ¶300—INSTRUCTIONS—SINGLING OUT PART OF EVIDENCE.

In a trial for homicide, defendant's requested charge that if the jury believed him free from fault in bringing on the difficulty, and there was no reasonable mode of escape without increasing his danger, and the facts impressed him that he was in imminent danger of life or great bodily harm, and deceased said to him, "I will kill you," and advanced on defendant with a knife in his hand, so as to create a belief of danger of life or great bodily harm, defendant had a right to shoot in self-defense, and the fact that he fired more than one shot did not deprive him of that right, was properly refused, as singling out a part of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. ¶¶ 300.]

6. HOMICIDE ¶116—SELF-DEFENSE.

The facts which would justify one in taking life must be such as not only impressed him, but such as would impress the mind of a reasonable man, of danger of loss of life or of great bodily harm.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. ¶¶ 116.]

7. CRIMINAL LAW ¶829—INSTRUCTIONS—GIVEN INSTRUCTIONS.

Requested charges covered by given charges were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ¶¶ 829.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Jesse Nail was convicted of murder in the second degree, and he appeals. Affirmed.

The facts sufficiently appear in the opinion.

The following charges were refused defendant:

(2) If there is one single fact proven to the satisfaction of the jury which is inconsistent with defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit.

(32) If you believe from the evidence that defendant is free from fault in bringing on the

difficulty, and there was no reasonable mode of escape without increasing his danger, and the facts impressed the defendant that he was in imminent danger of loss of life or great bodily harm, and deceased said to defendant, "I will kill you," and advanced on defendant with a knife in his hand, and that the manner of deceased was such as to create in the mind of defendant, and did so create, that he was in danger of losing his life or receiving great bodily harm, then defendant had a right to shoot in self-defense even to taking the life of deceased, and the fact that he fired more than one shot did not deprive him of the right of self-defense.

Prosch & Prosch, of Birmingham, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. [1, 2] Section 7278 of the Code of 1907 provides that:

"On the trial for any offense which may be punished capitally, or by imprisonment in the penitentiary, it is a good cause of challenge by the state that the person * * * thinks that a conviction should not be had on circumstantial evidence," etc.

The policy of the law, as thus declared, is to place positive and circumstantial evidence on the same basis of equality, so as to abolish all prejudice or discrimination against the latter, as a means or instrumentality for arriving at truth, in the process of judicial investigation of felonies against the state. *Jackson v. State*, 74 Ala. 26.

The court committed no error, therefore, in sustaining, over the objection of defendant, the state's "challenge for cause" of the juror Montgomery, who, on his voir dire examination by the court, had stated that he would not convict on circumstantial evidence unless it was so strong as to be sufficient to remove all possible doubt of defendant's guilt. The law requires that circumstantial, like positive, evidence be strong enough to convince only beyond all reasonable doubt; consequently, the juror, having exacted, as a prerequisite to his joining in a finding of a verdict of guilty, a higher degree of proof than the law deems necessary to a conviction, was disqualified and was properly challenged by the state for cause. Code, § 7278; *O'Rear v. State* (Sup.) 66 South. 81.

[3] It appears from the evidence for the state that, on the night of the killing, the defendant (Jesse Nail), his brother (Fayette Nail), the deceased (Noah Wood), one Ambrose, and one Prince, were all walking together in returning from Brookside to Cardiff in Jefferson county; that they were all drinking;—that during the course of the journey the defendant, shortly before he killed the deceased (Noah Wood), had a difficulty with said Prince (one of his above-mentioned companions on the journey), in which he (defendant), not acting in self-defense, knocked said Prince down with his pistol, then shoved him down a high embankment, and, as he was falling down it, shot at him in the dark several times with his pistol:

that nothing more was heard from Prince, but that he was left where he fell, and that none of the parties went down the embankment to see about him or to ascertain whether he was dead or alive, but that they all proceeded on the journey for some distance, when deceased remarked that he was going back to hunt for Prince, which he did without avail; and that later, on overtaking his companions (comprising defendant, defendant's brother, and said Ambrose), he was killed by the defendant and defendant's brother without provocation, justification, or excuse. It was the theory of the state that defendant's act in killing deceased was prompted by a motive to silence him, and thereby to prevent any disclosure on his part of the alleged crime which defendant had committed in assaulting Prince, and which apparently had resulted fatally, though, as a matter of fact, as was afterwards learned, Prince was uninjured except to the extent of having been knocked unconscious for a long time by the blow administered by defendant and the resultant fall down the embankment. If defendant believed, however, that he had committed a homicide in assaulting Prince, then, although he had not, such belief could furnish as strong an incentive on his part to suppress or conceal the crime as could the reality itself.

It is always competent for the state to prove facts which tend to show a motive for the commission of the offense charged; and this is true even though such facts show the commission of a previous crime, provided that crime is so connected by the evidence with the crime under investigation that it may be fairly inferred from such evidence that a desire to conceal such previous crime by destroying a person who had knowledge of it furnished the motive for doing the crime in question. *Miller v. State*, 130 Ala. 13, 30 South. 379; 21 Cyc. 916-917; 12 Cyc. 410; *Gassenheimer v. State*, 52 Ala. 313, and cases cited in the report of this case in the annotated Alabama Reports; *Shorter v. State*, 63 Ala. 129; *Collier v. State*, 68 Ala. 500; 6 Mayf. Dig. 627; 1 Mayf. Dig. 646.

We are of opinion that the connecting facts and circumstances in this case, though weak, were sufficient to justify the court in permitting proof of the difficulty between defendant and Prince, the character, violence, and circumstances of the assault on Prince, and the apparent condition in which he was left as a result thereof. Authorities supra; *Nordan v. State*, 143 Ala. 13, 39 South. 406.

[4] Charge 2 requested by the defendant is identical with charge 1, which was condemned by our Supreme Court in the recent case of *McClain v. State*, 182 Ala. 67, 62 South. 241.

[5, 6] Charge 32 was properly refused as singling out and giving undue prominence to a part of the evidence. Besides, the facts

which would justify defendant in taking life must be such as not only impressed the defendant, but such as would impress the mind of a reasonable man, that defendant was in danger of losing his own life or suffering grievous bodily harm.

[7] The other refused charges were amply covered by given charges.

We have discussed all questions urged in brief. As we find no error in the record, the judgment appealed from is affirmed.

Affirmed.

(12 Ala. App. 464)

**KILBY LOCOMOTIVE & MACHINE WORKS
v. D. B. LACY & SON. (No. 205.)**

(Court of Appeals of Alabama. Feb. 11, 1915.)

1. FRAUD — MISREPRESENTATIONS — DAMAGES.

A person injured by fraudulent representations is entitled to recover all the damages within the contemplation of the parties, or which were the necessary or the natural and proximate consequences of the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. —59.]

2. FRAUD — FALSE REPRESENTATIONS — MEASURE OF DAMAGES.

For fraudulent representations inducing the sale of personal property, where the purchaser retains the property, the measure of damages, in an action for deceit, is the difference between the actual value of the property at the time of sale and what its value would have been if the representations had been true, unless the actual damages are greater than this.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. —59.]

3. FRAUD — REPRESENTATIONS — SALE OF ENGINE — DAMAGES.

Where the purchaser of a secondhand locomotive, represented to have been overhauled and repaired until good as new, used the engine a year, and then had it repaired, in an action for deceit, the purchaser was not entitled to the cost of repair occasioned by the year's use or in making it conform to an act of Congress passed after the sale, but was entitled to the cost of putting it in such shape otherwise as it was represented to be and for the hire of another engine made necessary by the repairs for which the seller was liable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 60-62, 64; Dec. Dig. —59.]

4. FRAUD — DAMAGES — BURDEN OF PROOF.

In such case, the burden of proof was on plaintiff to show what part of the total expense of repair and in hiring another engine was necessary to indemnify plaintiff for the false representations.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 48, 47; Dec. Dig. —50.]

5. FRAUD — INNOCENT MISREPRESENTATIONS.

Innocent or honest misrepresentations will authorize a rescission of the contract of sale, but not an action for deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 27; Dec. Dig. —31.]

6. LIMITATION OF ACTIONS — DISCOVERY OF FRAUD — OPPORTUNITY FOR DISCOVERY.

Under Code 1907, § 4832, requiring a suit for fraud to be brought within 12 months after discovery of the fraud, the fact that plaintiffs had an opportunity for discovering the fraud,

while creating an adverse inference against them, is not conclusive that they did discover it earlier.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 323, 480-493; Dec. Dig. § 100.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Action of deceit by D. B. Lacy & Son against the Kilby Locomotive & Machine Works. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The pleadings and facts sufficiently appear from the opinion, as does the oral charge of the court excepted to. The following charges were refused the defendant:

(13) If Whitfield Clark honestly stated to D. B. Lacy the condition of the engine as the said Whitfield Clark believed the same to exist at the time of the sale, the jury must find the issues for the defendant.

(14) You cannot find a verdict for the plaintiff on account of the falsity of any representations which Clark may have made to Lacy, unless the jury are reasonably satisfied, from the evidence, that at the time of said statements said Clark knew that the same were false, or made the statements fraudulently or recklessly as true, with the intention to deceive the plaintiff.

(15) A representation is not fraudulent unless the party making the same had the knowledge that it was false, or unless he made a fraudulent or reckless representation of fact as true, which he did not know to be false, but by which he intended to deceive the party to whom the same was made.

Knox, Acker, Dixon & Sterne, of Anniston, for appellant. P. F. Wharton, of Anniston, for appellee.

THOMAS, J. [1] The general rule as to the measure of damages, when a person is injured by the false and fraudulent representations of another, is, as stated in the first authority cited below and borne out by the others, this:

"He is entitled to recover all the damages which were within the contemplation of the parties, or which, though not within the contemplation of the parties, were either the necessary or the natural and proximate consequences of the fraud; and he can recover nothing more than this, unless the circumstances were such as to render the other party liable in exemplary damages." 14 Am. & Eng. Ency. Law (2d Ed.) 177-179; 20 Cyc. 130 et seq.; 8 Am. & Eng. Ency. Law (2d Ed.) 640 et seq.; 13 Cyc. 23 et seq.

[2] And by the great weight of authority, where the fraud relied on consists of false representations as to the quality of personal property which induced its purchase, and where there has been no rescission of the contract, and the purchaser retains the property, the measure of his damages, in an action of deceit for such fraud, is, in ordinary cases, the difference between the value of the property at the time of the sale and what its value would have been if the representations had been true. 14 Am. & Eng. Ency. Law (2d Ed.) 182; 20 Cyc. 132, 133;

Foster v. Kennedy, 38 Ala. 359, 81 Am. Dec. 56; Moncrief v. Wilkinson, 93 Ala. 373, 9 South. 159; Ward v. Reynolds, 32 Ala. 384; Gibson v. Marquis, 29 Ala. 668.

In some cases, however, this rule is not applicable. It does not apply in any case when the difference between the actual value of the property and what its value would have been if the representations had been true does not in fact represent the actual damage sustained as the natural and proximate result of the fraud. In such cases, since it is a cardinal principle of the law that the person injured is entitled to receive compensation for the injury actually inflicted, the party defrauded may prove and recover his actual damages, except, of course, such as he might have avoided by the exercise of reasonable diligence. 14 Am. & Eng. Ency. Law (2d Ed.) 183; 20 Cyc. 130 et seq., 136, 140, 141; 1 Smith's Leading Cases, 248-252; Jones v. Ross, 98 Ala. 448, 13 South. 319; Hogan v. Thorington, 8 Port. 428; Kornegay v. White, 10 Ala. 255; Willis v. Dudley, 10 Ala. 933; Milton v. Rowland, 11 Ala. 732; Marshall v. Wood, 16 Ala. 806; Worthy v. Patterson, 20 Ala. 174; Rowland v. Shelton, 25 Ala. 217.

[3] One of the bones of serious contention in the present case, which is an action for deceit in the sale of a secondhand locomotive engine, is as to the proper measure of damages. The complaint, which was filed by appellees as plaintiffs below against appellant, who sold to appellees the said engine, alleged in substance, in the only counts that need be here noticed, that, at the time of and in the negotiations for the sale, the appellant, through its agent who conducted the sale, represented that said engine had recently been overhauled, repaired, and rebuilt by it in its shops, where the engine was at the time, so that it, and every part of it, was then as good as new. The complaint then alleges in effect that the representations were false and untrue—setting out how and wherein—and that defendant's said agent, who made them in conducting said sale, knew, at the time, that they were false and untrue, but that plaintiffs, in ignorance of their falsity and in reliance upon them, were induced to and did purchase said engine. The complaint claimed as damages the sums of money which plaintiffs were alleged to have expended (and which there was some evidence tending to support) in having said engine overhauled and repaired so as to make it as good as new, and in hiring another engine to use in its place while the one in question was undergoing such repairs.

The evidence tended to show, further, however, that the engine was not overhauled or repaired until after it had been used by plaintiffs for about a year, and that, when it was so overhauled and repaired, the original design of the engine, as respects the bracing of the fire box and boiler, was chang-

ed so as to make it meet the requirements of the federal Boiler Inspection Act,¹ which act was passed by Congress, or became operative, after plaintiffs purchased the engine.

Of course, the defendant was not liable for any of the costs of the overhauling and repairing that was rendered necessary by the wear and tear resulting from the use and service to which the plaintiffs had put the engine between the time of the purchase and the time that the overhauling and repairing was done, nor for any cost of such overhauling and repairing that was done in making the engine conform to the requirements of the federal act mentioned, but was, we think, liable, as the natural and proximate result of the wrong complained of, for the reasonable cost and expense to which the plaintiffs had been put in having the engine overhauled and repaired to the extent necessary to change it from the condition in which it was actually at the time of the purchase to the condition it was then represented to be in—in other words, to the extent necessary to make such representations good—and was likewise, we think, liable for the reasonable costs and expense to which the plaintiffs had been put in hiring another engine to use in their business in the place of the engine in question during the time the latter was undergoing the repairs last mentioned, but not during the time it was undergoing the other repairs referred to. Authorities last cited; 14 Am. & Eng. Ency. Law (2d Ed.) 179, 180; 20 Cyc. 138; Bryant v. Booth, 30 Ala. 311, 68 Am. Dec. 117; Chatham Machine Co. v. Smith (Tex. Civ. App.) 44 S. W. 592.

[4] The lower court, in substance and effect, so charged the jury, and we find no error, therefore, in any portion of the oral charge as to the measure of damages that was excepted to, nor in the court's refusal to give the written charge requested by defendant asserting that the measure of damages in the action was the difference between the value of the engine as represented and its actual value. The plaintiffs sought only to recover the expenses mentioned. In this connection, it may be said that the burden of proving these damages rests upon the plaintiffs, and it was incumbent on them, and not defendant, to show, to the satisfaction of the jury, what part of the total sums shown to have been expended for repairs and overhauling and in hiring other locomotives was necessary to indemnify plaintiffs for the false representations alleged to have been made and to make good those representations. Ritter v. Hoy, 2 Ala. App. 364, 56 South. 814. This duty cannot be met by showing the whole costs of such overhauling and repairs, when it appears, as pointed out, that a part

of such costs was necessary by reason of use and service to which plaintiffs had, after the purchase, put the engine, and that a part was necessary to make the engine conform to the requirements of the federal act mentioned. The plaintiffs must, by either positive or expert testimony, furnish the jury some reasonable basis upon which to say what part of such costs was due to the false representations complained of.

[5] The court erred in its oral charge to the jury as to the character of fraud sufficient to support this action, when it stated in effect that, if the representations alleged to have been made by defendant were untrue and were as to a matter of fact and operated as a material inducement to the plaintiffs in making the purchase, then it made no difference whether they were innocently and honestly made or not. Innocent or honest misrepresentations will authorize a rescission of the contract of sale, but not an action for deceit. The statute on this subject has modified, to some extent, the case law previously existing in this state as to the character of fraud necessary to support the latter action, so that the rule now is the same as obtains by judicial decision in most of the other states. We had occasion recently to discuss fully the matter in the cases cited below, and need not now reiterate. Code, §§ 2469, 4298, 4299; Hockensmith v. Winton, 66 South. 955; McCoy v. Prince, 66 South. 950; 14 Am. & Eng. Ency. Law (2d Ed.) 21, 22.

[6] The court, consequently, also erred in refusing written charges 13, 14, and 15, which correctly asserted the law in conformity with the authorities above cited.

The defendant was not entitled to the affirmative charge under its plea of the statute of limitations of one year, since the law allows the suit to be brought at any time within 12 months after the discovery by the aggrieved party of the facts constituting the fraud (Code, § 4852), and there was evidence tending to show that the discovery was not made prior to 12 months before bringing the suit. The fact that plaintiffs had an opportunity of discovering it earlier, while creating adverse inferences against them, is not conclusive that they did discover it earlier. Jones v. Coan, 146 Ala. 660, 41 South. 757.

The remarks of counsel complained of are not likely to be indulged in on another trial and need not therefore be considered. We have discussed the only errors seriously urged, and for those pointed out the judgment is reversed.

Reversed and remanded.

PELHAM, P. J., not sitting.

¹ U. S. Comp. St. 1913, §§ 8630-8639.

(12 Ala. App. 472)

BIRMINGHAM WATERWORKS CO. v. KIRKLAND. (No. 342.)(Court of Appeals of Alabama. Jan. 12, 1915.)
COURTS ¶91—**STARE DECISIS** — **COURTS OF LAST RESORT.**

The Court of Appeals must follow a decision of the Supreme Court construing a contract, though a previous decision of the Court of Appeals construed the same contract differently.

[Ed. Note.—For other cases, see **Courts**, Cent. Dig. §§ 318, 325, 328; Dec. Dig. ¶91.]

Appeal from Circuit Court, Jefferson County; Thomas W. Wert, Judge.

Action between the Birmingham Waterworks Company and K. K. Kirkland. From a judgment for the latter, the former appeals. Reversed and remanded.

Frank Spurlock, of Chattanooga, Tenn., and John London, Henry Fitts, and Percy, Benners & Burr, all of Birmingham, for appellant. Claud D. Ritter, of Birmingham, for appellee.

PELHAM, P. J. Confessedly the cardinal proposition, and the only fundamental question sought to be presented by appellant in bringing this appeal, involving substantially the same matters that had been previously passed upon by this court in an opinion written by Judge De Graffenried while a member of the court, in the case of *Birmingham Waterworks v. Kelley*, 2 Ala. App. 629, 56 South. 838, was to get a ruling from the court at variance with the previous holding in the *Kelley* Case. It was understood that the same question presented by the record in this case, involving a construction of the identical provisions of the contract between the city of Birmingham and the appellant, had been submitted to the Supreme Court in a case before it; and as this court is required by the statute of its creation to conform its holdings to the decisions of the Supreme Court, to the end that there shall be a uniformity of decisions in the state, it has been deemed proper, to avoid any confusion that might arise, to await the holding of the Supreme Court on the construction of the contract involved on this appeal.

In the case of *Birmingham Waterworks Co. v. Windham*, 67 South. 424, the Supreme Court has passed upon the main question presented on the appeal in this case, rendering an opinion giving a construction to the provisions of said contract as construed in the opinion in the *Kelley* Case, 56 So. 838, that is entirely at variance with the views expressed in the latter case. The rulings of the trial court in the instant case are in harmony with the *Kelley* Case, and it follows that they are not in accord with the holding of the Supreme Court in the *Windham* Case, supra, and that the proper order here is a reversal in conformity with the controlling holding in the latter case.

Reversed and remanded.

(12 Ala. App. 504)

KING. et al. v. GIBBS. (No. 807.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

1. DISMISSAL AND NONSUIT ¶25 — **DISCONTINUANCE—WRIT CONSTITUTES.**

In an action on a joint and several obligation, as a promissory note, the dismissal as to one of the parties who was duly served works a discontinuance as to the others.

[Ed. Note.—For other cases, see **Dismissal and Nonsuit**, Cent. Dig. §§ 47-59; Dec. Dig. ¶25.]

2. PROCESS ¶154 — **SERVICE—OBJECTION.**

In a suit against joint and several obligors, plaintiff discontinued as to one who was served with a branch writ. The writ which was issued on plaintiff's motion appeared from the order of the court to be identical with the principal writ as required by Code 1907, § 5300. Held that, no material variance appearing, plaintiff could not contend that the obligor as to whom he discontinued was not properly served.

[Ed. Note.—For other cases, see **Process**, Cent. Dig. § 209; Dec. Dig. ¶154.]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Action by John Gibbs against W. L. King and another. From a judgment for plaintiff, defendants appeal. Reversed and rendered.

Brown & Griffith, of Cullman, for appellants. W. E. James, of Cullman, for appellee.

PELHAM, P. J. [1] The form of action brought in the trial court by the appellee against the appellants was *ex contractu*, on a joint and several obligation (a promissory note). The record shows that the plaintiff dismissed his suit in the trial court as to the joint defendant G. B. King, and took judgment by default against the other defendants to the cause of action. It is the insistence of the appellants that the plaintiff in the court below by dismissing his suit as to the defendant G. B. King, who the record shows had been served with process, discontinued his cause of action and rendered the trial court without jurisdiction to render judgment against the other defendants to the cause of action, who bring this appeal.

The effect of the discontinuance as to one of the several defendants on the joint, or joint and several, cause of action, was to discontinue the case and put the parties out of court and leave the court without jurisdiction to proceed to a hearing of the case and rendition of judgment. *Evans Marble Co. v. McDonald & Co.*, 142 Ala. 130, 37 South. 830; *Curtis et al. v. Gaines*, Adm'r, 46 Ala. 455; *Beecher v. Henderson*, 4 Ala. App. 543, 58 South. 805.

[2] The point made by the appellee that the record falls to show that the defendant G. B. King had been served, because of a failure to show a compliance with the provisions of section 5300 of the Code of 1907, is without merit. The branch writ issued was not only an exact counterpart of the original writ, but is shown by the record to

have been issued in this case in pursuance of an order of the court at the instance and on the motion of the plaintiff. The purpose of the statute (Code, § 5300) is to preserve the identity of the cause of action as to the original and branch summons. This identity was established by the order of the court made in this case at the instance of the plaintiff, and, besides, any variance or other irregularity militating against the identity of the branch writ could only be taken advantage of by the party served, unless the record affirmatively disclosed a material variance. *Drennen & Co. v. Jasper Investment Co.*, 153 Ala. 322, 45 South. 157.

It follows that the trial court was without authority to render the judgment by default after a discontinuance of the cause. The judgment of the lower court is reversed, and a judgment of discontinuance is here entered. Reversed and rendered.

BROWN, J., not sitting.

(12 Ala. App. 518)

AMERICAN AUTOMOBILE INS. CO. v. WATTS. (No. 100.)

(Court of Appeals of Alabama. Nov. 10, 1914.
Rehearing Denied Dec. 15, 1914.)

1. INSURANCE — 146 — POLICY — CONSTRUCTION.

A stipulation authorizing cancellation of an insurance policy will be most strictly construed against the insurer, although, if there is nothing equivocal in it, the court cannot imply a meaning which the language does not warrant.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.]

2. INSURANCE — 229 — FIRE POLICIES — CONSTRUCTION.

A policy insuring an automobile against fire provided that it might be canceled at any time by either of the parties upon written notice to the other by stating when the cancellation should be effected, that the unearned premiums should be returned, and that notice of cancellation deposited in the United States mail, postage prepaid to the address of the insured, should be sufficient. The postal regulations (Rev. St. § 3936 [U. S. Comp. St. 1913, § 7418]) provide that when the writer of any letter shall indorse on the outside his name and address, such a letter shall not be advertised, but shall be returned to the writer if uncalled for at the expiration of the time specified in the writer's request, provided the time for holding be not shorter than 3 nor longer than 30 days. The statute also authorized the postmaster to hold ordinary letters for three months, and longer in case he had grounds to believe they could be delivered. The insurer, by registered letter sent to the insured's place of residence, notified him of the cancellation of the policy. The insured was out of town, and the letter was returned pursuant to the insured's request to return in five days. The insured returned within about a month, and his automobile was burned within the three-month period. *Held* that the notice of cancellation was not sufficient, for the insurer by its request to return the letter lessened insured's chances of receiving notice.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 500-503; Dec. Dig. § 229.]

3. APPEAL AND ERROR — 1051 — REVIEW — HARMLESS ERROR.

The erroneous admission of evidence is harmless, where the fact sought to be proven was a necessary conclusion from other competent evidence received without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.]

Appeal from Circuit Court, Dallas County; B. M. Miller, Judge.

Action by S. H. Watts against the American Automobile Insurance Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Pettus, Fuller & Lapsley, of Selma, and Stokely, Scrivner & Dominick, of Birmingham, for appellant. W. M. Vaughan, of Selma, for appellee.

PER CURIAM. This was an action on a policy insuring an automobile against loss or damage by fire for one year, from September 3, 1912, to September 3, 1913. The defendant (appellant here) sought to escape liability on the ground that, prior to the alleged destruction of the automobile, the policy had been duly canceled, pursuant to the authority conferred by the following provision contained in it:

"This policy may be canceled at any time by either of the parties hereto upon written notice to the other party stating when thereafter cancellation shall be effected; the date of cancellation as fixed in such notice shall be the end of the policy period; if canceled by the company, the earned premium shall be computed and adjusted on a pro rata basis; if canceled by the assured, the earned premium shall be computed at short rates in accordance with the table printed hereon; notice of cancellation deposited in the United States mail, postage prepaid, to the address of the assured, as stated herein, shall be sufficient notice, and the check of the company or its duly authorized agent similarly mailed a sufficient tender of any unearned premium."

The defendant, by its secretary, wrote a letter to the plaintiff, dated May 20, 1913, giving notice of its intention to cancel said policy, stating that the cancellation shall be effective on the 22d day of May, 1913, at noon, that all liability of the company under the policy shall absolutely cease at that time, and that the check of the company for \$4.47, the amount of the unearned premium under said policy, was inclosed. This letter, inclosing the check as stated, and addressed to the defendant at Selma, Ala., which was his address as stated in the policy, was registered in the post office at St. Louis, Mo., on May 22, 1913. In the upper left-hand corner of the address side of the envelope containing the letter were the words: "Return in five days to American Automobile Insurance Company, Pierce Building, St. Louis, Mo." The letter was received at the post office at Selma on May 24, 1913. On that day a notice with the plaintiff's name on it and advising him that there was registered mail for him and for him to call

for it was put in his box in that office, which was where he regularly received his mail. A second and similar notice was placed in the plaintiff's box on May 27th. There was nothing on either of those notices to indicate who was the sender of the registered mail referred to. The registered letter was not delivered to the plaintiff, or to any one for him, within five days after its receipt at Selma, and upon the expiration of that time was returned to the defendant. The plaintiff was not in Selma, which was his place of residence, when the letter was received there, and did not return or get the mail from his post office box until June 23, 1913. When his automobile was burned up about August 5, 1913, he had not been informed of the defendant's letter or of the import of it. Neither the letter nor the check nor any actual notice of the cancellation of the policy had been received by him at that time.

[1, 2] The pivotal question in the case is whether what was done by the defendant constituted a compliance by it with the terms of the stipulation which conferred on it the right to cancel the policy. It is well settled that such a stipulation is to be strictly construed, and that a cancellation of the policy by the insurer is not effected unless it strictly complies with the condition imposed upon it with respect to giving notice to the insured of the cancellation. *Continental Insurance Co. v. Parkes*, 142 Ala. 650, 39 South. 204. Of course, there is no room for construction when there is nothing ambiguous or equivocal in the stipulation; and, when such is the case, a court cannot properly impute to the provision any meaning except the single one which the language used plainly expresses. *Day v. Home Insurance Co.*, 177 Ala. 600, 58 South. 549, 40 L. R. A. (N. S.) 652; *Continental Casualty Co. v. Ogburn*, 175 Ala. 357, 57 South. 852, Ann. Cas. 1914D, 377. But if the language used is susceptible of more than one interpretation that one must be adopted which is most favorable to the insured. *Robinson v. Aetna Ins. Co.*, 128 Ala. 477, 30 South. 665; *Forest City Insurance Co. v. Hardesty*, 182 Ill. 39, 55 N. E. 139, 74 Am. St. Rep. 161; 19 Cyc. 656. The language of the policy was of the defendant's own choosing, and is to be construed most strongly against it. The court should lean against a construction which would limit or terminate the liability of the insurer. *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113; 2 Page on Contracts, § 1122.

The questions then arise, Can the clause of the above-quoted stipulation which provides for depositing the notice of cancellation and the company's check for the amount of the unearned premium in the United States mail, postage prepaid, to the address of the assured, as stated in the policy, have more than one meaning, so that the terms of it may be complied with in more than one

way? and, If there is more than one way of complying with such a requirement, was the method adopted by the defendant the one which was most favorable to the plaintiff? It is a matter of common knowledge that a letter may be mailed with or without registration, and that the envelope containing it may have or not have upon it a request of the sender that it be returned at the expiration of a specified time. If the sender's wish is to get back the letter, if it is not delivered within a specified time, this may be indicated by a return request; while if this is not what is sought, but evidence of delivery to the addressee is desired, this may be indicated, in the case of a registered letter, by a request by the sender to be furnished with the addressee's receipt for it. That the selection of the method of mailing has an effect, in contingencies not unlikely to arise, upon the opportunity to be afforded to the person addressed actually to receive the letter is apparent in the light of postal regulations, established and promulgated pursuant to statutory authority, with notice of which the sender of mail is chargeable. U. S. Rev. St. § 3936 (U. S. Comp. St. 1913, § 7418); *Postal Laws and Regulations* 1913, p. 350. The following regulations, set out in the publication mentioned, indicate how such opportunities of the addressee to receive a letter may be varied by the adoption of one rather than another and different method of mailing:

"Sec. 632. 1. When the writer of any letter on which postage is prepaid shall indorse on the outside thereof his name and address, such letter shall not be advertised, but, after remaining uncalled for at the office to which it is directed the time the writer may direct or the Postmaster General prescribe, shall be returned to the writer without additional charge for postage, and if not then delivered, shall be treated as a dead letter. 2. The writer's card request for the holding of a letter for a period shorter than 3 days or longer than 30 days shall be disregarded. * * * 4. Letters bearing the sender's return request shall be returned at the expiration of the time specified in the request, regardless of instructions from the addressee for the retention of his mail.

"Sec. 956. 1. Domestic registered letters and parcels which remain undelivered at either the office of their original address or the office to which they have been properly forwarded for the periods stated in paragraph 1, section 633, or such other period as may be named in the sender's return request, if any, not less than 3 nor more than 90 days, shall be marked on the face with the reason for their nondelivery, and be disposed of as herein provided. * * * 5. When a postmaster has good reason to believe that undelivered registered mail of domestic origin, bearing no time limit, can be properly delivered if it is held longer than the periods specified in the first paragraph of this section, he may indorse it 'Specially held for delivery' and retain it not longer than three months.

"Sec. 957. After a registered letter or parcel has been returned for restoration to the sender the addressee has no further claim upon it."

It is plain that, under these regulations, the defendant's indorsement on the envelope of the request that the letter be returned if not delivered in five days had the effect of de-

priving the plaintiff of the opportunity of receiving it, or of even ascertaining who was the sender of it, if for any reason it should happen that his mail was not called for within five days after the letter reached the post-office at Selma, and had the further effect of depriving the postmaster of the right, which, but for such indorsement, he would have had, of retaining the letter for delivery for not longer than three months if he believed that it could be properly delivered to the addressee, who lived in Selma and had a post office box there. But for that request for a return of the letter 85 days sooner than it could have been returned, pursuant to a request, on a failure to deliver, the letter could have been held at Selma until after the plaintiff actually returned and got his mail, about six weeks before the automobile was burned. The existence of different methods of mailing a letter, each equally permissible, and of differences in the opportunities afforded to the addressee of actually receiving it, according as one or another method is adopted injects an element of ambiguity into a stipulation which in general terms calls for a deposit of the letter in the mail, postage prepaid, to a stated address, without specifying the particular mode of mailing to be adopted. If it is held that such a stipulation is complied with by adopting a method of mailing, the result of which, in the not improbable event of the addressee's being absent for a few days from the place to which the letter is addressed, will be that he will not get it at all, the construction is one under which the sender may make the addressee's opportunity of getting the letter materially less than it would be if it was so mailed as to permit it to be forwarded to the addressee or to be held for a considerable time for delivery to him at the place to which it was addressed. To hold that under such a stipulation the sender has the option of selecting the method of mailing to be adopted would be construing it liberally in his favor, and not strictly in favor of the other party to the contract. The result would be that the stipulation, which is susceptible of more than one interpretation, would be interpreted most unfavorably to the insured. So far as the latter is concerned, an obvious purpose of the requirement of notice to him of a cancellation of the policy by the company is to give him an opportunity to reinsure. The company is not to be enabled to reduce this opportunity to a minimum, or to be given a chance to deprive the insured of it entirely, when the stipulation may be fully complied with in a way much less likely to involve such a result. The insured, by assenting to the stipulation in question, agreed to take such chance of his actually getting a notice of cancellation and a check for the return premium as was involved in the deposit of

them in the mail, postage prepaid, to his stated address; but it is not to be supposed that it was in the contemplation of either of the parties to the contract that the insurer was to be at liberty to reduce this chance to a minimum by requesting the return of the letter if it should not be delivered within a very brief period after it reached the place to which it was to be addressed, especially as, if there was any benefit to the insurer in its getting back into its possession the undelivered notice of cancellation and its unused check, it was a benefit to which the contract did not entitle it, while, by its bringing about that result in that way, the purpose of the stipulation so far as the insured was concerned would be wholly defeated. The facts of the case do not require a determination of the particular method or methods of depositing in the United States mail the notice of cancellation and a check for the return premium which properly may be regarded as a compliance with the stipulation in question. It is enough to say in conclusion that the method which the evidence shows was adopted by the defendant was one the adoption of which was so much more likely to result in depriving the plaintiff of all benefit from the stipulation than another or other methods which were equally within the general terms used, and might as well have been chosen, that to hold that what the defendant did was a compliance with the stipulation would amount to giving it a construction, not strict, as required by the rule governing in such a case, but so loose and liberal in behalf of the defendant and so unfavorable to the plaintiff as not to be permissible. The rulings of the trial court were in conformity with the views above expressed.

[3] What has been said disposes of the assignments of error which have been insisted on in argument, except one based upon the overruling of objections to testimony of the plaintiff to the effect that he never received any notice of the cancellation of the policy. Assuming, without conceding, that there was error in those rulings, it was error without injury to the appellant, as it was a necessary conclusion from other evidence in the case, which was admitted without objection and was uncontroverted, that the fact was as it was deposed to by the witness over the objections referred to. A judgment is not to be reversed because of the admission of questioned evidence of a fact which was clearly proved by undisputed evidence the admissibility of which was not questioned.

Affirmed.

NOTE.—The foregoing opinion was prepared by Presiding Judge WALKER before his retirement from the Court of Appeals and has been adopted by the court.

(12 Ala. App. 74)

HAROLD v. STATE. (No. 161.)

(Court of Appeals of Alabama. Jan. 14, 1915.)

1. HOMICIDE \S 109—SELF-DEFENSE.

For accused to be justified in killing deceased, he must not only have been free from fault in bringing on the difficulty, but he must, at the time he struck the fatal blow, have been in imminent peril of losing his own life or suffering great bodily harm, and the conditions surrounding him must have been such that he could not have retreated without increasing his danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139; Dec. Dig. \S 109.]

2. HOMICIDE \S 300—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

In a homicide case, where accused claimed that he killed in self-defense, he has the burden of showing his inability to retreat; and hence, in the absence of any showing as to his inability to retreat, instructions that he was under no obligation to flee and had the legal right to stand his ground and kill his adversary should be refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

3. HOMICIDE \S 115—SELF-DEFENSE—ATTACK.

An attack with brass knucks made by an intoxicated man cannot be held so manifestly felonious as to warrant accused in killing his assailant without attempting to retreat.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 155-157; Dec. Dig. \S 115.]

4. HOMICIDE \S 116—SELF-DEFENSE—DUTY TO RETREAT.

Where accused was attacked, he should retreat unless the circumstances were such that he entertained a reasonable belief that it was necessary to kill deceased in order to save his own life, and an irrational belief, however honest, will not answer.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. \S 116.]

5. HOMICIDE \S 300—TRIAL—INSTRUCTIONS—SELF-DEFENSE.

Where accused claimed self-defense, but there was no evidence which would have justified the jury in finding that he entertained a reasonable belief that he could not have retreated without increasing his peril, a charge on accused's rights under those circumstances is abstract and should be refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

6. CRIMINAL LAW \S 1142—APPEAL—RECORD.

On appeal the court must presume that the instruction originally given was as shown by the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3014, 3016-3037; Dec. Dig. \S 1142.]

7. HOMICIDE \S 300—TRIAL—INSTRUCTIONS.

A charge that if the jury could not say whether accused acted upon a reasonable belief that it was necessary to take the life of deceased to save himself, or that he cut before such a "peding" necessity arose, he should be acquitted, is properly refused, the term "peding necessity" being unintelligible.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. \S 300.]

8. HOMICIDE \S 23, 77 — MANSLAUGHTER — "MURDER IN SECOND DEGREE" — "MANSLAUGHTER IN FIRST DEGREE."

"Murder in the second degree" and "manslaughter in the first degree" are distinguished by the fact that malice must be present in the former and absent in the latter; hence an instruction disregarding that essential should be refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 35, 39, 40, 71; Dec. Dig. \S 23, 77.]

For other definitions, see Words and Phrases, First and Second Series, Murder in Second Degree; Manslaughter in First Degree.]

Appeal from Circuit Court, Escambia County; A. E. Gamble, Judge.

Charlie Harold, alias, was convicted of murder in the second degree, and he appeals. Affirmed.

The evidence sufficiently appears from the opinion of the court. The following charges were refused defendant:

(16) If the jury believe from the evidence that defendant is free from fault in bringing on the difficulty in which deceased lost his life, and that deceased made an attack upon him with a deadly weapon with murderous intent, defendant was under no obligation to flee, or had the legal right to stand his ground, and if need be kill his adversary.

(19) If the jury believe from the evidence that defendant was free from fault in bringing on the difficulty in which defendant lost his life, and reasonably apprehended death or great bodily harm to himself unless he killed deceased, the killing was justifiable.

(20) The court charges the jury that if they believe from the evidence that defendant was without fault in bringing on the difficulty, and there existed at the time in the mind of defendant a reasonable belief, honestly entertained, that there was either a real or apparent, imperious, and impending necessity to cut in order to save his life, or to save himself from great bodily harm, and that from the reasonable belief, honestly entertained, that deceased had dangerous weapons, retreat would only increase his danger, and defendant from such belief cut and killed deceased, then the jury must not convict defendant.

(39) I charge you that if, after looking at all the evidence in this case, your minds are left in such a state of uncertainty that you cannot say beyond a reasonable doubt whether defendant acted upon a well-founded and reasonable belief that it was necessary to take the life of deceased to save himself from great bodily harm, or death, or that he cut before such a pending necessity arose, then this is such a doubt as would entitle defendant to an acquittal, and you should so find.

(41) To constitute murder in the second degree, defendant must inflict an act of violence which produces death, with intent to kill deceased, or do an act of violence which ordinarily in the usual course of events produces death or does great bodily harm. To constitute manslaughter in the first degree, defendant must have an intention to kill or inflict an act of violence which ordinarily or in the usual course of things produces death or great bodily harm.

Leigh & Chamberlain, of Mobile, and E. L. McMillan, of Brewton, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

THOMAS, J. The only insistence of appellant's counsel in this case is that the trial

court erred in refusing written charges 16, 19, 20, 39, and 41 requested by appellant, in disposing of which insistence it is necessary that we review briefly the evidence.

Ignoring the case as made by the evidence for the state, and taking as true the defendant's own version, it appears that, shortly before the difficulty, deceased was at a livery stable in the town of Brewton, where he had some whisky, of which he had been drinking, when defendant came up and upon invitation of deceased also took a drink; that while there a third party present, who was a cripple, called defendant a d—— liar about a matter incidentally arising and immaterial here, whereupon defendant knocked this party down; that deceased, upon remarking that defendant should not impose on a cripple in his presence, struck defendant with his fist, whereupon defendant then knocked deceased down also; that immediately after getting up off of deceased, defendant went to a pump out in the street to wash his face and hands, when deceased followed behind him; and that, as defendant was bending over washing at the pump, the deceased hit him a glancing lick on the head from behind with a pair of brass knucks that were on his hand; but that, missing his full aim, he fell over defendant onto the ground, where defendant seized him, and, after holding him there for a while, got up to go home, telling deceased to leave him alone; that deceased then got up and followed, endeavoring all the while with a pair of brass knucks on his hand to hit defendant, who was backing off, whereupon defendant took out his knife and stabbed the deceased to death. In the language of defendant:

"I cut him when he struck me over the eye. When I cut him, he was coming towards me, and had a pair of knucks on his hand. He kept moving towards me, trying to hit me. I think I made three passes at him. It was all over in a minute, I reckon."

[1] This happened out in the open street, where, so far as appears, there was nothing to prevent the defendant from retreating and thereby avoiding the blows aimed at him by deceased, who, it seems, was partly intoxicated, and consequently not only less able to use effectively the knucks, but less able to pursue the defendant if the latter had retreated. For the law to justify defendant in killing deceased, the defendant must not only have been free from fault in bringing on the difficulty, but he must, at the time he struck the fatal blow, have been in imminent peril of losing his own life or of suffering great bodily harm at the hands of his assailant, and the conditions surrounding him must have been such that he could not have retreated without increasing his danger, or such as would have appeared so to a reasonable man circumstanced as was the defendant. 1 Mayf. Dig. 800 et seq.

[2] The burden of showing his peril and his inability to retreat rested upon defendant,

and, even if we accept as true his own version, it does not appear that the character and manner of the assault made upon him by deceased, nor that the kind of weapon used in that assault, nor that the place and circumstances of that assault, were such as to relieve him of the duty of retreating or to justify him in taking the life of his assailant; consequently, the court did not err in refusing charges 16 and 19, which contained no hypothesis with reference to the matter of retreat. 1 Mayf. Dig. 800 et seq.

[3] We find nothing to conflict with these views, in the cases of *Beasley v. State*, 181 Ala. 28, 61 South. 259, *Cook v. State*, 5 Ala. App. 11, 59 South. 519, and *Storey v. State*, 71 Ala. 337, cited us by appellant, which assert the doctrine that:

"When the assault is manifestly felonious in its purpose and forcible in its nature, as in murder, rape, robbery, burglary, and the like, * * * the party attacked is under no obligation to retreat."

This is but a reiteration of the well-known common-law principle, as declared in *Russell on Crimes*, that:

"A man may repel force with force in defense of his person, habitation, or property, against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, * * * [but] the intent to murder, ravish, or commit other felonies attended with force or surprise, should be apparent and not be left in doubt; so that if A. make an attack upon B., it must plainly appear by the circumstances of the case (as the manner of the assault, the weapon, etc.) that the life of B. is in imminent danger; otherwise, his killing the assailant will not be justifiable self-defense." *Russell on Crimes*, vol. 3 (International Ed. 1896), pp. 213, 214.

In the *Beasley Case*, *supra*, which is the only one of the cases mentioned as cited us by appellant where the doctrine was applied (the other two—the *Cook* and *Storey Cases*—having merely incidentally declared it), the facts were entirely different from those here. There the assault upon defendant was made with a gun, which is a known deadly weapon, a discharge from which could have effectively reached the defendant even if he had retreated. Therefore, under the circumstances of that case, the court held in effect that the assault upon defendant, if the jury believed the evidence, was manifestly felonious, its character, judged from the weapon presented and the manner of its attempted use by deceased, clearly disclosing an intent on his part to murder defendant; since, as a matter of law, it is to be presumed that every man intends the known usual and natural consequences of his acts, and since it is known that the usual and natural consequences of shooting a person with a gun are to kill him, and that if he retreats in the open his danger is increased. This cannot be said of an assault upon a person in the open streets with a pair of knucks. Hence we cannot say as a matter of law that the assault made upon the defendant in this case,

even when looking alone to his own evidence, was "manifestly felonious." Hence charges 18 and 19 were abstract as applied to the facts of this case.

[4, 5] To relieve the duty to retreat, the defendant must, as said, not only have been free from fault in bringing on the difficulty, but the assault upon him by deceased must have been coupled with an intent and capacity, or seeming capacity, to take life or to inflict some great bodily harm. It must appear that the assailant, by his conduct and acts, impressed the mind of the defendant that it was the deceased's purpose to kill at the time that the fatal blow was struck in defense. The deceased must not only have had the means at hand for effecting a deadly purpose, but it must have appeared from some act or demonstration of his that it was his intention at the time of the killing to carry out his purpose, thereby inducing a reasonable belief on the part of the defendant that it was necessary to deprive deceased of his life in order to save his own. *Lewis v. State*, 51 Ala. 1.

It must have been a reasonable belief, honestly entertained, and begotten by attendant facts and circumstances of such a character as to justify such a belief in the mind of a reasonable man. An irrational belief, one not authorized by the facts and circumstances then attending defendant, however honestly entertained, will not answer. 1 Mayf. Dig. 802, § 21.

Hence charge 20 was properly refused, if for no other reason, because it was abstract, in that there was nothing in the evidence which would have justified the jury in finding that defendant entertained a reasonable belief that he could not have retreated without increasing his peril, even granting that his peril was shown to have been such as would have justified the killing in the event there was no mode of escape open to him by retreat. The defendant, failing, as he did, to show facts and circumstances sufficient to furnish a foundation for a belief in the mind of a reasonable man, environed as he was, that he could not retreat, is not in position to complain of the refusal of the charge. We are not to be understood, however, as intending to hold that the charge even abstractly asserts a correct proposition of law. While it probably meets every criticism aimed at a similar charge in *McCain v. State*, 160 Ala. 38, 49 South. 361, yet we are of opinion that the charge is faulty for other reasons than those pointed out in said case. The necessity which will justify the taking of human life, it is true, need not be real, provided it is apparently so to the mind of a reasonable man; but the slayer must honestly and reasonably believe it to be real, and not merely that it appears so. His belief, although reasonable and although honest, that such necessity is apparent, will not therefore excuse him; yet the charge in ef-

fect asserts that if he reasonably and honestly believes that it is either real or apparent it will excuse him.

[6, 7] One clause in charge 39, even if the charge is not otherwise faulty as applied to the facts of this case (see *Charlie Langham v. State*, 68 South. 504), is sufficient for want of sense in such clause to have justified the court in refusing the charge as a whole. This clause in the transcript of the charge reads, "or that he [defendant] cut before such a *pending* necessity arose." Whether this word "*pending*" appeared in the original charge, or whether by typographical error in copying the charge the clerk substituted that word for "*impending*" or some other word, we do not know. Our sole guide is the record, and we must presume for purposes here that the original was as is what purports to be its copy in the transcript.

[8] Charge 41 was properly refused, because the definition of "murder in the second degree" and of "manslaughter in the first degree," as given in the charge, is the same. While such definition is correct, as far as it goes, yet it fails in completeness and fails to distinguish between these two degrees of homicide, and would consequently have left the impression on the minds of the jury that there is no difference between them, and that murder in the second degree and manslaughter in the first degree were one and the same thing in law; whereas, in fact murder is characterized by malice, which the charge ignores, and manslaughter by an absence of malice, which the charge likewise ignores.

We have discussed the only errors insisted upon, and, as we find none in the record, the judgment of conviction and sentence of 10 years is affirmed.

Affirmed.

(12 Ala. App. 101)

WARE v. STATE. (No. 755.)

(Court of Appeals of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 12, 1915.)

1. JURY \S 116—QUASHING VENIRE—STATUTE—GROUNDS.

Under Jury Law (Laws 1909, p. 305) §§ 17, 32, providing that, if the sheriff fails to summon any jurors, or if "any person summoned fails or refuses to attend the trial," such grounds shall not be sufficient to quash the venire, the court, as to a juror who had attended other trials therein, but who was absent on the day of defendant's trial without leave of court or consent of defendant, was not required on that ground to quash the venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 542, 543; Dec. Dig. \S 116.]

2. JURY \S 120—MOTION TO QUASH VENIRE—EVIDENCE—COMPETENCY—HEARSAY.

An unsworn statement made to the court over the telephone by a person at a juror's office to the effect that the juror had left the state was hearsay, and could furnish no legal basis for finding such to be the fact.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 547-549; Dec. Dig. \S 120.]

3. INDICTMENT AND INFORMATION §122 — REQUISITES—MATTERS UNKNOWN TO GRAND JURY.

The general rule is that, when a fact is known or is proved before the grand jury, there is no warrant for them to aver in the indictment that such fact is unknown, and that, when it appears at the trial that a fact alleged to have been unknown was known to the grand jury, a conviction should not be allowed, but, if the fact alleged to have been unknown was not a material fact, the defendant would not be entitled to an acquittal; and hence, where the prosecuting witness had testified before the grand jury that a part of the money taken was a \$5 "bill" of the currency of the United States, the allegation in the indictment, which properly described the other property taken, that defendant took \$5 lawful money of the United States of America, "a particular description of which was to the grand jury unknown," was immaterial to the identity of the offense, and not a variance between allegation and proof which would entitle defendant to a reversal.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 321-325; Dec. Dig. §122.]

4. INDICTMENT AND INFORMATION §120 — DESCRIPTION—SURPLUSAGE.

Robbery, being an offense in which there are no degrees, the value and amount of the property taken is immaterial, provided it has some monetary value, and the description of the property in the indictment is only necessary to show that it had monetary value and to identify the particular act of robbery intended to be charged; and hence an averment of the taking of \$5, "a more particular description of which was to the grand jury unknown," might be rejected as surplusage.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 315; Dec. Dig. §120.]

5. CRIMINAL LAW §1169—HARMLESS ERROR—EVIDENCE.

Error in admitting evidence as to what the watches alleged to have been taken by defendant cost was harmless, where witness subsequently testified that that was their value.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. §1169.]

6. ROBBERY §23—EVIDENCE—IDENTIFYING PROPERTY TAKEN.

In a prosecution for robbery, evidence as to where prosecuting witness had bought the watches taken, corroborated by that of the one from whom he bought them, was admissible, since it aided in identifying the watches recovered as the watches taken.

[Ed. Note.—For other cases, see Robbery, Cent. Dig. §§ 29-31; Dec. Dig. §23.]

7. CRIMINAL LAW §517—EVIDENCE—CONFESSIONS.

Where the state laid an ample predicate showing that alleged confessions or declarations against interest were voluntarily made, they were admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. §517.]

8. CRIMINAL LAW §778—INSTRUCTIONS—FLIGHT.

An instruction in a prosecution for robbery that evidence to show flight of a defendant may be offered by the state and may be considered in connection with the other evidence, that on evidence of defendant's flight it would be for the jury to say whether it was, in fact, a flight, and that evidence as to flight should be considered in the light of all the other evidence in the case,

including any explanation thereof, was proper. [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. §778.]

9. CRIMINAL LAW §759—QUESTION FOR JURY—INSTRUCTIONS—INFERENCES FROM EVIDENCE.

In a prosecution for robbery, where it appeared that a short time after the offense, defendant left the city, and did not return until he was brought back under arrest, the question whether he left from a consciousness of guilt and to escape arrest, or from innocent motives, was for the jury; and hence defendant's requested charges that, if the jury believed the evidence, they could not find any flight from a consciousness of guilt or a desire to escape arrest or punishment, were properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1737, 1738, 1790-1793; Dec. Dig. §759.]

10. CRIMINAL LAW §792, 796—INSTRUCTIONS—ACCESSORIES.

In a prosecution for robbery, a charge that in felony cases those punishable capitally or by imprisonment in the penitentiary, all parties concerned in its commission, or aiding or abetting its commission by words or actions giving assistance, support, or encouragement, would be equally responsible, and that the question of the punishment was left to the jury's discretion, was proper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1818-1820, 1928-1934; Dec. Dig. §792, 796.]

11. CRIMINAL LAW §807—TRIAL—ARGUMENTATIVE INSTRUCTIONS.

Requested charges in a trial for robbery that, before the jury could find defendant guilty, they must be satisfied to a moral certainty not only that the proof was consistent with his guilt, but that it was wholly inconsistent with every other reasonable conclusion, and that, unless so satisfied that they would act upon that decision in matters of the highest concern to themselves, they must acquit, and that, if the testimony was such that two conclusions could be reasonably drawn from it, the one favoring innocence, and the other establishing guilt, the law and justice demanded that the jury adopt the former and acquit, were argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. §807.]

12. CRIMINAL LAW §829—INSTRUCTIONS—GIVEN INSTRUCTIONS.

A requested charge which so far as correct is covered by a given charge is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. §829.]

13. CRIMINAL LAW §549—WEIGHT AND SUFFICIENCY OF EVIDENCE.

If there is a probability of defendant's innocence, he should not be found guilty.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1249, 1251; Dec. Dig. §549.]

14. CRIMINAL LAW §778—INSTRUCTIONS—PRESUMPTION OF INNOCENCE—AFFIRMATIVE CHARGE.

In a prosecution for robbery, defendant's requested charge that the legal presumption of innocence must be regarded by the jury as matter of evidence to the benefit of which he was entitled, and which attended him until the evidence placed his guilt beyond a reasonable doubt, "therefore you must acquit," was properly refused, as being the equivalent of an affirmative charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. §778.]

15. CRIMINAL LAW §807—TRIAL—ARGUMENTATIVE INSTRUCTION.

A requested charge that the humane provision of the law is that upon the evidence there should not be a conviction unless, to a moral certainty, it excludes every reasonable hypothesis other than guilt, that, no matter how strong the evidence, yet, if it might be reconciled with the theory that some other person had committed the offense, then defendant's guilt was not shown by the measure of proof which the law requires, was argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1859, 1960; Dec. Dig. §807.]

16. CRIMINAL LAW §784—REQUESTED INSTRUCTIONS—BURDEN OF PROOF.

In a trial for robbery, defendant's requested charge that his good character might be considered in connection with all the other evidence, and, if it raised a reasonable doubt as to his innocence, the jury should acquit, was erroneous, as requiring an acquittal on a reasonable doubt of innocence, instead of reasonable doubt of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. §789.]

17. CRIMINAL LAW §778—TRIAL—MISLEADING INSTRUCTION.

In a prosecution for robbery, a charge that, in order to convict, the jury must find that there was no other reasonable conclusion to be reached but that of guilt, and that, if it did not so find, the state had no case, and they should acquit, was misleading and incorrect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. §778.]

18. CRIMINAL LAW §827—TRIAL—ELLIPTICAL INSTRUCTION.

In a prosecution for robbery, a charge that the jury might take the showing or statement of a certain witness to the jury along with the indictment and other papers in the case, and in their consideration of the evidence might read such statement and discuss its connection with the other evidence, was objectionable, as being elliptical; since after reference to the absence of the witness, it allowed the jury to discuss its connection with the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2006; Dec. Dig. §827.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Thompson Ware was convicted of robbery, sentenced to 15 years imprisonment, and he appeals. Affirmed.

The facts sufficiently appear. The oral charge of the court set out on page 60 of the record is as follows:

Evidence may be offered tending to show flight of a defendant, and, when it is offered by the state, it may be considered by the jury in connection with the other evidence in the case. In the first place, where evidence is offered tending to show defendant's flight, that he went away from the scene of an alleged offense, it would be for the jury to say was it a flight as a matter of fact. You would have to determine from the evidence whether it was a flight or not, and then you would further consider such evidence in the light of all the other evidence in the case, including any explanation or statement which may be offered by defendant of the alleged flight, and whether it was a reasonable explanation or not, and all the other evidence in the case, giving each part of it such weight as you think it entitled to receive.

The oral charge on page 59 of the record is as follows:

It is the law of Alabama in felony cases, and by felony cases the law means an offense against the criminal law which is punishable capitally or by imprisonment in the penitentiary, so in felony cases all parties who are concerned in the commission of the felony, whether they directly commit the act constituting the felony, or aid and abet in its commission, are held to be equally responsible; so that, whether a party commits by himself the entire act which constitutes a felony, or if he is concerned with another in its commission, if he aids another in his commission, if he assists another in its commission by word or deed, either by words of encouragement, assistance, or support, or by actions giving encouragement, assistance, or support, either party under these circumstances would, in the eyes of the law, be held to be equally responsible; that is, so far as the personal guilt or innocence is concerned. The question of punishment is one which is always to be fixed by the jury entirely within their own discretion.

The following charges were refused defendant:

(X) If you believe the evidence in this case, you cannot find that there was any flight on the part of this defendant.

(Z) I charge you that you cannot find that there was any flight by defendant in this case from a consciousness of guilt or a desire to escape arrest or punishment.

(3) Before you can find defendant guilty, you must be satisfied to a moral certainty, not only that the proof is consistent with defendant's guilt, but that it is wholly inconsistent with every other reasonable conclusion, and, unless you are so satisfied that you would each venture to act upon that decision in the matters of the highest concern to your own interest, then you must find defendant not guilty.

(15) If the testimony in this case, in its weight and effect, be such as that two conclusions can be reasonably drawn from it, the one favoring defendant's innocence, and the other tending to establish his guilt, law, justice, and humanity alike demand that the jury should adopt the former and find defendant not guilty.

(17) In all criminal prosecution, the accused may give evidence of his previous good character, not only where a doubt exists on the other proof, but even to generate a reasonable doubt of his guilt.

(28) If there is a probability of defendant's innocence, he should be found not guilty.

(30) The legal presumption of innocence is to be regarded by the jury in every case as a matter of evidence to the benefits of which accused is entitled, and, as a matter of evidence, it attends the accused until his guilt is by the evidence placed beyond a reasonable doubt; therefore you must acquit.

(35) The humane provision of the law is that, upon the evidence, there should not be a conviction unless to a moral certainty it excludes every reasonable hypothesis other than that of the guilt of the accused. No matter how strong may be the fact, if they can be reconciled with the theory that some other person may have done the act, then the guilt of defendant is not shown by that full measure of proof which the law requires.

(42) The defendant's good character may be considered in connection with all the other evidence in the case, and, if it generate a reasonable doubt in the minds of the jury as to defendant's innocence, they must acquit him.

(43) The jury must find from the circumstances relied on in this, in order to convict that there is no other reasonable conclusion to be reached but that of defendant's guilt, and,

if you do not so find, then the state has failed to make out a case, and it is your duty to acquit.

(K) You will be permitted to take the showing or statement of the testimony of the witness Brown which was introduced in evidence in this case to the jury room with you, along with the indictment and other papers in the case, and, in considering the evidence in this case, it is permissible for you to read such showing or sworn statement of said witness Brown, and to discuss the connection with all the other evidence in the case.

Erle Pettus, of Birmingham, for appellant.
R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. The defendant was charged with robbery, an offense punishable capitally, and was convicted and given a sentence of 15 years.

The bill of exceptions contains the following statement with respect to the organization of the petit jury for the trial, to wit:

"John T. Palmer was a regular juror who had been organized and impaneled as such for the trial of capital cases for the week, among which was the case of the state against [the present defendant] Thompson Ware. This juror had been in attendance all the week from Monday, May 18th, till Thursday, May 21st [the day of the present trial]. All of the jurors, both regular and special, for the week were called around and qualified by the court separately for the trial of the present case. When the name of the above-named juror was called to be specially qualified for said case, he did not answer, and the bailiff was directed to, and did, call him from the court door. No other juror or person in the courtroom had seen him on the day of the trial, and he failed to answer to repeated calls. The court thereupon recessed for a few minutes, in response to defendant's objection to proceeding with the trial, and ascertained by telephoning to the office of the said juror that he had left early on the morning of that day (May 21st) and was out of the state, and that he would not return to the state till the next week. The party giving this information claimed to have gone to the train with said juror, and claimed that he had an emergency call out of the state."

And then, after reciting, among other things, that "the juror was absent without excuse, without leave of the court, and without the consent of defendant," and that "the defendant moved to quash the venire on the ground of the absence of the juror," and that the motion was overruled, and that defendant excepted, the bill of exceptions continues:

"The court then ordered the name of said juror, Palmer, to be stricken from the list of jurors which had been at the time of the trial furnished the defendant for the purpose of selecting a jury; and the name of the said juror, Palmer, was so stricken from the list after the same had been furnished to the defendant to strike the jury, and after the cause had been peremptorily called for trial; and the name of the juror was not stricken by the solicitor for the state, nor by the defendant or his attorneys, but was thus stricken off by order of the court because said juror did not answer when his name was called, but appeared to be absent without excuse, and was reported to have left the city without leave of court; and the defendant then and there duly objected and excepted," etc., to the action of the court in so ordering the striking of the name of the juror and in forcing defendant to trial.

[1, 2] Our jury law (Gen. and Loc. Acts 1909, p. 305) clearly relieves the action of the court, if otherwise it would have been erroneous, of any error, in that, in sections 17 and 32 thereof, it is expressly provided that:

"If the sheriff fails to summon any jurors, or if any person summoned fails or refuses to attend the trial, * * * none, or all of these grounds shall be sufficient to quash the venire, or continue the cause."

The juror here, though it does appear that he did attend the other trials that had been had in the court on the several days before defendant was tried, "failed to attend defendant's trial." While it is true that the statement made to the court over the telephone by the person at the juror's office to the effect that the juror had left the state was, since not sworn to, mere hearsay, and could furnish no legal basis, therefore, for finding such to be the fact, yet it was not necessary for the court, in order to proceed legally to the trial without the juror, to find that the juror had left the state. It is, as seen, entirely sufficient to this end that the juror "fails to attend the trial," which fact may be satisfactorily inferred from the failure of the juror to answer when, as here, his name is duly called in the court and at the door of the court. Even before the statute cited, the court was not bound to send for a juror, summoned in a capital case, who fails to answer when his name is called, although it be shown that the juror resides in the city where the court is held and was in the city at the time his name was drawn. *Johnson v. State*, 47 Ala. 9.

The indictment follows the Code form for charging the offense of robbery (Code, § 7161, form 96), and describes the property taken as:

"One gold watch of the value of \$95; one gold-filled watch of the value of \$3.75; one leather pocketbook of the value of 25 cents; one pocketknife of the value of 50 cents; one \$10 bill of the paper currency of the United States of America; and \$5 lawful money of the United States of America, a particular description of which \$5 is to the grand jury unknown."

J. E. Ryan, the person alleged to have been robbed, and who was the owner of the said property so alleged to have been taken from his person, testified as a witness for the state, and gave a description of such property, which, in all respects, corresponded with the description set out in the indictment as above quoted, except that he more particularly described the \$5 therein mentioned than it is therein described; he stating that it was a \$5 bill of the lawful currency of the United States of America, and that he so swore as a witness before the grand jury that found the indictment; while the indictment, as seen, charges that it was "\$5 lawful money [without stating whether it was in coin or currency] of the United States of America, a particular description of which said \$5 is to the grand jury unknown." This variance between allegation and proof (the proof showing, as seen, that the \$5 was in

currency, and that this fact was known to the grand jury, while the allegation shows that such description was not known to them) forms the basis for the defendant's contention that he was entitled to the general affirmative charge which he requested in writing, and which the court refused.

[3] While the general rule is, as appellant contends, that when a fact is known, or is proved, before the grand jury, there is no warrant in the law for them to aver in the indictment that such fact is unknown, and that, consequently, when it appears on the trial that a fact, alleged in the indictment to have been unknown to the grand jury, was known to them, a conviction on such indictment should not be allowed (*Winter v. State*, 90 Ala. 637, 8 South. 556; *Axelrod v. State*, 7 Ala. App. 61, 60 South. 959; *Childress v. State*, 86 Ala. 84, 5 South. 775; *Brown v. State*, 120 Ala. 342, 25 South. 182; *James v. State*, 115 Ala. 83, 22 South. 565; *Morris v. State*, 97 Ala. 82, 12 South. 276), yet, this rule is subject to the qualification that, if the fact alleged to have been unknown was not, in truth, a material fact, nor made so by the character of the averment, then the result mentioned does not follow, and the defendant would not be entitled to an acquittal, although it did appear on the trial that the fact was known to the grand jury. 34 Cyc. 1805; *Brown v. State*, 120 Ala. 342, 25 South. 182; *Bates v. State*, 152 Ala. 77, 44 South. 695; *Davis v. State*, 3 Ala. App. 71, 57 South. 493; *Bradford v. State*, 147 Ala. 95, 41 South. 462; *Carden v. State*, 89 Ala. 130, 7 South. 801; *McGehee v. State*, 52 Ala. 224; *State v. Stedman*, 7 Port. 495; *Lodano v. State*, 25 Ala. 64; *Collins v. State*, 70 Ala. 19; *Newsom v. State*, 107 Ala. 133, 18 South. 206; *Stone v. State*, 115 Ala. 121, 22 South. 275; *Gilmore v. State*, 99 Ala. 154, 13 South. 536.

A variance between allegation and proof which does not go to the extent of showing that the offense proved is not the offense charged is immaterial. *Meadows v. State*, 136 Ala. 67, 34 South. 183.

Here the evidence for the state, as developed in the testimony of the witness mentioned, showed, as stated, that there was taken from him, on the occasion of the alleged robbery, property corresponding in description with every article of the property as set out in the indictment—no more, no less—including the \$5. Whether, therefore, this \$5 was in coin or currency was, we think, immaterial to the identity of the offense, because the offense was sufficiently otherwise identified in the indictment. The offense being sufficiently otherwise identified therein by a definite description of the other property taken, a general description of the \$5 as “\$5 lawful money,” etc., was sufficient without any additional averment that a further description of the \$5 was unknown to the grand jury. Consequently such averment may be treated and rejected as surplusage. Authorities *supra*.

If the indictment had charged the taking of only the \$5 mentioned, which was not, under the authorities, sufficiently described without the additional averment that a further description was unknown to the grand jury, then there would be evident merit in the defendant's contention, because in such case the allegation that a further description was unknown to the grand jury was a material one; but the indictment, as seen, goes further, and charges the taking at the same time of, not only the \$5, but also \$10 and other articles of personal property, each of which, including the \$10 is described in the indictment with sufficient particularity to constitute it a valid charge as to them without any additional averment, which is omitted as to them, that a further description was unknown to the grand jury. Authorities last cited. *Peters v. State*, 100 Ala. 10, 14 South. 896; *Churchwell v. State*, 117 Ala. 124, 23 South. 72; *Thompson v. State*, 106 Ala. 67, 17 South. 512; *Boyd v. State*, 153 Ala. 41, 45 South. 591; *Thomas v. State*, 117 Ala. 84, 23 South. 659; *Burney v. State*, 87 Ala. 80, 6 South. 391; *Grant v. State*, 55 Ala. 201; *Reese v. State*, 90 Ala. 624, 8 South. 818.

In view of this fact, the grand jury might well have omitted, after describing, as they did, the \$5 as “\$5 lawful money of the United States of America,” any averment that a further description of the \$5 was to them unknown; since, even without this averment, the indictment would, we think, have been so sufficiently definite in describing the particular offense charged as to meet the requirements of good pleading. *State v. Murphy*, 6 Ala. 845; *Carden v. State*, 89 Ala. 130, 7 South. 801; *Newsom v. State*, 107 Ala. 133, 18 South. 206; *McGehee v. State*, 52 Ala. 224; *Grant v. State*, 55 Ala. 208; *State v. Stedman*, 7 Port. 495; *Lodano v. State*, 25 Ala. 64; *Collins v. State*, 70 Ala. 19; *Porter v. State*, 58 Ala. 68.

[4] Robbery being an offense in which there are no degrees, the value and amount of the property taken is entirely immaterial, provided it has some monetary value (*Jackson v. State*, 69 Ala. 249), and the description of such property in the indictment is only necessary to the extent of showing that such property is of a character that has some monetary value, and to the extent of identifying and making certain the particular act of robbery that it is intended to charge.

The indictment here having described, as seen, definitely all the other property taken except the \$5, the act of robbery charged was, we think, sufficiently identified without a particular description of the \$5. If a particular description of the \$5 was unnecessary to the identity of the offense, and hence to the validity of the indictment, then an averment that a particular description was unknown to the grand jury was equally unnecessary, and may be rejected as surplusage. Authorities *supra*.

[5] The error of the court in permitting the witness Ryan to testify as to what the watches alleged to have been taken cost him was harmless; since he subsequently testified that that was their value. On a charge of robbery it is only necessary that the property taken have some monetary value. *Jackson v. State*, 69 Ala. 249. This, as seen, sufficiently appeared by legal testimony.

[6] There was no error in allowing the witness Ryan to state where he bought the watches, as this evidence, corroborated by the testimony of the persons from whom he bought them, aided in identifying the watches recovered as the watches that were taken.

Defendant's counsel urge in brief that they should have been permitted to ask the state's witness Streit, who testified with reference to defendant's alleged confessions, as to whether or not "there was any such thing as a third degree" employed in extracting the alleged confession. It appears from the record that the defendant was allowed full latitude in this particular, and that the witness was permitted to answer fully and completely all questions propounded on this subject. He stated that no such methods were employed.

[7] It further appears that the state laid an ample predicate for the introduction of the evidence as to the alleged confessions, which showed prima facie that they were voluntarily made. *Franklin v. State*, 28 Ala. 9; 1 Mayf. Dig. 204, § 3.

[8] The part of the oral charge with reference to flight that was excepted to on page 60 of the record was free from error. 1 Mayf. Dig. 331, § 17; *Bowles v. State*, 58 Ala. 335; *Ross v. State*, 74 Ala. 532.

[9] So was the action of the court in refusing charges X and Z on the same subject. The evidence shows that a short time after the commission of the offense the defendant did leave the city of Birmingham, and did not return until he was brought back under arrest. Whether he left from a consciousness of guilt and to escape arrest or from innocent motives, as he claims, was for the jury to say.

[10] There was no error in that part of the oral charge, excepted to on page 59 of the record. *Malachi v. State*, 89 Ala. 134, 8 South. 104.

[11] Charges 3 and 15 were argumentative. *Stevens v. State*, 6 Ala. App. 6, 60 South. 459.

[12] Charge 17, if a correct exposition of the law, was covered by given charge 16.

[13] Charge 28, though held good in *Fleming v. State*, 150 Ala. 19, 43 South. 219, and *Adams v. State*, 175 Ala. 11, 57 South. 591, is fully covered by given charges 8 and 9.

[14] Charge 30 was patently bad, being in its concluding sentence the equivalent of the affirmative charge.

[15] Charge 35, if not faulty, as being argumentative, is fully covered by given charge 24.

Charge 39 is a practical duplicate of given charge 27.

[16] Charge 42 was bad, if for no other rea-

son, because it asserts that, if the jury have a reasonable doubt of defendant's innocence, they must acquit him; whereas the law is that, if they have a reasonable doubt of his guilt, they must acquit him.

[17] Charge 43 was misleading and incorrect. The correct proposition of law attempted to be set out in this charge is contained in given charges 10 and 22.

[18] Charge K, if not otherwise objectionable, is so because elliptical, in this, that after referring to the showing made for the absent witness, Brown, it asserts that it is permissible for the jury "to discuss the connection with all the other evidence in the case." Evidently something is omitted, since the sentence, as quoted, fails to make sense.

We have discussed the only points urged in brief. As we find no error in the record, the judgment of conviction is affirmed.

Affirmed.

(12 Ala. App. 237)

FINNETT v. STATE. (No. 361.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

1. JURY ~~§~~70—SPECIAL VENIREMEN—DRAWING FROM JURY BOX.

Under Jury Law (Acts 1909, p. 314) § 20, providing that, whenever there are not enough qualified jurors in attendance, the judge shall draw from the jury box names of as many jurors as he deems necessary, who are or reside within five miles of the courthouse, the judge could not discard the names of three jurors, as they were being drawn from the jury box, where it was admitted that they were within five miles of the courthouse, because one was a brother of the defendant who would be tried at the same time, and another was a mayor, who might claim an exemption.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. ~~§~~70.]

2. JURY ~~§~~58—SPECIAL VENIRE—STATUTE.

The curative provisions of section 29 of the Jury Law (Acts 1909, p. 317) have no application to what constitutes a legal venire.

[Ed. Note.—For other cases, see Jury, Cent. Dig. § 266; Dec. Dig. ~~§~~58.]

Appeal from Circuit Court, Bullock County; M. Solle, Judge.

George Finnett was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. [1] Section 20 of the Jury Law (Acts 1909, p. 314) provides:

"Whenever there are not enough qualified jurors in attendance upon the court to form the juries required, the judge of the court shall draw from the jury box names of as many jurors as he may deem necessary, who are then within, or reside within, five miles of the courthouse," and shall require the sheriff forthwith to summon all jurors thus drawn to attend court at the time their services are required.

The record in this case shows that at the term at which the defendant was tried there were not enough jurors in attendance upon the court to form the necessary juries required for the disposition of the business before the court, and that the court entered up an order for the purpose of supplying the de-

iciency. It clearly appears, however, from the recitals in the bill of exceptions, that the judge did not follow the spirit or the letter of the law in the formation of the jury in drawing the names of the jurors from the jury box.

It appears from the record in this case relating to the manner of drawing these additional jurors that, while engaged in drawing the jury, the names of three different jurors who resided within five miles of the courthouse, and whose names as they appeared on the cards in the jury box were exposed to view by the judge and came to his attention, but were rejected by him, and not taken from the jury box and ordered to be summoned as jurors, although the names were seen and taken into account by the judge, to whom it was made known at the time by the sheriff, of whom the judge had requested the information, that each of said jurors did, in fact, live within five miles. The bill of exceptions recites in this connection:

"In all other instances he [the judge] drew as he came to them the persons as he found them in said [jury] box, after ascertaining that they resided, or at the time were, within five miles of the court."

It is not enough that the judge did this "in all other instances." The statute makes no exception, and places no discretion of this nature with the judge drawing the names from the jury box in forming a jury. The law provides the qualifications of jurors and the method of forming venire, and in the drawing of names to constitute a venire the judge is given no authority, and is vested with no right, by virtue of his office, to discriminate between jurors possessing the legal qualifications, and have some ordered, summoned, and placed upon the venire and reject others.

In drawing one at a time the necessary names from the jury box to constitute a venire, it is the judge's duty to accept and order summoned all of those persons whose names he comes to on the cards in the order of coming to them who fulfill the requirements of qualified jurors for the venire being formed as provided by the statute. No authority or discretion whatever is vested in the judge in the formation of a venire by drawing the names of jurors from the jury box under our jury law to reject the names of persons that meet the legal requirements, because for some reason of his own he deems them undesirable persons to serve as jurors in certain cases appearing on the docket, as seems to have been the idea of the trial judge from the reasons set out in the bill of exceptions for his action in thus discriminating and rejecting the three names referred to. The only reason set out for the judge's having rejected one of the three names is stated to be due to the fact that the cases on the docket standing for trial were principally for the violation of the prohibition laws, and that this man was rejected by the judge, and not plac-

ed upon the venire for the week as a juror, because he was a brother of a defendant charged with violating the prohibition law in one of the cases set for trial during the week. The fact that this person was so unfortunate as to have a brother charged with the violation of the prohibition laws whose case was set for trial during the same week with other defendants charged with like offenses would not, without more than this unhappy relationship to render him incompetent and unfit for jury service, disqualify him as a juror in this defendant's case and the other cases with which his brother had no connection, and his rejection as a juror by the judge in drawing the jury on this account was entirely unauthorized. It is stated in the bill of exceptions that another of the names was not accepted and the person not ordered summoned as a juror by the judge drawing the jury because such person was the acting and de jure mayor of Union Springs, and the judge thought he would claim his exemption from jury service. His rejection by the judge in drawing the jury on this account was unwarranted, whether the juror did or did not have an exemption from jury service that he might or might not claim as a privilege when summoned. Nor did the judge have the right or discretion in drawing the jury to reject the name of the person who the sheriff informed the judge could probably not be found, because said to be temporarily out of the county.

Timely and appropriate objections to the action of the court in rejecting each of the names on the cards in the jury box were made by the defendant, and separate exceptions reserved to the court's rulings, at the time of drawing the jury; and, before going to trial, the defendant moved to quash the venire from which he was required to select a jury for the trial of the case against him because it did not contain the names of the said three persons discarded or rejected. From what we have said it follows that the judgment of the circuit court must be reversed, because the defendant was not tried by the venire to which, under the law, he was entitled.

[2] The curative provisions of section 29 of the Jury Law have no application to what constitutes a legal venire, and, the defendant having been denied his right to have such a venire in the trial of his case, the judgment of conviction must be reversed. *Jackson v. State*, 171 Ala. 38, 43, 55 South 118.

We find no other error in the record.
Reversed and remanded.

(12 Ala. App. 667)

MERINO v. STATE. (No. 863.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

Appeal from Circuit Court, Bullock County; M. Sollie, Judge.

Cicero Merino was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., for the State.

BROWN, J. The record in this case presents the identical question disposed of in the case of *Finnett v. State*, 67 South. 768, and on the authority of that case the judgment of the circuit court must be reversed.

Reversed and remanded.

(12 Ala. App. 670)

SNEAD v. STATE. (No. 362.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

Appeal from Circuit Court, Bullock County; M. Sollie, Judge.

John Henry Snead was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., for the State.

THOMAS, J. The identical question in this case was decided by this court in the case of *George Finnett v. State*, 67 South. 768, and on that authority the judgment of conviction here appealed from is reversed.

Reversed and remanded.

(12 Ala. App. 663)

CHAPPELL v. STATE. (No. 360.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

Appeal from Circuit Court, Bullock County; M. Sollie, Judge.

Celia Chappell was convicted of crime, and she appeals. Reversed and remanded.

W. L. Martin, Atty. Gen., for the State.

BROWN, J. The record in this case presents the identical question disposed of in the case of *Finnett v. State* (Ala. App.) 67 South. 768, and on the authority of that case the judgment of the circuit court must be reversed.

Reversed and remanded.

(12 Ala. App. 133)

BLACK v. STATE. (No. 793.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

CRIMINAL LAW \S 1131—**DISMISSAL—ESCAPE OF DEFENDANT.**

While defendant's appeal would be dismissed for his unlawful escape pending the appeal, defendant, by returning to custody, submitting to the jurisdiction of the Supreme Court, and complying with the rules, could be heard at the next regular call of the docket of the division to which he belonged.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2971-2979, 2985; Dec. Dig. \S 1181.]

Appeal from Circuit Court, Cullman County; D. W. Speake, Judge.

Asbery Black was convicted of seduction, and appeals. Dismissed.

R. C. Brickell, Atty. Gen., for the State.

PELHAM, P. J. The defendant, who takes the appeal in this case, from a judgment of conviction in the trial court of seduction, imposing a sentence in the penitentiary for a term of 10 years, has unlawfully escaped. It has been made known to the court by good and sufficient proof that subsequent to taking the appeal, which is here on certificate under seal of the clerk of the trial court, the defendant escaped from the custody of the officers holding him on this charge in the county jail of Cullman county,

and is now a fugitive from justice. The appeal is dismissed on the motion of the Attorney General. By returning to the custody of the proper officer of the law, submitting himself to the jurisdiction of this court, and complying with all the rules of procedure, the case can be heard at the next regular call of the docket of the division to which the case belongs. *Warwick v. State*, 73 Ala. 486, 49 Am. Rep. 59.

Dismissed.

BROWN, J., not sitting.

(12 Ala. App. 669)

SHAW v. STATE. (No. 335.)

(Court of Appeals of Alabama. Feb. 11, 1915.)

CRIMINAL LAW \S 1131—**APPEAL—DISMISSAL—GROUNDS—ESCAPE PENDING APPEAL.**

Where defendant, pending his appeal, escaped from custody and became a fugitive from justice, the appeal must be dismissed on motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2971-2979, 2985; Dec. Dig. \S 1131.]

Appeal from Circuit Court, Marshall County; W. W. Haralson, Judge.

David C. Shaw was convicted of crime, and he appeals. Appeal dismissed.

Street, Isbell & Bradford, of Albertville, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The Attorney General makes a motion to dismiss the appeal in this case because the defendant, pending appeal, has escaped from the custody of the officers of the law. It has been made known to the court by good and sufficient proof that the defendant is a fugitive from justice, having escaped from the jail of Marshall county, where he was in custody and held by the officers of the law charged with that duty, and the motion is therefore granted. *Black v. State*, supra; *Warwick v. State*, 73 Ala. 486, 49 Am. Rep. 59.

Appeal dismissed.

(12 Ala. App. 147)

DAVIS v. STATE. (No. 340.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

1. LARCENY \S 30—**INDICTMENT—DESCRIPTION OF PROPERTY—SUFFICIENCY.**

The description in an indictment describing the property as lawful money of the United States of specific denominations is sufficient to enable the jury to determine that the proof of the money taken from the person of prosecutor was the same as that described in the indictment.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. \S 64-75, 99; Dec. Dig. \S 30.]

2. INDICTMENT AND INFORMATION \S 61—**AVERTMENT OF FACTS JUDICIALLY NOTICED.**

The value of money described as lawful money of the United States is a matter of judicial knowledge, of which no averment or proof is required.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 183; Dec. Dig. \S 61.]

Appeal from City Court of Andalusia; Ed T. Albritton, Judge.

Barney Davis was convicted of crime, and he appeals. Affirmed.

S. H. Gillis, of Andalusia, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. [1, 2] The indictment described the property as:

"Thirty-eight dollars, lawful money of the United States, consisting of two ten-dollar bills of the denomination of ten dollars each, one five-dollar bill of the denomination of five dollars; one one-dollar bill of the denomination of one dollar, eight silver dollars of the value of eight dollars, and four dollars in silver, consisting of twenty-cent pieces and fifty-cent pieces, the property of Ed McGhee."

This description was sufficiently certain to enable the jury to determine what the proof showed was taken from McGhee's person was the same as that described in the indictment, and, the money described being lawful money of the United States, its value is a matter of judicial knowledge, of which no averment or proof was required. *Hamilton v. State*, 147 Ala. 113, 41 South. 940; *Chisolm v. State*, 45 Ala. 66; *Rector v. State*, 66 South. 857; *Wall v. State*, 78 Ala. 418; *Jackson v. State*, 69 Ala. 252; 25 Cyc. 187.

The use of the word "is," instead of "in," in the connection pointed out in the demurrer, was a clerical mistake which is self-correcting. The indictment was sufficient, and the demurrer thereto was properly overruled.

The appeal is on the record proper without bill of exceptions, and, as the question above discussed is the only question presented for review, the judgment must be affirmed.

Affirmed.

(12 Ala. App. 241)

MAXWELL v. STATE. (No. 271.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. WITNESSES \S 374—IMPEACHMENT—INTEREST.

The exclusion of evidence that the principal witness for the prosecution against one charged with violating the prohibition law had been a witness in other cases instituted by the same party against other persons, which evidence could have a bearing on the issues only as tending to show that the witness had been paid to testify, was not error, where the question of payment of the witness was fully gone into on cross-examination and redirect examination.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 1201, 1202; Dec. Dig. \S 374.]

2. WITNESSES \S 376 — RECEPTION OF EVIDENCE—REBUTTAL.

Where witnesses for a defendant who was charged with violating the prohibition law had testified that a witness for the prosecution stated that the prosecuting witness was paying \$10 a head for turning up blind tigers, and was promising better jobs, it was proper to permit the solicitor to show by the prosecuting witness in rebuttal that he had not paid or offered to

pay that witness or any one else money or to give a better job on that account.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 1204—1206; Dec. Dig. \S 376.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

John Maxwell was convicted of violating the prohibition law, and he appeals. Affirmed.

It appears from the testimony that Abbott, the principal witness for the state, Stone, and other witnesses, were employed in the Profile Cotton Mills, and that the officers of the mill were endeavoring to break up tigers about it. Abbott had testified to purchasing liquor from the defendant, and other witnesses introduced by the defendant had stated that Abbott had told them that they were paying \$10 a head for those who turned up tigers, and that Stone was the one authorizing the payment, and was also promising the ones a better job. Stone was permitted to testify in rebuttal that he had not paid or offered to pay Abbott, or any one else, any money or give them a better job for turning up tigers.

T. C. Sensabaugh, of Anniston, for appellant. William L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] The fact that the witness Abbott had been a witness in other cases made by one Stone against other parties than the defendant could have no other bearing on the issues before the court than a purpose to show that the witness was paid, or had been promised pay, to testify in the case at bar, and the court permitted the defendant's counsel to ask the witness all questions on cross-examination reasonably calculated to have a tendency to elicit testimony on that subject. On redirect examination the matter was gone into fully, and the witness stated that he had received no pay or promise "in any way, shape, or form" if he would "testify or turn up a tiger." The various rulings of the court on admitting and rejecting the testimony of the witness Abbott were without error or abuse of discretion.

[2] The questions asked the witness Stone by the solicitor on rebuttal and permitted by the court against the objection of defendant's counsel were proper, and the responsive answers given to them were relevant and admissible for the purpose of contradicting the evidence that had been brought out by the defendant. The evidence elicited was strictly in rebuttal of matters the defendant had previously introduced into the issues, and the court committed no error in permitting the questions to be answered.

No other question is presented other than those we have discussed.

Affirmed.

(12 Ala. App. 212)

MAXWELL v. STATE. (No. 272.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. CRIMINAL LAW §448 — OPINION EVIDENCE—CONCLUSION FOR JURY—PROBABILITY OF MISTAKE.

Where the prosecuting witness testified that he bought beer at defendant's house in a room partially dark, that his eyesight was poor, but that it was his best judgment that it was defendant, and not defendant's son, that sold the beer, it was not error to sustain an objection to a question on cross-examination whether it was probable that he had been mistaken as to the identity of the seller; since that called for a conclusion upon a matter which was for the jury to determine.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1035-1039, 1041-1043, 1045, 1048-1051; Dec. Dig. §448.]

2. CRIMINAL LAW §1170½ — APPEAL — HARMLESS ERROR—QUESTION—CURE BY ANSWER.

Error, if any in permitting the witness to be asked whether he had had any conversation with defendant since being summoned as a witness was not prejudicial to defendant, where the witness answered in the negative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. §1170½.]

3. CRIMINAL LAW §338 — EVIDENCE — CIRCUMSTANCES — SUBSEQUENT CONDUCT OF THIRD PERSON.

In a prosecution for a violation of the prohibition law, it was not error to exclude evidence offered by defendant that a detective who did not testify in the case had been talking with the witness for the defendant, who had thereafter left; since, even if the witness was induced by the detective to leave, it could not affect the issues in the case or the credibility of any witness who testified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 755, 756, 787, 788, 801, 855; Dec. Dig. §338.]

4. CRIMINAL LAW §807, 811—INSTRUCTIONS —ARGUMENTATIVE REQUEST—SINGLING OUT TESTIMONY.

In a prosecution for a violation of the prohibition law, a requested charge that, if there was a resemblance between defendant and his son, the jury should consider the prosecuting witness' opportunity to see and recognize the defendant in the room, the condition of his eyesight, and ability to recognize defendant, and, if they had a reasonable doubt whether it was the defendant that sold the beer, they should acquit, was argumentative, and singled out, and gave undue prominence to, a portion of the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1805, 1959, 1960, 1969-1972; Dec. Dig. §807, 811.]

5. CRIMINAL LAW §814—INSTRUCTIONS—ABSTRACT REQUEST.

Where the prosecuting witness testified that, in his best judgment, the person from whom he bought beer was defendant, a requested charge that the mere fact that the beer was bought at defendant's house and the party who sold it looked like defendant did not warrant a conviction was abstract.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1821, 1833, 1839, 1860, 1865, 1883, 1890, 1924, 1979-1985, 1987; Dec. Dig. §814.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

John Maxwell was convicted of violating the prohibition law, and he appeals. Affirmed.

The following are the charges refused to the defendant:

(1) If there was a sharp resemblance between Jason Maxwell and this defendant, then it would be your duty to consider the witness Haralson's opportunity to see and recognize the defendant in the room, and the conditions of his eyesight, and his ability to see and observe the party from whom he says he purchased the beer, and if from the whole evidence you have a reasonable doubt as to whether it was the defendant, John Maxwell, that sold the beer, if beer was sold, then you should find defendant not guilty.

(2) The court charges that the jury would not be warranted in finding the defendant guilty upon the mere statement of the witness Haralson that he bought the beer at defendant's house, and the party he purchased it from looked like defendant.

T. C. Sensabaugh, of Anniston, for appellant. William L. Martin, Atty. Gen., for the State.

THOMAS, J. Appellant was convicted of violating the prohibition law.

[1] The first exception shown by the record relates to the action of the trial court in refusing to allow defendant's question to the state's witness Haralson on cross-examination as to whether or not it was probable that the witness, who testified that he had purchased beer from defendant, was mistaken as to the identity of the defendant. This clearly called for the conclusion of the witness upon matters not requiring expert knowledge, and upon an issue which it was the peculiar province of the jury to find. The witness was permitted fully and in detail to state on cross-examination as to the time, place, circumstances, and conditions under which he bought the beer, and as to the resemblance between defendant and defendant's son, and as to how long he had known each and how often he had seen them. He testified that he bought the beer at defendant's house; that the room wherein the beer was delivered to him was "sort of dark" on the inside, the doors being closed, and there being shades over the windows; that the party who sold him the beer was in the room, and never came on the outside; that witness' eyes were weak; but that it was his best judgment that it was defendant, and not defendant's son, who resembles defendant, that sold and delivered witness the beer. As to whether or not the defendant was "probably mistaken" in his best judgment was a question for the jury, and the court committed no error in this case in sustaining the state's objection to the question mentioned.

[2] The fact that the court permitted the state to ask, over defendant's objection, the witness if he had had a conversation with defendant since being summoned as a wit-

ness, if error, was without injury, since the witness answered in the negative.

[3] Defendant's counsel asked defendant, when on the stand as a witness for himself, substantially, "Do you know whether or not Detective Stone has talked to your witness Odum, who has left here this morning, and is not present to testify?" The court sustained an objection to the question, when defendant's counsel then announced, "We propose to prove that he has talked to him," and excepted to the action of the court in sustaining the objection. It will be observed that there is no suggestion in the announcement that the talking, which defendant offered to prove, that had been done by Stone to defendant's witness, was with reference to or about this case; but, even if it was, there would be no error in the action of the court in declining to permit the proof, since any bias or interest that may have been displayed by Stone in the prosecution, even if it went to the extent that he induced or frightened defendant's witness said Odum into leaving court before testifying, and any intimidation that Odum may have felt, would be immaterial to the consideration here, since neither Stone nor Odum testified at the trial. Such proof would be of value in a contempt proceeding against Stone, but certainly of none on this trial.

[4] Charge 1 refused to the defendant was argumentative, and sought to single out, and give undue prominence to, a portion of the testimony.

[5] Charge 2, besides being otherwise faulty is abstract; since the witness Haralson referred to in the charge testified that, in his best judgment, the person from whom he bought the beer was defendant.

We find no error in the record, and the judgment of conviction is affirmed.

Affirmed.

(12 Ala. App. 16)

JAMES v. STATE. (No. 171.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW § 696—EXAMINATION—RESPONSIVE ANSWERS.

A statement by a witness not responsive to the question may be properly excluded on motion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1639-1644; Dec. Dig. § 696.]

2. HOMICIDE § 174—EVIDENCE—RES GESTÆ.

Evidence that, after the shooting, accused went for a doctor, is properly excluded when no part of the res gestæ.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.]

3. CRIMINAL LAW § 413—EVIDENCE—SELF-SERVING DECLARATION—RES GESTÆ.

A statement by accused, immediately after the shooting, that he did not intend to shoot deceased, is inadmissible as being a self-serving declaration, unless so closely connected with the shooting as to be part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 928-935; Dec. Dig. § 413.]

4. CRIMINAL LAW § 364—EVIDENCE—ADMISSIBILITY—RES GESTÆ.

Where accused shot his mother's maid, and, in response to his mother's question as to who was shot, the maid answered that accused had shot her, and he replied he did not mean to do it, evidence of accused's statement was admissible as part of the res gestæ.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. § 364.]

5. CRIMINAL LAW § 1119—APPEAL—QUESTIONS PRESENTED FOR REVIEW.

Where the record did not show that the court acted upon the motion of the state's solicitor to exclude competent evidence, there is nothing for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2927-2930; Dec. Dig. § 1119.]

6. HOMICIDE § 250—OFFENSES—MURDER—INVOLUNTARY MANSLAUGHTER.

Deceased made a dying declaration that, on her refusal to comply with accused's request, he shot her. Accused testified that he was playing with a pistol which he did not know was loaded and accidentally shot deceased. Held that, if deceased's version was correct, accused was guilty of murder, because no provocation short of battery or an assault can reduce an intentional killing to manslaughter in the first degree, while, if accused's version was correct, he was guilty of no offense unless involuntary manslaughter if he was negligent.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.]

7. HOMICIDE § 309—INSTRUCTIONS—REFUSAL.

While, under the evidence, accused could not be guilty of manslaughter in the first degree, the refusal of a charge that he could not be convicted of that offense is not error, where he might have been convicted of involuntary manslaughter, and the charge did not require consideration of that offense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649, 650, 652-655; Dec. Dig. § 309.]

8. CRIMINAL LAW § 815—TRIAL—INSTRUCTIONS—IGNORING ISSUES OR EVIDENCE.

In a prosecution for homicide, an instruction predicated an acquittal on a theory of accidental shooting, which ignored the question whether accused was intentionally pointing the pistol at deceased, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.]

9. CRIMINAL LAW § 815—TRIAL—INSTRUCTIONS—IGNORING EVIDENCE.

An instruction authorizing an acquittal on the ground of conflicts in the state's evidence is properly refused because ignoring the whole evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. § 815.]

10. CRIMINAL LAW § 807—TRIAL—INSTRUCTIONS.

A requested charge that the state has the burden of convincing the jury beyond reasonable doubt of accused's guilt, and he cannot be convicted because of the absence of evidence, but the jury must consider only the evidence which has been offered, is properly refused as argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. § 807.]

Appeal from Circuit Court, Tallapoosa County; S. L. Brewer, Judge.

Burley James was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The facts sufficiently appear from the opinion. The following charges were refused defendant:

(2) If the jury believe from all the evidence that the shooting was accidental, you will find defendant not guilty.

(6) If the jury had a reasonable doubt as to whether the shooting of Donie Wright was intentional or accidental, you will find defendant not guilty.

(7) If the jury find that there are conflicts in the evidence offered by the state in this case, and if from this the jury had a reasonable doubt of the guilt of defendant, you should find him not guilty.

(12) The burden is on the state to convince the jury beyond a reasonable doubt that defendant is guilty before you can convict him, and you cannot find him guilty because of the absence of evidence, but you must consider only the evidence that has been offered in the case.

Jas. W. Strother, of Dadeville, and J. W. Nolen, of Alexander City, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. [1, 2] The statement of the witness Dr. Hodge (who, after the shooting, professionally attended the deceased), to the effect that defendant came for him to do so, was properly excluded on motion of the solicitor; and this for two reasons: First, because such statement was not in response to any question that had been propounded to the witness; and, second, because it does not appear that defendant's act in going for the witness was any part of the *res gestæ* of the crime. *Maxwell v. State*, 65 South. 734; *Dick v. State*, 87 Ala. 61, 6 South. 395; *Lundsford v. State*, 2 Ala. App. 41, 56 South. 89. For the latter reason, it was likewise not error for the court to decline to permit the defendant to state that he went for the doctor to attend deceased. Authorities *supra*.

[3] The declaration of the defendant, alleged to have been made immediately after the shooting, to the effect that he did not intend to shoot deceased, was entirely self-serving, and, consequently, inadmissible, unless shown to have been so closely connected with the main fact that it may be affirmed by the court with reasonable certainty that it formed part of the *res gestæ*. *Lundsford v. State*, *supra*, and other authorities *supra*.

[4] It appears that the shooting took place at the horse lot on the premises of defendant's parents near the dwelling house thereon, where the parties resided with defendant's parents (the defendant being a son and the deceased being a hired girl living in the family); that there had been no ill will or bad feeling between the two; that on the occasion in question they had gone to the lot, the former to feed the mule and the latter to give shucks to the cow; that while they were out there the pistol shot was fired that

hit deceased and from which she subsequently died; that defendant's mother, who was in the house at the time, did, immediately on hearing the shot, call out from the house to the parties in the lot and inquire as to what was the matter; that deceased replied that defendant had shot her; and that defendant replied that he "did not go to do it." It would seem that this declaration on his part, made immediately after the shooting, at the scene thereof, in the presence of deceased and under the circumstances as detailed, was admissible as a part of the *res gestæ*; since acts and declarations may form part of the *res gestæ*, though not in point of time exactly coincident with the main fact, provided they stand in the relation of unpremeditated results and were produced by and instinctive upon the occurrences to which they relate, rather than the retrospective narration of such occurrences. *Nelson v. State*, 130 Ala. 83, 30 South. 728; *Lundsford v. State*, 2 Ala. App. 38, 56 South. 89; 1 Mayf. Dig. 772.

[5] However, while it does appear that the solicitor moved to exclude the testimony of defendant's mother, who, testifying as a witness for him, stated that the defendant said at the time mentioned that he "did not go to do it," yet it does not appear that the court ever acted on this motion, and consequently, for aught to the contrary appearing, the declaration remained in as evidence. Consequently, no ruling of the court is presented for review in this particular.

[6] There were only two persons present at the time of the shooting—deceased and defendant. The dying declarations of deceased were to the effect that defendant asked her to assist him in shucking some corn, that she refused, and that he immediately shot her as she turned to go; while the statement of defendant, as a witness for himself, was to the effect that while he and deceased were at the lot he was "projecting" with a pistol which he did not know was loaded, and that deceased was shot as a result of its accidental discharge.

If the testimony of the deceased be believed, then the defendant intentionally shot her and was, under the law, guilty of nothing less than murder, because no provocation short of a battery or an assault can reduce an intentional killing to manslaughter in the first degree. *Judge v. State*, 58 Ala. 406, 29 Am. Rep. 757; *Nutt v. State*, 63 Ala. 180; *Martin v. State*, 119 Ala. 1, 25 South. 255; *Prior v. State*, 77 Ala. 56; *Grant v. State*, 62 Ala. 233.

On the other hand, if the testimony of defendant be believed, then the killing was entirely accidental, and he is guiltless in the eyes of the law, unless he either intentionally pointed the pistol at deceased or handled it—a dangerous weapon—with gross negligence, in either of which latter events he would be guilty of involuntary manslaughter, although the shooting was, as he contends,

an accident. *Gibbs v. State*, 7 Ala. App. 32, 60 South. 999; *Johnson v. State*, 94 Ala. 41, 10 South. 667; *Sanders v. State*, 105 Ala. 4, 16 South. 935; *Fitzgerald v. State*, 112 Ala. 40, 20 South. 966; *Medley v. State*, 156 Ala. 78, 47 South. 218.

[7] Hence, under the law as applicable to the evidence, the defendant could only be guilty of either murder or involuntary manslaughter. There was no theory of the evidence upon which he could be convicted of manslaughter in the first degree, of which he was found guilty by the jury. However, although this be true, we are of opinion that the court did not err in this case in refusing to give the following written charge requested by defendant, to wit, "The court charges the jury that, under the evidence in this case, you cannot find the defendant guilty of manslaughter in the first degree," because, as has been often held, such a charge is confusing and misleading as applied to a case where the offense charged is, as here, divided into degrees, since such a charge omits to require a consideration by the jury of the other degrees charged. *Stoball v. State*, 116 Ala. 454, 23 South. 162; *Williams v. State*, 161 Ala. 52-58, 50 South. 59; *Olive v. State*, 8 Ala. App. 178, 63 South. 36.

[8] Charges 2 and 6 were each properly refused, since each predicated an acquittal of defendant upon a belief by the jury that the shooting was accidental and ignored the question as to whether or not he was intentionally pointing the gun at her, and, if not, as to whether in handling it he was or not guilty of gross negligence. Authorities *supra*.

[9] Charge 7 ignores the consideration of the whole evidence.

[10] Charge 12, if not otherwise faulty, is argumentative.

We find no error in the record, and the judgment of conviction is affirmed.
Affirmed.

(12 Ala. App. 22)

HICKMAN v. STATE. (No. 281.)

(Court of Appeals of Alabama. Feb. 11, 1915.)

1. WITNESSES \Leftrightarrow 380—IMPEACHMENT.

While a party cannot directly impeach the character of his own witness for the purpose of discrediting testimony given by the witness, he may, if the witness proves hostile or has misled him by previous statements, by leading questions call the attention of the witness to such previous contradictory statements, and hence in a prosecution for homicide, where the state called accused's daughter, who was the wife of deceased, it was not improper to question her as to contradictory statements made when testifying before the grand jury.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1210-1219; Dec. Dig. \Leftrightarrow 380.]

2. WITNESSES \Leftrightarrow 363—IMPEACHMENT.

Where a witness called by the state, who was related to accused, did not testify as the state had been led to expect, the state may examine the witness as to her visits to accused

for the purpose of showing that she had recently come under his influence.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1177, 1178, 1181; Dec. Dig. \Leftrightarrow 363.]

3. HOMICIDE \Leftrightarrow 203—EVIDENCE—DYING DECLARATION.

Where deceased, after having expressed a hope of recovery, later stated that he was badly shot and would never get up from his bed, there was sufficient predicate for the admission of his statement of the difficulty as a dying declaration.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. \Leftrightarrow 203.]

4. CRIMINAL LAW \Leftrightarrow 413—EVIDENCE—SELF-SERVING DECLARATION.

Where accused, a few minutes after firing the fatal shot, told a witness that he had killed deceased, but that he had to, the statement, while a confession, was not admissible for the defense, being also a self-serving declaration.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 928-935; Dec. Dig. \Leftrightarrow 413.]

5. CRIMINAL LAW \Leftrightarrow 864—EVIDENCE—RES GESTÆ.

A statement, made by accused a few minutes after firing the fatal shot and after he had left the scene of the difficulty, by which he explained that he had to kill deceased, is not admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 805, 808-810, 813, 816-818; Dec. Dig. \Leftrightarrow 864.]

6. CRIMINAL LAW \Leftrightarrow 1170—APPEAL—HARMLESS ERROR.

Where a statement by accused was undisputed, and he testified thereto himself, he was not prejudiced because the court refused to allow him to also prove it by other witnesses.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3145-3153; Dec. Dig. \Leftrightarrow 1170.]

Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge.

Osband Hickman was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The defendant was indicted for murder in the second degree for killing Asbury Rushing by shooting him with a gun, and was convicted of manslaughter in the first degree. The deceased was the son-in-law of the defendant, having married the defendant's daughter "Bama," in August, 1913, who at the time of the trial deposed to being 18 years of age. The evidence shows that the deceased, with his wife, lived only a short distance from the residence of the defendant; that on the day the homicide was committed the deceased and the defendant had gone to town together, returning home late in the afternoon, and on arriving at the house of the deceased defendant invited deceased and Bama to accompany him to his home and take supper with him; that they accepted the invitation and went with the defendant. The evidence has tendencies going to show that both the deceased and the defendant were drinking. While deceased and his wife were in the kitchen at supper, the young sister of deceased's wife, Rosa Lee, a girl of 15, was there also engaged in her work about wash-

ing the dishes, and engaged in conversation with the deceased, and that the deceased became boisterous and abusive toward the girl Rosa Lee; that Rosa Lee reported this to her father, who was in the front room with the other members of the family. As to what occurred after this, the evidence is conflicting; that on the part of the state tending to show that, soon after the girl Rosa Lee went into the room where the defendant was, defendant came out on the back porch bringing with him a gun, and called the deceased and "dared" him to go out of the kitchen into the yard, and that deceased and "Bama" went out in the yard together, and defendant "dared" him to come up on the steps, and that deceased stepped up on the steps and said to defendant that his (deceased's) wife was in no condition for him to have a fuss, and, "I'll take your dare and go back to Bama and go home," and, as deceased turned and started to go back to Bama, defendant said: "God damn you! I'll shoot you anyhow"—and fired. That the charge from the gun passed through the wrist of the deceased and into his left hip just over his left hip pocket, and lodged in the "gluteus muscle," and the deceased fell backwards off the steps. The evidence on the part of defendant tended to show that, when the daughter Rosa Lee came into the room, he told her to go back into the kitchen and wash the dishes, that deceased would not bother her, and to pay no attention to him, and when she returned to the kitchen the defendant heard the deceased "railing at her" and tell her that he would burst her brains out with a cup. The defendant here testifies:

"Then I went to the door and called him: 'Asbury, don't you know that wont do? You know you are in my house.' And he replied with an oath, 'Yes, I do know that I am in your house, and I am going to kill you.' I heard the sound of scuffling in the kitchen like he was getting up, and I stepped back in my room and got my gun, and when I got back out there on the porch Asbury [the deceased] was coming out of the kitchen onto the kitchen porch with Bama holding to him, and she was holding on to him and begging him to go home, and I put in and told him. I said: 'Asbury, you go on home; I don't want to have any trouble with you.' And he got around to the edge of the door and struck at me with his knife, or I thought it was a knife. It just did touch my shoe enough for me to feel it. He was standing on the ground, and I was standing on the porch about the water shelf, and I stepped back toward the little room, and he started back, and his wife got hold of him, and they went out toward the corner of the house, and he jerked loose from her, saying, 'I am going to get him,' and then he ran up on the third step, or something like that, with his arm upraised in a striking position, and then I shot him. At the time I shot him, I was standing near the middle of the porch about 1½ or 2 feet from the top step. I could not see well, and if he turned his left side to me as he came up the steps he turned just as the gun fired."

On redirect examination, the state's witness Bama Rushing was asked by the solicitor the following question:

"To refresh you, when you was there before the grand jury, did you not testify that when Asbury came out of the kitchen, and you and Asbury being out there in the yard, that your father came to the door and dared Asbury to come up on the porch?"

The defendant objected to the question, and the court overruled the objection; the defendant duly excepting. The witness answered, "No, sir."

The solicitor then asked the witness:

"And did you not testify before the grand jury that Asbury started, and that he got up on the first step, and that then he turned and said, 'Bama is in no condition for me to have a difficulty, and I am going to her,' and that he then started to you, and then as he turned and started to you that your father shot him?"

Over the objection and exception of the defendant, the witness was permitted to answer the question, as follows: "He said that before he ever run up on the steps."

The solicitor later asked a series of questions, and the witness answered as follows:

"(1) Q. How many times have you seen your father? A. I haven't seen him but once. (2) Q. Haven't seen him but once? A. But once. (3) Q. When was it that you had the conversation with him? A. I haven't had a conversation with him. (4) Q. You were in the jail with him Sunday, weren't you? A. Yes, but I didn't have a conversation with him. I had a few words with him. (5) Q. How long did you stay there? A. About an hour and a half. (6) Q. You stayed there about an hour and a half? A. Yes, sir. (7) Q. Who did you talk to while you was there? A. I didn't talk to nobody. (8) Q. Was anybody else there besides you and your father? A. Yes, sir. (9) Q. Well, did you talk to your father any? A. I said a few words to him. (10) Q. Did you talk any about this case? A. No, sir; not a thing about this case. (11) Q. Nothing about the case at all? A. No, sir. (12) Q. Nothing about what you were going to testify? A. No, sir. (13) Q. Nor about what you had testified to before the grand jury? A. No, sir. (14) Q. Not at all? A. No, sir. (15) Q. Who else was down there when you went to see your father? A. My mother and brothers and sisters. (16) Q. Your mother, your brothers, your sisters, and you? A. Yes, sir. (17) Q. Did your father and mother, and brothers and sisters talk, or did any of them in your presence discuss the case? A. No, sir. (18) Q. You didn't talk about your father's case at all? A. No, sir. (19) Q. Nor about the trial of it? A. No, sir. (20) Q. Didn't talk about what the testimony would be at all? A. No, sir. (21) Q. Have you talked to anybody at all since you were before the grand jury, about this case? A. Nobody except Patrick Rushing. (22) Q. Nobody except Patrick Rushing, you say? A. Yes, sir. (23) Q. You haven't talked to any one else at all? A. Not as I remember of. (24) Q. Not that you remember of? A. No, sir. (25) Q. And you haven't told anybody what your testimony would be? A. No, sir."

W. W. Sanders, of Elba, for appellant.
W. L. Martin, Atty. Gen., for the State.

BROWN, J. [1] It is an ancient rule of the law that a party cannot directly impeach the character of his own witness for the purpose of discrediting testimony given by the witness and with which the party is dissatisfied. The reason for this rule, that seems to have stood the test of time and experience, is that when a party offers a wit-

ness in proof of his cause he thereby, in general, represents him to be worthy of belief, and will not be allowed to assume the inconsistent attitude of saying that he is unworthy of belief. This rule, however, is not violated, if the witness proves to be hostile to the proponent, or by previous statements made by the witness he has been deceived or misled, and is surprised and placed at a disadvantage by unexpected answers, by allowing leading questions calling to the attention of the witness previous contradictory statements, even though an affirmation of such previous statements may have a tendency to affect the credibility of the witness. *White v. State*, 87 Ala. 26, 5 South. 829; *Hemingway v. Garth*, 51 Ala. 530; *Thomas v. State*, 117 Ala. 178, 23 South. 665; *Schieffelin v. Schieffelin*, 127 Ala. 35, 28 South. 687; *Southern Bell Telephone Co. v. Mayo*, 134 Ala. 645, 33 South. 16.

The witness Bama Rushing was the wife of the deceased and also the daughter of the defendant, and on her examination as a witness for the state testified, contrary to the state's theory of the case, that the deceased, after he had started home with witness, turned and said that he was going back and kill the defendant, and ran up the steps and struck at the defendant with his knife, and defendant shot him. Thereupon, in response to the question put by the solicitor, witness admitted that she had testified before the grand jury a few days before the trial and also admitted that she had had a conversation with the solicitor before she went on the stand. On this predicate the court, over the objection of the defendant, allowed the solicitor to ask the witness:

"Did you not testify, when you were before the grand jury, that Asbury (the deceased) started to your father and got on the steps, but that Asbury turned around and told your father that Bama (the witness) was in no condition for him to have a difficulty, and that he (deceased) then turned to go back to you, and that as he turned your father shot him?"

This question, under the rule above stated, was proper, and the court ruled correctly in allowing it. *Lantern v. State*, 1 Ala. App. 31, 55 South. 1032; *Glenn v. State*, 157 Ala. 12, 47 South. 1034; *Thompson v. State*, 99 Ala. 173, 13 South. 753; *Billingslea v. State*, 85 Ala. 325, 5 South. 137.

[2] Nor is the rule in such case violated by allowing the proponent to show by the witness that the witness has "recently been brought under the influence of the other party."

"The weight of authority," says Greenleaf, "seems in favor of permitting the party to show that the evidence has taken him by surprise, and is contrary to the examination of the witness preparatory to the trial, or to what the party had reason to believe he would testify, or that the witness had recently been brought under the influence of the other party and has deceived the party calling him." 1 Greenl. Ev. § 444.

The above quotation from Greenleaf was cited with approval in *Campbell v. State*, 23 Ala. 77.

By a series of questions, the state was allowed to show that the witness Bama Rushing, on Sunday before the trial, went to the jail where her father was confined, with the other members of the family, and remained there one hour and a half; that witness and her father only spoke a few words, and nothing whatever was said about the case or what witness would testify on the trial. This evidence was admissible as having a tendency to show that the witness had recently been brought under the influence of the adverse party, and to strengthen the predicate that the witness was hostile to the state, and as justifying the leading questions allowed by the court. There would certainly have been no impropriety in allowing the state to offer this proof in laying the predicate, not for impeachment of the witness, but of showing hostility and surprise, and justifying leading questions embodying previous contrary statements to refresh the recollection and overcome lapses of memory possibly occasioned by the friendly relation of the witness with the defendant. The court kept within the rule already stated, and the appellant has no right to complain.

[3] The predicate for the admission of the dying declaration showed that after the deceased had received a mortal gunshot wound, which subsequently produced his death, he first expressed belief that he would get well, but soon thereafter he expressed it as his belief that he would die from the wounds inflicted by the defendant. It was also shown that the deceased on the night he was shot, and after he had been carried home and placed on a bed, expressed himself thus: "I am shot and I am shot bad, and I will never get up from there." And it was shown that immediately after making these statements he made the statement about the facts of the difficulty admitted as a dying declaration. The predicate was sufficient for the admission of this evidence. *Gregory v. State*, 140 Ala. 16, 37 South. 259.

[4, 5] The defendant offered to prove by the state's witness Alf Sharpless, on cross-examination, that a short time after he heard the gun fire, the time being estimated by witness from two to four minutes, witness met the defendant coming in the direction of the house of the witness, at a point 100 yards away from defendant's house, the place of the killing, and when defendant met witness he said to witness, "I have shot Asbury, but I had to do it." While this statement was a confession as to an undisputed fact in the case, it was also a self-serving declaration by which defendant sought to justify his conduct, and was not admissible at his instance unless it was a part of the *res gestæ*. *Jones on Evidence*, § 236; *Martin v. Williams*, 18 Ala. 190; *James v. State*, 67 South. 773.

The declaration was made after the defendant had left the scene of the difficulty, and sufficient time had elapsed for thought, and for defendant to realize that he had committed a deed for which the law would call him to account, and was prima facie a retrospective narrative of a past occurrence, sufficiently removed in point of time and place to justify its exclusion. We entertain the opinion that it was not a part of the res gestæ of the shooting, and that the court ruled correctly. *Holland v. State*, 162 Ala. 10, 50 South. 215; *Nelson v. State*, 130 Ala. 83, 30 South. 728; *Lundsford v. State*, 2 Ala. App. 38, 56 South. 89. This case is distinguishable from the cases of *Stevens v. State*, 138 Ala. 71, 35 South. 122, and *James v. State*, 67 South. 773. In those cases, the declaration held to be a part of the res gestæ was made immediately after the shot was fired, and at the exact spot where the encounter occurred, and was an involuntary exclamation or declaration produced by the act.

[6] The statement of the defendant to his daughter Rosa Lee, "Go on back to the kitchen and wash up the dishes; he is not going to bother you; you just pay no attention to him"—made before the shooting, was testified to by the defendant without objection and was not disputed by any other evidence in the case, and, if this evidence was admissible at all, the defendant was not prejudiced by the rulings of the court refusing to allow defendant to prove this undisputed fact by other witnesses.

We find no prejudicial error in the record, and the judgment of the circuit court is affirmed.

Affirmed.

(12 Ala. App. 599)

LANE v. CITY OF TUSCALOOSA.
(No. 708.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW § 315—EVIDENCE—PRESUMPTIONS.

Under Code 1907, § 1258, under which an ordinance took effect from and after its publication, it is unnecessary, in a prosecution, to show that it remained in effect, as things proven to have existed are presumed to have continued until the contrary is established.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 748; Dec. Dig. § 315.]

2. INTOXICATING LIQUORS § 238—OFFENSES—QUESTION FOR JURY.

In a prosecution for violating an ordinance forbidding the selling or keeping of intoxicating liquors, evidence that liquors in unusual quantities and in packages convenient for sale, found concealed in defendant's house in a davenport, together with evidence that he had made a sale at his house a short time previously, justified submitting the case to the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.]

3. MUNICIPAL CORPORATIONS § 122—ENACTMENT OF ORDINANCE—ORDAINING CLAUSE.

Whether or not Code 1907, § 1252, providing for an ordaining clause for ordinances, is

merely directory, under section 1259, making the book of ordinances published by the city admissible in evidence, such book was prima facie proof of the validity of the ordinance, and the burden was on defendant, prosecuted under the ordinance, to rebut the presumption afforded by the statute.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 281-289; Dec. Dig. § 122.]

4. CRIMINAL LAW § 371—OTHER OFFENSES—SALES OF INTOXICATING LIQUOR.

On a charge of keeping or selling liquor, contrary to ordinance, evidence of a previous sale, in connection with other evidence tending to show the keeping, was admissible to show the purpose for which the liquors were kept, and to rebut the presumption that they were kept for private use.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

From a conviction violating a municipal ordinance of the city of Tuscaloosa, Charlie Lane appeals to the Tuscaloosa county court, and on conviction by that court he appeals here. Affirmed.

The matters complained of sufficiently appear from the opinion. Section 3 of the ordinance is as follows:

It shall be unlawful for any firm, corporation, person or association within this city to manufacture, sell, offer for sale, keep or have in possession for sale, barter, exchange, give away, furnish at public places or elsewhere, or otherwise dispose of prohibited liquors and beverages described in section 1 of this ordinance, or any of them, in any quantity; but this inhibition does not include, and nothing in this ordinance shall affect the social serving of such liquors or beverages in private residences in ordinary social intercourse: Provided, however, that nothing in this ordinance contained shall repeal sections 2, 3, 4, 5, 6, 7, 8, 9, and 10 of an act of the Legislature approved November 23, 1907, entitled "An act to prohibit the manufacture, sale, barter, exchange, giving away to induce trade, the furnishing at public places, or otherwise disposing of any alcoholic, spirituous, vinous or malt liquors, intoxicating liquors or beverages, or other liquors or beverages by whatever name called, which if drunk to excess will produce intoxication, except the sale of alcohol in certain cases, and upon certain conditions, and except the sale of wine for sacramental purposes," which said section of said act shall remain in full force and effect; any violation of any section of this ordinance shall be a misdemeanor punishable by fine for not more than \$100, to which, at the discretion of the court or judge trying the case, may be added imprisonment in the city jail or confinement at hard labor for the city for not more than six months.

Wright & Flite, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

BROWN, J. This prosecution was commenced before the recorder's court of the city of Tuscaloosa March 27, 1914, for a violation of an ordinance of that city prohibiting keeping or having in possession for sale spirituous, vinous, or malt liquors. The appellant was convicted on the trial in the recorder's court, and appealed to the county

court, where he was again convicted, and from that judgment of conviction he prosecutes this appeal.

The evidence was undisputed that the appellant's house was searched by the police authorities of the city on March 24, 1914, under a search warrant, and that the officers found 21 half pints of "Paul Jones Whisky" concealed in a davenport; that only a few days before the search one Crider, who was examined as a witness for appellee, bought from the appellant 2 half pints of whisky at appellant's house, and paid him \$1 therefor. The appellee also offered in evidence the book of ordinances of the city of Tuscaloosa, containing the ordinance under which the prosecution was commenced, which showed on its face that it was adopted on September 16, 1909, approved by the mayor on September 17, 1909, and published in the *Times-Gazette*, a newspaper published in the city of Tuscaloosa, on September 18, 1909, covering the offense of which appellant was convicted. (Reporter will set out section 3 of the ordinance appearing in the record, p. 10.)

The appellant, on the authority of *Excelsior Steam Laundry Co. v. Lomax*, 166 Ala. 612, 52 South. 347, and *Adler v. Martin*, 179 Ala. 97, 59 South. 597, insists that the court should have given the affirmative charge requested by him in writing, because it was not shown that the ordinance was in force at the time of the alleged offense.

[1] There was no dispute that the ordinance book offered in evidence was the regular ordinance book of the city of Tuscaloosa. In fact, this was admitted by the appellant, and the ordinance, as stated above, showed on its face that it was passed, approved, and published prior to the time of the offense, and under the statute it took effect "from and after its publication." Code, § 1258.

"When things are once proved to have existed in a particular state, they are presumed to have continued in that state until the contrary is established by evidence, either direct or presumptive." *Jones on Evidence*, § 58; 22 Am. & Eng. Ency. Law (2d Ed.) 1242; *Michael v. State*, 163 Ala. 425, 50 South. 929; Code, § 1259.

This proof distinguishes this case from the authorities cited and relied on by appellant.

[2] The evidence showing that liquors in unusual quantities, considering the kind and nature of the packages, were found concealed in appellant's house in a davenport, an unusual place of concealment, in connection with the evidence that he had made a sale at his house a short time previous to the commencement of the prosecution, justified the submission of the case to the jury. *Allison v. State*, 1 Ala. App. 207, 55 South. 453; *Spigener v. State*, 66 South. 896; *Gustin v. State*, 10 Ala. App. 171, 65 South. 302.

[3] It is insisted that the ordinance is void because it does not contain an ordaining

clause in the form prescribed by section 1252 of the Code. If this section of the Code is not merely directory in so far as it prescribes a form for the ordaining clause, as it appears to us to be (*St. Louis v. Foster*, 52 Mo. 513; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; 2 Dillon on Municipal Corporations [5th Ed.] 575; 28 Cyc. 352; 36 Cyc. 1157), under the provisions of section 1259 of the Code, the book of ordinances, purporting to have been published by authority of the city, and admitted to be such, was prima facie proof of the validity of the ordinance, and the burden was on the defendant to rebut the presumption afforded by the statute, and no such proof was offered. There was therefore no error in refusing the affirmative charge.

[4] On a charge of keeping prohibited liquors contrary to law or ordinance of a city, evidence of a sale previous to the commencement of the prosecution, in connection with other evidence tending to show the keeping in unusual quantities, is admissible as testimony to show the purposes for which the liquors are kept, and to rebut and overcome any presumption that they were kept for private use. Authorities supra.

There is no error in the record, and the judgment of the county court is affirmed.

Affirmed.

(12 Ala. App. 604)

LANE v. CITY OF TUSCALOOSA. (No. 674.) (Court of Appeals of Alabama. Jan. 12, 1915.)

INTOXICATING LIQUORS — 236 — OFFENSES — EVIDENCE — SUFFICIENCY.

Evidence held sufficient to justify a finding that accused was keeping intoxicating liquors, contrary to an ordinance, as charged.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 300-322; Dec. Dig. § 236.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Will Lane was convicted of violating an ordinance forbidding keeping or sale of intoxicating liquors, and appeals. Affirmed.

Wright & Fite, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

PELHAM, P. J. The appellant's contention that the ordinance of the city of Tuscaloosa offered in evidence, and for a violation of which the defendant was convicted, was not a valid ordinance in force at the time of the commission of the alleged offense, is disposed of by what was said in the case of *Charlie Lane v. City of Tuscaloosa* (Ala. App.) 67 South. 778.

There was no conflict in the evidence. It showed that when a search was made of the defendant's premises, which were occupied by him as a home, he denied having prohibited beverages of any kind in the house. This denial was made to the searching officers, who, upon searching various parts of the

house, finally discovered a nicely constructed and neatly fitted trapdoor in one of the rooms, covered with a matting. The trapdoor was immediately in front of a fireplace, concealed by a rug six feet long by three feet wide, completely covering it from view. In the opening under this trapdoor and the space between the floor of the room on the second story, into which the trapdoor was fitted, and the ceiling of the room beneath on the first floor, the officers discovered 33 half pints of whisky, each half pint being in a separate package. Four other half pints of whisky were found at another place in the house. The defendant was present when the officers discovered the whisky, and they asked him whose whisky it was, but the defendant made no reply to the inquiry. This evidence, showing such a quantity of whisky adroitly concealed in an unusual place for keeping beverages for private use in dispensing hospitality or for home consumption, taken in connection with the fact that the packages were in convenient sizes for ready delivery upon effecting a sale, and the further fact of the defendant's denial that he had prohibited liquor of any kind in the house, in the absence of any explanation, was sufficient to justify an inference that they were kept for an unlawful purpose, and overcome any presumption to the contrary, and we cannot say that the evidence in this case afforded no basis for a finding of guilt by the trial judge, sitting as judge and jury, as is the contention of appellant's counsel in brief. See *Gustin v. State*, 10 Ala. App. 171, 177, 65 South. 302; *Lee v. State*, 10 Ala. App. 191, 64 South. 637. Affirmed.

(12 Ala. App. 617)

TAGGETT v. CITY OF TUSCALOOSA.
(No. 787.)

(Court of Appeals of Alabama. Jan. 14, 1915.)

1. CRIMINAL LAW § 371—EVIDENCE OF OTHER OFFENSES—INTENT.

In a prosecution for keeping or selling liquors, evidence of a sale made by defendant of a bottle of beer a few days prior to the time when her premises were searched and a large quantity of bottles, empty and full, was found, was admissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 830-832; Dec. Dig. § 371.]

2. CRIMINAL LAW § 404—EVIDENCE—BOTTLE.

In a prosecution for keeping or selling liquor contrary to ordinance, a bottle of beer identified as the one sold to witness by defendant, previous to the sale for which prosecution was had, was admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.]

3. INTOXICATING LIQUORS § 238—OFFENSES—QUESTION FOR JURY.

In a prosecution for keeping or selling liquor contrary to ordinance, the evidence tending to support the charge, its weight and sufficiency was for the jury.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. § 238.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Alice Taggett was convicted of violating an ordinance against the keeping or selling of intoxicating liquors, and appeals. Affirmed.

Wright & Fite, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

PELHAM, P. J. The points made against the ordinance, for a violation of which the defendant was tried and convicted, we have disposed of adversely to the appellant's contentions in the case of *Charlie Lane v. City of Tuscaloosa* (Ala. App.) 67 South. 778.

[1] The court properly admitted evidence of a sale made by the defendant of a bottle of beer to one Crider a few days prior to the time when her premises were searched and a large quantity of beer bottles, empty whisky cases, etc., together with a few full bottles of beer and whisky, was found by the searching officers. The court limited the evidence of the sale as going alone to show an unlawful intent on the part of the defendant in having in her possession the prohibited liquors, and for that purpose it was admissible. *Allison v. State*, 1 Ala. App. 206, 55 South. 453; *Rosenberg v. State*, 5 Ala. App. 196, 59 South. 366.

[2] The bottle of beer was identified as the one sold to the witness by the defendant, and there was no error committed in permitting it to be introduced in evidence. *Harris v. State*, 9 Ala. App. 87, 64 South. 352; *Phillips v. State*, 156 Ala. 140, 47 South. 245.

[3] The tendencies of the evidence supported the charge made against the defendant, and its weight and sufficiency, involving the question of her guilt or innocence was a matter for the jury (*Tice v. State*, 3 Ala. App. 164, 57 South. 506), and the court quite properly refused the general charge for the defendant and submitted the case to the jury.

Affirmed.

(12 Ala. App. 608)

BROWN v. CITY OF TUSCALOOSA.
(No. 798.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW § 589—CONTINUANCE—GROUNDS—DISCRETION OF COURT.

The refusal of a continuance, asked on the ground that the jury had heard all the evidence in a prior prosecution against the same defendant, in which he was acquitted, was within the rule that such applications involve matters of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1315, 1319; Dec. Dig. § 589.]

2. CRIMINAL LAW § 1151—REVIEW—DISCRETIONARY MATTERS—CONTINUANCE.

A refusal of continuance will not be reviewed, save for abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3045-3049; Dec. Dig. § 1151.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Will Brown was convicted of violating an ordinance, and appeals. Affirmed.

Wright & Fite, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

BROWN, J. [1, 2] The only question presented in this record, not considered in the case of *Charlie Lane v. City of Tuscaloosa*, 67 South. 778, is the action of the trial court in refusing to grant the defendant a continuance. The matter urged in support of the application for continuance is that the defendant had been tried by another jury for a violation of the prohibition ordinance of the city of Tuscaloosa, and, after the introduction of all the evidence, the court, at the instance of the defendant, directed a verdict in his favor; that the evidence in that case was heard by all the jurors, from which a jury was to be selected to try this case.

It has been repeatedly held that the ruling of the trial court on application for continuance involves a matter of discretion that will not be reviewed, unless the discretion is shown to have been grossly abused. *White v. State*, 86 Ala. 69, 5 South. 674. This record does not show such abuse of discretion as to authorize this court to revise the action of the trial court in refusing to grant the continuance.

The other questions presented were disposed of adversely to the contention of the appellant in the case of *Lane v. City of Tuscaloosa* (Ala. App.) 67 South. 778, and on the authority of that case the judgment of the county court is affirmed.

Affirmed.

(12 Ala. App. 196)

ROGERS v. STATE. (No. 264.)

(Court of Appeals of Alabama. Feb. 2, 1915.)

1. INDICTMENT AND INFORMATION \S 162—COMPLAINT—AMENDMENT—FORM.

A defect in a complaint for gaming, in that it did not designate one of the enumerated places at which gaming was prohibited, as required in such cases by Code 1907, \S 6984, was an amendable defect, and an amendment offered to obviate that objection was properly allowed.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 524; Dec. Dig. \S 162.]

2. INDICTMENT AND INFORMATION \S 202—VERIFICATION—CURE.

Where no objection was made to the complaint as amended, on the ground that it was not reverified by oath, the court, under the curative provision of Code 1907, \S 6723, must treat the defect as having been cured by the amendment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. \S 640-650; Dec. Dig. \S 202.]

3. GAMING \S 85—COMPLAINT—SUFFICIENCY.

A complaint, charging, substantially as prescribed by Code 1907, \S 6984, that defendant

within 12 months bet at a card or dice game in a public place, resort, or where spirituous, vinous, or malt liquors were sold or given away, and a complaint filed on appeal to the circuit court, in compliance with section 6730, relating to complaints on appeal *triable de novo*, charging that he bet at a card or dice game at a place where spirituous liquors were sold, etc., or in a public house, highway, or some other public place where people resort, etc., charged the offense with such certainty as to put defendant on notice of the accusation.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. \S 220-223, 228, 261, 266; Dec. Dig. \S 85.]

4. GAMING \S 101—QUESTION FOR JURY—PUBLIC PLACE.

In prosecution under Code 1907, \S 6983, for betting at game of cards or dice played at a public place, or where spirituous liquors are sold or given away, *held*, on the evidence, that whether the place was a public place was for the jury.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. \S 300; Dec. Dig. \S 101.]

5. GAMING \S 72—STATUTE—"HOUSE OR PLACE WHERE SPIRITUOUS, VINOUS, OR MALT LIQUORS ARE RETAILED, SOLD, OR GIVEN AWAY."

Under such statute to constitute a "house or place where spirituous, vinous, or malt liquors are retailed, sold or given away," it must appear that the business of retailing, etc., is maintained at the place, and that there is some business connection between that business and the place where the game is played.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. \S 168-186; Dec. Dig. \S 72.]

6. CRIMINAL LAW \S 1169—REVIEW—HARMLESS ERROR—EVIDENCE—ADMISSIBILITY.

In a prosecution under such statute, evidence that some of the persons engaged in gaming with defendant had a bottle of liquor and gave some of it to the others, and that these persons fought, and that one of them was injured, was immaterial; and, in view of the verdict fixing the fine at the maximum amount, its admission was reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 754, 3088, 3130, 3137-3143; Dec. Dig. \S 1169.]

Appeal from Circuit Court, De Kalb County; W. W. Haralson, Judge.

Dock Rogers was convicted of gaming, and he appeals. Reversed and remanded.

The original affidavit, omitting formal charging part, is that within 12 months before making this affidavit Dock Rogers bet at a game played with cards or dice or some device or substitute for cards or dice. In the county court, after demurrers had been sustained, the court permitted complaint to be amended by inserting in the affidavit the following words:

"In a public place where people resort, or where spirituous, vinous or malt liquors were sold or given away."

When the matter reached the circuit court by appeal the solicitor filed the following complaint:

"Said Dock Rogers bet at a game played with cards or dice, or some device or substitute for cards or dice, at a place where spirituous liquors were, at the time, sold, retailed, or given away, or in a public house, highway, or some

other public place, or at an outhouse where people resort," etc.

The demurrers raise the question that it does not sufficiently describe the place and does not sufficiently allege the offense and charges no offense. The last ground was also made the basis for a motion to quash.

Isbell & Scott, of Ft. Payne, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. [1] If it be conceded that the original complaint was wanting in that certainty which is necessary to constitute a formal accusation of crime, and that it was demurrable for failing to designate one of the places enumerated in the statute at which such games are prohibited, as required of indictments in such cases by section 6984 of the Code; still this was an amendable defect, and the purpose of the amendment offered by the solicitor was to obviate the objection raised to the complaint by the defendant's demurrer, which had been sustained, and the amendment was properly allowed. *Campbell v. State*, 150 Ala. 72, 43 South. 743; *Simpson v. State*, 111 Ala. 6, 20 South. 572; *Wright v. State*, 136 Ala. 139, 34 South. 233; *Holland v. State*, 139 Ala. 120, 35 South. 1009. The better practice as to such amendments is to allow the original affidavit to be amended by adding the requisite averments, and require a reverification after the amendment is made. *Gandy v. State*, 81 Ala. 70, 1 South. 35.

[2] No objection appears to have been made to the complaint as amended on the ground that it was not reverified by oath, and under the curative provisions of section 6723 of the Code, this defect must be treated on appeal as having been cured by amendment.

[3] As amended, the complaint charged the offense substantially as required by section 6984 of the Code, and was not subject to the objections urged against it by defendant's motion to quash and demurrer, both of which the court correctly overruled. *Holland v. State*, 139 Ala. 123, 35 South. 1009.

Likewise, the complaint filed by the solicitor, on appeal, in the circuit court in compliance with the statute (Code, § 6730) charged the offense with such a degree of certainty as to put the defendant on notice of the nature and cause of the accusation against him, and this is all the law requires. *Little v. City of Attalla*, 4 Ala. App. 291, 58 South. 949; *Miles v. State*, 94 Ala. 106, 11 South. 403.

[4] There was evidence showing and tending to show that the defendant and five other persons engaged in playing a game with cards near Allen Dewyer's place, 150 yards from the road, one of the witnesses for the state testifying:

"We were playing five-up—we had 10 cents on the corner—there were six of us playing. The man that beat got the 60 cents. * * * I don't know how often we had played there, several times. * * * I have played there lots of times. I don't know as Dock [the de-

fendant] was with us every time we played. Dock was there before this. All the other boys have been there at other times at this identical spot."

The defendant did not deny that he was in the game on the occasion testified to by the state's witnesses, but denied that he had ever played cards at this place before that time. The only controverted question in the case was whether or not the place was a public place within the meaning of the statute, and this, under the evidence, was properly submitted to the jury. *Cartledge v. State*, 132 Ala. 18, 31 South. 553; *Winston v. State*, 145 Ala. 91, 41 South. 174; *Ferrell v. Opelika*, 144 Ala. 135, 39 South. 249; *Coleman v. State*, 20 Ala. 51; *Tolbert v. State*, 87 Ala. 27, 6 South. 284.

[5] To constitute a place a "house or place where spirituous, vinous, or malt liquors are retailed, sold, or given away" within the meaning of the statute, and the averments of the complaint filed by the solicitor on appeal, it must be shown that a business of retailing, selling, or giving away spirituous, vinous, or malt liquors is maintained at the place, and that there is some business connection between the business and the place at which the game is played. *Phillips v. State*, 51 Ala. 20. The isolated fact that one or more of the parties had a bottle of whisky at the place and drank therefrom and gave to others in a social way does not constitute the place one at which gaming is prohibited by the statute.

[6] The trial court committed reversible error in allowing the solicitor to prove that some of the persons who engaged in the game with the defendant had a bottle of liquor and gave some of it to the others, and also in allowing the evidence going to show that these persons engaged in a fight, and that one of them was injured. The defendant was not on trial for being in any way connected with the unlawful sale or disposition of liquor, or of being a party to an assault on the injured persons, and this evidence was clearly immaterial to any issue in the case. The only possible influence it could have exerted was the wholly illegitimate one of aggravating the punishment of the offense for which the defendant was on trial. *Henson v. State*, 114 Ala. 25, 22 South. 127. The jury in assessing the amount of the fine fixed it at the maximum allowed by the statute; and, in view of this fact, we cannot say that the admission of this immaterial evidence was without prejudice to the defendant's rights.

If the place where the game was played was a public place, within the meaning of the statute, the defendant's ignorance of this fact would not exculpate him; it was his duty to know that the place where he engaged in this sport was not one where the law prohibited it. If the defendant could be allowed to say that he did not know that the place was a public place, then one indicted for playing the game at a tavern, inn, or

other place designated by the statute could plead his ignorance and say that he did not know that the place was a tavern or inn, etc. The charge requested by the defendant was well refused.

For the error pointed out, the judgment of the circuit court must be reversed and the cause remanded.

Reversed and remanded.

(12 Ala. App. 1)

RAGSDALE v. STATE. (No. 693.)

(Court of Appeals of Alabama. Dec. 17, 1914.
Rehearing Denied Jan. 12, 1915.)

1. CRIMINAL LAW § 665—APPEAL—DISCRETION OF TRIAL COURT.

The court's permission to the state to introduce the evidence of a witness who had remained in the courtroom after the witnesses had been sworn and put under the rule out of the hearing of the court was a matter of discretion as to which there was no abuse, where it appeared that the witness was the second witness examined for the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1549-1568½; Dec. Dig. § 665.]

2. CRIMINAL LAW § 517—EVIDENCE—CONFESSIONS—VOLUNTARY CHARACTER.

Where the circumstances under which defendant's statements in the nature of confessions on declarations against interest were made, as well as the statements themselves, showed them to be voluntary, they were properly admitted.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. § 517.]

3. HOMICIDE § 158—EVIDENCE—THREATS.

In a trial for homicide, threats and inculpatory statements by defendant shortly before and after the killing, evincing ill will or expressing a menace toward deceased, were admissible without any predicate.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.]

4. CRIMINAL LAW § 404 — EVIDENCE — CLOTHES WORN BY DECEASED.

A shirt worn by deceased at the time of the killing and showing the perforation of the shots, though it had been laundered between that time and the trial, was admissible in evidence to give the jury the benefit of seeing the bullet holes in illustration, explanation, or contradiction of the other evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.]

5. WITNESSES § 277—CROSS-EXAMINATION—SCOPE.

There was no abuse of discretion in permitting the state to cross-examine defendant as to where he got the pistol with which he did the shooting, as to how many cartridges he bought at the time, and as to which pocket he had the pistol in, etc.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.]

6. CRIMINAL LAW § 778—TRIAL—MISLEADING INSTRUCTION.

Defendant's requested charges that the presumption was that he was free from fault in bringing on the difficulty; that deceased did not die from wounds inflicted by him; that if he killed deceased, there was a presumption

that he was justified; that there was a presumption that if he killed deceased, it was a lawful act; that the act complained of was not done with malice aforethought; and that there was a presumption that the killing was not done maliciously—were misleading, in that the jury might have understood therefrom that the presumptions therein predicated obtained even after the evidence had convinced them to the contrary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. § 778.]

7. HOMICIDE § 300—TRIAL—INVOLVED INSTRUCTION.

Defendant's requested charge that the conduct of the deceased at the time of the fatal difficulty might be looked to, to determine the degree of the offense, and also in determining the necessity of prompt defensive measures and in determining guilt or innocence, was involved and unintelligible, since the offense charged was shown by the indictment, and since the part relating to his guilt or innocence tended to make the meaning of the charge uncertain.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

8. CRIMINAL LAW § 811—TRIAL—INSTRUCTIONS SINGLING OUT EVIDENCE.

Instructions which assert that the jury may look to certain evidence are properly refused as singling out certain parts of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. § 811.]

9. CRIMINAL LAW § 782—TRIAL—ARGUMENTATIVE INSTRUCTIONS.

Such instructions are bad as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. § 782.]

10. CRIMINAL LAW § 81 — DEFENSES — "ALIBI."

An "alibi" is a general traverse of the material averment of the indictment that the defendant committed the crime charged against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 35, 36, 50; Dec. Dig. § 31.]

For other definitions, see Words and Phrases, First and Second Series, Alibi.]

11. HOMICIDE § 109—DEFENSES—"SELF-DEFENSE."

"Self-defense" is a plea in the nature of a confession and avoidance, and does not traverse the averment of doing the act charged, but confesses and seeks to justify the act as legal and to avoid any punishment because it was done in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139; Dec. Dig. § 109.]

For other definitions, see Words and Phrases, First and Second Series, Self-defense.]

12. HOMICIDE § 300—TRIAL—INSTRUCTIONS—SINGLING OUT EVIDENCE.

Defendant's requested charge that he set up self-defense, and that the burden of proof was not changed by the undertaking to prove it, and that if from the evidence on self-defense the jury had a reasonable doubt as to guilt, he should be acquitted, although they could not find self-defense to have been proven, was objectionable as singling out parts of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. § 300.]

13. CRIMINAL LAW — 766 — TRIAL—QUESTION OF LAW—SELF-DEFENSE.

A charge, referring to the jury the question of self-defense and leaving to their determination what constitutes the elements of self-defense, was erroneous as submitting a question of law to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1794, 1796, 1797; Dec. Dig. — 766.]

14. HOMICIDE — 300 — TRIAL — MISLEADING INSTRUCTION.

A charge was misleading where it did not state the conditions upon which the state was called upon to prove the freedom from fault and other elements comprehended in the plea of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

15. CRIMINAL LAW — 789 — TRIAL—INSTRUCTIONS—SINGLING OUT EVIDENCE.

Charges that if any individual juror, or if the whole jury, had a reasonable doubt arising out of the evidence as to whether defendant acted in self-defense, they could not convict were erroneous as singling out and inviting the jury's attention to only that part of the evidence as to defendant having acted in self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. — 789.]

16. CRIMINAL LAW — 789 — TRIAL—INSTRUCTIONS SUBMITTING QUESTION OF LAW.

Such charges were erroneous as submitting a question of law to the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. — 789.]

17. CRIMINAL LAW — 778 — TRIAL—INSTRUCTIONS—BURDEN OF PROOF.

A charge that there was no such a thing as shifting the burden of proof from the state, but that it had the burden throughout trial, was erroneous as calculated to impress the jury that the burden was not on defendant to reasonably satisfy them of the pressing necessity to take life under his plea of self-defense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. — 778.]

18. CRIMINAL LAW — 798 — TRIAL—INSTRUCTIONS—REASONABLE DOUBT.

A charge that if any individual juror has a reasonable doubt arising out of the evidence as to whether the act charged against defendant was unlawful or not, they could not convict, was erroneous.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1940, 7943; Dec. Dig. — 798.]

19. CRIMINAL LAW — 763, 764 — INSTRUCTIONS—PROVINCE OF JURY.

Where it appeared that there was bad feeling between defendant and deceased because of a previous difficulty and a probability of a renewal of trouble when they met again, a requested instruction that defendant, as a matter of law, had the right to be where he was at the time of the shooting was an invasion of the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. — 763, 764.]

20. CRIMINAL LAW — 807 — TRIAL — ARGUMENTATIVE INSTRUCTION.

Such charge was erroneous as stating no proposition of law, and as being argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. — 807.]

21. HOMICIDE — 300 — TRIAL — MISLEADING INSTRUCTION.

A requested charge that the rule of self-defense is that a person may and must act on the reasonable appearance of things, was misleading, as purporting to embody the entire rule of law as to self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

22. CRIMINAL LAW — 830 — TRIAL—INSTRUCTIONS PRESENTED TOGETHER—EFFECT.

A charge presented with another on the same piece of paper and refused as "one charge" will be condemned, where the other charge was bad.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2012, 2017; Dec. Dig. — 830.]

23. HOMICIDE — 300 — TRIAL—INSTRUCTIONS — BURDEN OF PROOF.

A charge that the burden is on the state to prove that defendant was not free from fault in bringing on the difficulty was bad, as failing to embody the other elements of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

24. HOMICIDE — 300 — TRIAL—INSTRUCTIONS — SELF-DEFENSE—BELIEF.

Requested instructions that, if the jury believed defendant free from fault in bringing on the difficulty, and that he did not enter into the conflict willingly and had no reasonable means of escape, and was apparently in imminent danger of life or great bodily harm, he might anticipate his assailant by shooting, and that if the circumstances at the shooting were such as to convince him of danger of life or limb and he was so convinced, and that to retreat would increase such danger or from other reasonable appearances would do so, and defendant was free from fault in bringing on the difficulty, he had the right to stand his ground and shoot the assailant, were erroneous, in omitting to predicate an honest or bona fide belief, as a reasonable man, of imminent danger.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

25. HOMICIDE — 300 — TRIAL—INSTRUCTIONS — SINGLING OUT EVIDENCE.

A charge that, if the jury believed that defendant did not bring on the difficulty, and that when he was passing on the highway in a peaceable manner deceased advanced toward him and began a conflict while he was retreating and afterwards began to cut defendant with his knife, defendant had the right to shoot was objectionable as singling out part of the evidence.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

26. HOMICIDE — 300 — TRIAL—INSTRUCTIONS — INCORRECT STATEMENT OF FACT.

Such charge, hypothesizing facts not shown by the evidence in the record, was properly refused.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. — 300.]

27. CRIMINAL LAW — 763, 764 — TRIAL—INSTRUCTIONS—PROVINCE OF JURY.

Such charge was erroneous as invading the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. — 763, 764.]

28. HOMICIDE — 286 — TRIAL — INSTRUCTIONS — DEADLY WEAPON — MALICE.

Where the homicide was clearly shown to have been purposely done with a deadly weapon, a charge that malice as a matter of law was not presumed from the use of such weapon was erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 586-591; Dec. Dig. —286.]

29. HOMICIDE — 341 — APPEAL — HARMLESS ERROR — INSTRUCTIONS.

The refusal of such charge was without injury, where defendant was convicted of manslaughter in the first degree, in which malice was no ingredient of the crime.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 721; Dec. Dig. —341.]

30. CRIMINAL LAW — 811 — TRIAL — INSTRUCTIONS — SINGLING OUT EVIDENCE.

Charges that in considering the evidence the jury should consider the relative size and ages of deceased and defendant; that the law did not require of a boy 19 years of age the deliberation and judgment required of a mature man; that the jury might consider that defendant was only 19—singled out parts of the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. —811.]

31. CRIMINAL LAW — 807 — TRIAL — INSTRUCTIONS — ARGUMENTATIVE INSTRUCTION.

Such instructions were argumentative.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1805, 1959, 1960; Dec. Dig. —807.]

32. INFANTS — 66 — CAPACITY TO COMMIT CRIME — PRESUMPTION.

There is no presumption of law that a person over 14 years is unable to comprehend and appreciate the wrongfulness of his guilty act, and the law draws no distinction between a person 19 or 20 years and one 30 or 32 years.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 172; Dec. Dig. —66.]

33. HOMICIDE — 300 — TRIAL — INSTRUCTIONS — SELF-DEFENSE.

Charges that if defendant was free from fault, it was immaterial, if he shot in self-defense, what he said before or after the shooting, and that the fact that he had a pistol at the time of the shooting did not deprive him of the right of self-defense, were erroneous, in failing to set up the constituent elements of self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. —300.]

34. HOMICIDE — 300 — TRIAL — MISLEADING INSTRUCTIONS.

Charges that the fact that defendant threatened deceased would not deny him the right to invoke the rule of self-defense, and that the fact that he had a pistol in his possession at the killing did not deprive him of that right, were misleading.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. —300.]

35. CRIMINAL LAW — 763, 764 — TRIAL — INSTRUCTIONS — PROVINCE OF JURY.

Such charges invaded the province of the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1731-1748, 1752, 1768, 1770; Dec. Dig. —763, 764.]

36. HOMICIDE — 300 — TRIAL — ARGUMENTATIVE INSTRUCTIONS.

Such charges were argumentative.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614, 616-620, 622-630; Dec. Dig. —300.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

William W. Ragsdale was convicted of manslaughter in the first degree, and he appeals. Affirmed.

The indictment charged the killing of James W. McCauley, by shooting him with a pistol, but without premeditation or deliberation. The witness McCauley was a second witness offered by the state. The bill of exceptions states that the rule had been invoked by the state, and the witnesses had all been excluded from the courtroom, but this witness, however, remained in and sat by counsel for the state. He had not been sworn until he was called as a witness. The state's counsel admitted that they knew he was going to be used as a witness, but denied that they knew he was in the room, and requested that he be sworn and excused from the room, as the state needed him on the examination of witnesses. The witness was a brother of deceased. Herndon, being introduced as a witness, testified that he saw defendant on the day before the killing, and was asked if he heard defendant say anything about McCauley, or what he was going to do to McCauley, the day before the killing. The witness answered, over objection, "Defendant said McCauley could not get off for that with him." Wells, a witness for the state, testified that a statement was made to him and Mr. East by defendant shortly after the killing. The question was asked him if "anything was said by you in the nature of a promise, or did you promise him anything, or offer him any reward, or say it would be better for him if he did not make a statement, or worse for him not to make a statement, or anything of that nature?" The witness answered: "No, sir. I did not make any, and never heard any." The witness further answered that he did not know at that time, and did not now know personally, whether defendant had ever been arrested or whether he was in custody. Witness was then permitted to testify that defendant said that he went up to Mr. McCauley and told him they had better settle that little difficulty and McCauley got to cutting, and he had to kill him.

The following charges were refused to defendant:

(4) The presumption is that defendant was free from fault in bringing on the difficulty.

(7) The presumption is that McCauley did not die as a result of the wounds inflicted by defendant.

(8) If you find from the evidence in this case that defendant did kill McCauley, then I charge you that the presumption is that he was justified in doing so.

(9) The presumption is that if defendant kill-

ed McCauley, his act in doing so was a lawful act.

(27) The presumption in this case is that the act complained of was not done with malice aforethought.

(29) The presumption is that the killing in this case was not done maliciously.

(10) The conduct of deceased at the time of the fatal difficulty may be looked to by the jury to determine the degree of the offense charged, also, in determining the necessity of promptness of defensive measures on the part of defendant, and his guilt or innocence.

(12) The defendant sets up self-defense in this case, and the burden of proof is not changed when he undertakes to prove it; and if, by reason of the evidence in relation to such self-defense, you should entertain a reasonable doubt as to defendant's guilt, he should be acquitted, although you may not be able to find that the self-defense has been fully proven.

(15) If any individual juror has a reasonable doubt arising out of the evidence as to whether defendant acted in self-defense or not, then you cannot convict defendant.

(18) Same as 15 as applied to the whole jury.

(21) There is no such thing in this case as shifting the burden of proof from the state to defendant; the burden being on the state throughout the trial.

(23) If any individual juror has a reasonable doubt arising out of the evidence in this case as to whether the act charged against defendant were unlawful or not, then you cannot convict him.

(25) The court charges the jury as a matter of law that defendant has a right to be where he was at the time of the shooting complained of.

(26) The rule of self-defense in a case of this kind is that a person may and must act on the reasonable appearance of things.

(28) The burden is on the state to prove that defendant was not free from fault in bringing on the difficulty.

(32) If the jury believe from the evidence that defendant was free from fault in bringing on the difficulty and did not enter into the conflict willingly, and had no reasonable means of escape, and was apparently in imminent danger of his life or exposed to great bodily harm, then he had a right to anticipate his assailant in shooting.

(36) If the circumstances at the time of the shooting were such as to convince the defendant that he was in impending danger to life or limb, and defendant was so convinced, and that to retreat would increase such danger, or from the reasonable appearance of the condition would do so, and he was free from fault in bringing on the difficulty, then I charge you that defendant had the legal right to stand his ground, cease his retreat, and shoot his assailant to death.

(35) If the jury believe from the evidence that defendant did not provoke or bring on the difficulty, that he was passing along the highway in an orderly and peaceful manner, and that deceased came upon him in an insulting manner and advanced towards him and entered into a conflict with him while he was retreating, and afterwards procured his knife and was cutting defendant at the time he was shot, then I charge you that defendant had the right to shoot deceased.

(37) Malice as a matter of law is not presumed from the use of a deadly weapon.

(38) In considering the evidence in this case, it is your duty to take into consideration the relative sizes and ages of deceased and defendant.

(39) The law does not require of a boy 19 years of age that deliberation, caution, judgment, and forethought that it requires of a mature man.

(45) In trying a case of homicide against a boy 19 years old, the jury may take into con-

sideration his age, together with the other evidence in the case.

(42) If you find from the evidence that defendant was free from fault in bringing on the difficulty that resulted in the killing, then it is immaterial, if Ragsdale shot in self-defense, what he said either before or after the shooting.

(43) Same in legal effect as 42.

(44) The fact that defendant had a pistol in his possession at the time of the killing does not deprive him of the right of self-defense.

(41) The mere fact, if it be a fact, that defendant made threats as to deceased down at the furnace would not deprive him of the right to invoke the protection of the doctrine of self-defense.

Estes, Jones & Welch, of Bessemer, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] Permitting the state's counsel to introduce the evidence of the witness E. T. McCauley, who had remained in the courtroom when it was shown that the witnesses had been sworn and put under the rule out of the hearing of the court, was a matter of discretion in the trial judge in which no abuse is shown. The witness McCauley was the second witness examined in behalf of the state, and no error prejudicial to defendant authorizing a reversal appears to have resulted. Certainly no abuse of discretion is shown, and that is the question to be considered. *Belk v. State*, 10 Ala. App. 70, 64 South. 515.

[2] The surrounding circumstances and conditions under which the statements of the defendant in the nature of confessions or declarations against interest were made, as well as the nature of the statements themselves, show them to have been entirely voluntary, and they were properly admitted. *Dupree v. State*, 148 Ala. 620, 42 South. 1004; *Love v. State*, 124 Ala. 82, 27 South. 217; *McKinney v. State*, 134 Ala. 134, 32 South. 726; *Morris v. State*, 146 Ala. 66, 41 South. 274; *Burton v. State*, 107 Ala. 108, 18 South. 284.

[3] The character of the evidence elicited was in the nature of threats and inculpatory statements made by the defendant shortly before and after the killing, evincing ill will or expressing a menace towards the deceased, and these may be shown independent of a predicate. *Shelton v. State*, 144 Ala. 106, 42 South. 30; 1 Mayf. Dig. 262, 263, and cases there cited; *Ex parte State*, 181 Ala. 4, 61 South. 53.

[4] Although the shirts worn by the deceased at the time of the killing and perforated by the shots had been laundered between the time of the fatal encounter and the trial, they were a proper subject of evidence after they had been properly identified and this fact proven, so that the jury might have the benefit of whatever physical testimony the articles showing the bullet holes afforded in the way of illustration, explanation, or contradiction with reference to what eyewitnesses to the transaction had testified. It has long been the rule in this state,

as announced by the Supreme Court, that the clothes the deceased wore at the time of the killing are admissible in evidence, and the rule is not to be changed simply because the clothes have been washed, if they afford other illustrative evidence aside from such marks or stains as may have been removed in the cleansing process, such as bullet holes. *Pate v. State*, 150 Ala. 10, 43 South. 343.

[8] There was no abuse of the judicial discretion in permitting the state's counsel to propound questions to the defendant on cross-examination as to where he got the pistol with which he did the shooting, how many cartridges he bought at the time, which pocket he had the pistol in, etc. The law allows great latitude on cross-examination, and its extent is largely a matter of the trial court's discretion. *Smiley v. Hooper*, 147 Ala. 646, 41 South. 660. The examination may extend even to remote matters for the purpose of testing the credit to be accorded the witness, his memory or accuracy. *Amos v. State*, 96 Ala. 120, 11 South. 424.

Other rulings on the evidence are without prejudicial error, and do not, we think, require discussion.

[8] Charges 4, 7, 8, 9, 27, and 29, refused to the defendant, are erroneous and misleading in that they instruct the jury, or might well have been understood by the jury as instructing, that the presumptions of law therein predicated as to the defendant's innocence obtain even after the jury has heard the evidence which may have convinced the jury to the contrary beyond a reasonable doubt. *McEwen v. State*, 152 Ala. 38, 44 South. 619.

[7] Charge No. 10 is involved (*Turner v. State*, 160 Ala. 40, 49 South. 828) and is not an intelligible statement of any proposition of law. The offense "charged" is shown by the indictment, and the conduct of the deceased at the time of the difficulty could not be looked to for the purpose of ascertaining the degree of the offense charged against the defendant. The use of the last five words in this charge in the connection in which they appear also tends to make the charge of uncertain meaning.

[8, 9] Instructions which assert that the jury may look to certain evidence are properly refused as argumentative and as giving undue prominence to certain portions of the testimony. *Shelton v. State*, 144 Ala. 106, 42 South. 30.

[10-12] Charge No. 12 is in the same language as a charge in *Hatch's Case*, 144 Ala. 50, 40 South. 113, except in the use of the words "self-defense" in place of the word "alibi" as used in the charge approved in *Hatch's Case*. An alibi is a general traverse of the material averment of the indictment that the defendant committed the crime charged against him (*Albritton v. State*, 94 Ala. 76, 10 South. 426), and such a charge, while it might be held good as not singling out part of the evidence, when applied to a

defense that is a general denial or traverse of the material averment in the indictment that the defendant did the act charged, could not for the same reason and on the same principle be held good as applicable to the charge in this case, substituting "self-defense" for "alibi." Self-defense is a plea in the nature of a confession and avoidance, and does not traverse the averment of doing the act charged, but confesses and seeks to justify doing the act as legal and avoid any evil consequences from having done it because of having acted in self-defense.

[13] But, aside from this, the charge is bad in that it submits a question of law to the jury. It has long been held that a charge referring to the jury the question of self-defense and leaving to their determination what constitutes the elements of self-defense is erroneous. *Davis v. State*, 8 Ala. App. 147, 62 South. 1027; *Plant v. State*, 140 Ala. 52, 57, 37 South. 159; *Roden v. State*, 97 Ala. 54, 56, 12 South. 419; *Miller v. State*, 107 Ala. 40, 19 South. 37; *Gilmore v. State*, 126 Ala. 30, 39, 28 South. 595; *Adams v. State*, 133 Ala. 166, 175, 81 South. 851; *Smith v. State*, 130 Ala. 95, 98, 30 South. 432; *Tarver v. State*, 9 Ala. App. 17, 20, 64 South. 161; *Powell v. State*, 5 Ala. App. 75, 82, 59 South. 530; *Garth v. State*, 8 Ala. App. 23, 26, 62 South. 383; *Greer v. State*, 156 Ala. 15, 19, 47 South. 300.

[14] The charge is misleading, it seems to us, in not stating the conditions under which the state is called upon to prove freedom from fault and certain other elements comprehended in the defendant's plea of self-defense. *Crumpton v. State*, 167 Ala. 4, 52 South. 605; *Etheridge v. State*, 141 Ala. 29, 37 South. 337; *Allen v. State*, 148 Ala. 588, 42 South. 1006. We may also call attention to the fact that, while not mentioning the *Hatch Case*, supra, wherein the Supreme Court by a divided court approved this charge, the Supreme Court, in the late case of *McClain v. State*, 182 Ala. 67, 62 South. 241, has condemned the identical charge by an undivided court, the charge being designated as "Q" in the latter case.

[15, 16] Charges 15 and 18 single out and invite the attention of the jury to only that part of the evidence as to the defendant's having acted in self-defense. Each of these charges submits a question of law to the jury. See authorities cited in discussion of charge 12, and *O'Rear v. State*, 66 South. 81.

[17] Charge 21 was reasonably calculated to impress the jury with the belief that the court was instructing them that the burden of proof was not on the defendant to reasonably satisfy the jury of the pressing necessity to take life under his plea of self-defense, and such is not the law. *Naugher v. State*, 105 Ala. 26, and authorities cited in the opinion on page 30, 17 South. 24.

[18] Charge 23 is patently bad.

[19, 20] Charge 25 invades the province of the jury. As referred to the evidence, it

was shown that there was bad feeling existing between the defendant and deceased because of a difficulty they had engaged in the day before. There was also evidence tending to show that there was a likelihood of a renewal of hostilities when the parties met again. If the defendant, having armed himself since the first difficulty, crossed the street where the fatal rencounter occurred under these circumstances, knowing that he would likely meet the deceased and that there would be a renewal of the former difficulty, then he would not, as a matter of law, have a right to go to the place where he was when the killing took place. A person must not be disregarding of the consequences of any wrongful word or act, and must refrain from doing that which may encourage or provoke a difficulty. *McEwen v. State*, 152 Ala. 38, 44 South. 619. Besides, the charge states no proposition of law and is argumentative. It was under the evidence in this case a question for the jury.

[21, 22] "The rule of self-defense" is not, as a matter of law, confined to the statement of that rule of law as set out in the twenty-sixth refused charge. The learned judge, from whose opinion appellant's counsel call to our attention that they copied the charge (*De Arman v. State*, 71 Ala. 351, 359), in using the language copied into the charge was (as may readily be seen from reading the connection in which it was used) not laying down a general rule, but was only applying the applicable *part* of the rule of self-defense to the particular facts of the case then under discussion. To be given in charge as embodying the entire rule of law appertaining to self-defense, it would have a decidedly misleading tendency. Besides, the record shows that charges 26 and 27 were presented to the court together on the same piece of paper and refused as "one charge," and we have heretofore condemned charge 27 as bad.

[23] Charge 28 is bad in that it fails to embody the other elements of self-defense. Before this burden is placed on the state, other elements of self-defense must be proven to the reasonable satisfaction of the jury by the defendant. *McBryde v. State*, 156 Ala. 44, 47 South. 302, and authorities cited, following a discussion of charge 1 in that case, on pages 55 and 56.

[24] Charges 32 and 36 omit to predicate an honest or bona fide belief on the part of the defendant, as a reasonable man, of imminent impending danger. *Reld v. State*, 181 Ala. 14, 61 South. 324. Given charges 24 and 31 correctly state the propositions embodied in these charges and predicate the honest belief of the defendant.

[25-27] Charge 35 singles out part of the evidence for the consideration of the jury

and instructs the jury to base a finding on that evidence. It also incorrectly states the evidence, in that it states facts as a hypothesis for a finding that are not shown by the evidence set out in the record (*Sims v. State*, 146 Ala. 109, 41 South. 413) and invades the province of the jury (*Crumpton v. State*, 167 Ala. 4, 52 South. 605).

[28] The killing in this case was shown, without conflict in the evidence, to have been purposely done with a deadly weapon, and charge No. 37 does not state a correct proposition of law. *Murphy v. State*, 37 Ala. 142; *Commander v. State*, 60 Ala. 1.

[29] Besides, the refusal of the charge is without injury to the defendant, as the record shows the defendant was convicted of manslaughter in the first degree, in which express or implied malice does not enter as an ingredient of the crime. *Clarke v. State*, 117 Ala. 1, 23 South. 671, 67 Am. St. Rep. 157.

[30-32] Charges 38, 39, and 45 single out and give undue prominence to parts of the evidence, and are but mere arguments.

There is no presumption of law as to the requisite knowledge possessed by a person over 14 years of age not being sufficient to comprehend and appreciate the wrongfulness of his guilty act. The law makes no less "requirements," and draws no distinctions between a person of 19 or 20 years of age and one of 30 or 32 years of age, as to their having the requisite guilty knowledge to comprehend and appreciate wrongdoing, and the consequences of such an act. Charge 39 undertook to draw a distinction of law unknown to the law.

[33] Charges 42, 43 and 44 are erroneous, and properly refused in failing to set forth the constituent elements of self-defense. *Gilmore v. State*, 126 Ala. 21, 28 South. 595.

[34] The facts that the defendant had previously made threats against the deceased and had a pistol in his possession at the time he killed deceased, when taken in connection with all the other evidence in the case, might have led the jury to the conclusion that the defendant was not acting in self-defense at the time of the killing, and he would therefore, in that sense, have been deprived of setting up such a defense. For this reason charges 41 and 44 are misleading.

[35] They also invade the province of the jury. See *Hays v. State*, 155 Ala. 40, 46 South. 471; *Smith v. State*, 165 Ala. 74, 51 South. 632.

[36] These charges are also argumentative, and properly refused on that account. *Sweatt v. State*, 156 Ala. 85, 47 South. 194.

We find no reversible error in the record, and the judgment of the lower court will be affirmed.

Affirmed.

(12 Ala. App. 248)

MOORE v. STATE. (No. 185.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

1. WITNESSES ⇨287—CROSS-EXAMINATION OF STATE'S WITNESS—REDIRECT EXAMINATION.

Where a witness for the state was cross-examined extensively as to his interest in the prosecution, the court properly permitted the solicitor to ask him on redirect examination whether he appeared before the grand jury voluntarily, or in response to a subpoena.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 930, 1000-1002; Dec. Dig. ⇨287.]

2. CRIMINAL LAW ⇨1170½—HARMLESS ERROR—EXAMINATION OF WITNESSES.

Permitting a witness to be asked relative to his knowledge as to who reported the case to the grand jury, without there being any testimony showing that the witness himself reported it or instigated the prosecution, was harmless, where the witness returned a negative answer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. ⇨1170½.]

3. CRIMINAL LAW ⇨673—DOCUMENTARY EVIDENCE—PRELIMINARY INQUIRY.

Objection to a preliminary inquiry seeking to identify a paper and connect accused with it was properly overruled, though the testimony thus developed failed to connect defendant with the paper.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1597, 1872-1876; Dec. Dig. ⇨673.]

4. INTOXICATING LIQUORS ⇨233—PROSECUTION—ADMISSIBILITY OF EVIDENCE.

In a prosecution for violating the prohibition law, a witness' testimony that, when he bought whisky from defendant, he saw three bottles of beer in defendant's store, was admissible as prima facie evidence, under the express provisions of Acts 1909, p. 64, § 4, that defendant, who had no liquor license, kept liquors for sale contrary to law, and was proper to be considered in connection with evidence tending to show a sale of whisky to the witness.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 293-297, 298½; Dec. Dig. ⇨233.]

5. WITNESSES ⇨345—CROSS-EXAMINATION—CONVICTION OF "FELONY."

Under Code 1907, § 4008, providing that, if a witness has been convicted of a crime involving moral turpitude, this fact may be shown as tending to impeach the witness' credibility, it was error to exclude a question inquiring of a witness for the state on cross-examination whether he had been convicted and sent to the penitentiary; a crime such as justifies imprisonment in the penitentiary on conviction being a "felony" as defined by section 6756, and a felony being a crime involving moral turpitude.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1128-1128; Dec. Dig. ⇨345.]

For other definitions, see Words and Phrases, First and Second Series, Felony.]

6. WITNESSES ⇨48—DISQUALIFICATION—CONVICTION OF "CRIMEN FALSI."

At common law, a conviction of any form of "crimen falsi," or "the crime of falsifying, which might be committed either by writing, as by the forgery of a will or some other instrument; by words, as by bearing false witness or perjury; and by acts, as by counterfeiting or adulterating public money, dealing with false

weights and measures, counterfeiting as well as other fraudulent and deceitful practices"—carries with it the stigma of infamy, and disqualifies the convict to become a witness, regardless of whether the crime was a felony or a misdemeanor.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 109-115; Dec. Dig. ⇨48.]

For other definitions, see Words and Phrases, First and Second Series, Crimen Falsi.]

7. WITNESSES ⇨344—IMPEACHMENT—CONVICTION—"MORAL TURPITUDE."

"Moral turpitude," within Code 1907, § 4008, providing that a witness' conviction of a crime involving moral turpitude may be shown as tending to impeach his credibility, means "anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man or to society in general, contrary to accepted and customary rule of right and duty between man and man" (quoting Words and Phrases, Moral Turpitude).

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120, 1125; Dec. Dig. ⇨344.]

8. CRIMINAL LAW ⇨1153—APPEAL—DISCRETIONARY RULING—WITNESSES.

The trial court's exercise of discretion, in a criminal case, in permitting a witness to testify who has not been placed under the rule, will not be reviewed in the absence of gross abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. ⇨1153.]

9. WITNESSES ⇨379—IMPEACHMENT—CONTRADICTORY STATEMENTS.

Where a witness stated on cross-examination that he testified before the grand jury that he did not buy any whisky or beer from defendant and did not tell S. that he bought beer from defendant, but that the grand jury did not ask him about beer, the testimony of S. contradictory thereof in respect to his conversation with the witness was properly admitted.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1209, 1220-1222, 1247-1256; Dec. Dig. ⇨379.]

10. WITNESSES ⇨376—INTEREST—REBUTTAL.

Where accused offered evidence tending to show that a witness unduly interested himself in the prosecution, the witness was properly permitted to testify that he did not pay witnesses and urge them to come to court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1204-1206; Dec. Dig. ⇨376.]

11. INTOXICATING LIQUORS ⇨238—PROSECUTION—AFFIRMATIVE CHARGE—EVIDENCE.

Where, in a prosecution for violating the prohibition law, there was evidence that defendant, at his house, within 12 months before being indicted, sold liquor to the state's witness and received pay therefor, and that he had a store connected with his house, an affirmative charge requested by defendant was properly refused.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. ⇨238.]

12. CRIMINAL LAW ⇨789—CAUTIONARY INSTRUCTIONS—REFUSAL.

A requested instruction that the jury should not convict without a reasonable belief of defendant's guilt although such belief might not be sufficiently strong to exclude a reasonable doubt of defendant's innocence, being self-con-

tradictory and argumentative, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. § 789.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Gus Moore was convicted of violating the prohibition law, and he appeals. Reversed and remanded.

See, also, 10 Ala. App. 179, 64 South. 520.

L. A. Sanderson and Goodwyn & McIntyre, all of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

BROWN, J. [1] The theory advanced by the appellant in his defense, as indicated by the examination of the state's witnesses and by some of the evidence offered on the trial, was that the prosecution was a malicious one instigated by the state's witness Sellers for the purpose of acquiring possession of defendant's lands adjoining those of Sellers. On the cross-examination of the state's witness Arrington, who is shown to have been one of Sellers' tenants, he was examined extensively as to the interest he had manifested in the prosecution of the defendant, and his testimony tended to refute the fact that he had taken any unusual interest in the prosecution, but showed that he had appeared before the grand jury and testified at the time the defendant was indicted. On redirect examination, the court allowed the solicitor to ask the witness if he appeared before the grand jury voluntarily, or if he appeared there in response to a subpoena. The question elicited testimony pertinent and material to the inquiry as to what interest, if any, the witness had manifested in the prosecution. For this reason, there was no error in overruling the defendant's objection to the question; and, for like reasons, there was no error in overruling the defendant's motion to exclude the answer.

[2] While, in view of the negative answer of the witness to the question calling for his knowledge as to who reported this case to the grand jury, in the absence of testimony tending to show that the witness himself reported it or was connected with the instigation of the prosecution, we are unable to see how this fact could be material to any issue in the case; yet the negative answer of the witness to this inquiry could not have prejudiced the defendant.

[3] There is nothing in the record to show what, if anything, was on the paper exhibited to the witness Arrington by the solicitor; but, assuming that this paper contained matter which, if it had been admitted, would have been prejudicial to the rights of the defendant, there was nothing improper in the preliminary inquiry of the solicitor seeking to identify this paper and to connect the defendant with it; and there was no error in

the ruling of the court in allowing this preliminary inquiry. The court could not assume at this stage of the trial that the state would not be able to identify the paper and connect the defendant with the fact of its presence at witness' door. While there is nothing in the testimony developed on the preliminary inquiry tending to connect the defendant with the paper, yet, in view of the fact that the contents of the paper were not disclosed to the jury, no prejudice could have resulted to the defendant from this preliminary inquiry. If the defendant had made a motion to exclude the evidence of the witness as to this paper, after the court refused to permit the paper to be introduced in evidence, it was clearly the defendant's right to have it excluded; and, if the motion had been made at this stage of the case, it no doubt would have been granted. However, at the time the objections were made to the preliminary questions, and motion made to exclude the answer thereto, it was not the defendant's right to have such inquiry stopped.

[4] There was no error in allowing the witness Jerico to testify that, about the time the witness Arrington swore that he bought whisky from the defendant, he (Jerico) saw three bottles of beer in a little box on ice in the defendant's store. This fact, in the absence of a license authorizing the defendant to engage in the liquor business, was prima facie evidence that the defendant was keeping liquors for sale contrary to law, and was a fact pertinent to be considered by the jury in connection with the evidence tending to show a sale of whisky to Arrington. Acts 1909, p. 64, § 4; Patterson v. State, 8 Ala. App. 422, 62 South. 1023; Kinsaul v. State, 8 Ala. App. 405, 62 South. 990; Stokes v. State, 5 Ala. App. 159, 59 South. 310; Bell v. State, 2 Ala. App. 224, 57 South. 154.

[5, 6] The defendant asked the witness Jerico on cross-examination the following question: "State whether or not you have been convicted in this court and sent to the penitentiary for a term." The court sustained an objection to this question, and the appellant here insists that in this ruling the court committed error which should work a reversal of the judgment. Section 4008 of the Code of 1907 provides that, if a witness has been convicted of a crime involving moral turpitude, this fact may be shown as tending to impeach the credibility of the witness; and section 4009 provides that the witness may be examined touching his conviction for crime. Section 6756 of the Code defines the difference between felonies and misdemeanors as follows:

"A felony within the meaning of this Code, is a public offense which may be punished by death, or by imprisonment in the penitentiary; all other public offenses are called misdemeanors."

Therefore, if the witness previous to his examination had been convicted of a crime which justified a sentence to the penitentiary for a term, it was a felony. *Clifton v. State*, 73 Ala. 473. A conviction for a felony at common law carried with it the stigma of infamy and disqualified the convict to become a witness or to serve as a juror, and the same result follows the conviction for any form of *crimen falsi*, such as "the crime of falsifying; which might be committed either by writing, as by the forgery of a will or other instrument; by words, as by bearing false witness, or perjury; and by acts, as by counterfeiting or adulterating the public money, dealing with false weights and measures, counterfeiting seals, and other fraudulent and deceitful practices" (*Black's Law Dictionary*, p. 300)—regardless of whether the crime was a felony or a misdemeanor (16 Am. & Eng. Ency. Law [2d Ed.] 245; 22 Cyc. 501; *Smith v. State*, 129 Ala. 91, 29 South. 699, 87 Am. St. Rep. 47).

Section 1795 of the Code of 1896 provided:

"No objection must be allowed to the competency of the witness because of his conviction for any crime, except perjury or subornation of perjury, but if he has been convicted of other infamous crime, the objection goes to his credibility."

Construing that statute, the Supreme Court, in the case of *Smith v. State*, 129 Ala. 89, 29 South. 699, 87 Am. St. Rep. 47, said:

"The rule of the common law was that persons convicted of treason, felony, and the *crimen falsi*, were rendered infamous and were disqualified as witnesses in civil and criminal cases. * * * The common-law rule, which prevailed in this state, was changed by the enactment of the statute now embraced in section 1795 of the Code so as to relieve a witness of disqualification by reason of having been convicted of an infamous crime, except where the conviction is for perjury or subornation of perjury; providing, however, that the evidence of such conviction goes to his credibility. It is too clear for argument that the words 'infamous crime' employed in the statute have the same meaning as they had at common law."

In *Gordon v. State*, 140 Ala. 38, 36 South. 1012, applying that section, the court said:

"Manlaughter was a felony at common law, and by the common law a conviction and sentence for crime belonging to the class called infamous and comprised in treason, felony, and *crimen falsi* rendered the convict incompetent to testify as a witness."

But in that case the court held that it was not permissible to offer proof of a conviction for wantonly or maliciously throwing into a railroad train, which under some circumstances is a felony and under others a misdemeanor, because it was not a common-law felony or an offense within the description *crimen falsi*. In the case of *Deal v. State*, 136 Ala. 57, 34 South. 23, the Supreme Court, speaking by Justice Sharpe, the author of the opinion in the *Gordon* Case, held that evidence of a conviction for burning a gin, which was not a felony at common law, but was a felony under our statute, was admissible to discredit the witness. 3 Cyc. 986.

The *Smith* and *Gordon* Cases both cite, as sustaining their enunciations, *Sylvester v. State*, 71 Ala. 23, and *Taylor v. State*, 62 Ala. 164. In *Sylvester's Case*, the court holds:

"At common law persons convicted of crimes which render them infamous were excluded from being witnesses. An infamous crime was regarded as comprehending treason, felony, and *crimen falsi*."

And in *Taylor's Case*:

"The rule of the common law is that persons convicted of treason, felony, and the *crimen falsi* were rendered infamous, and were disqualified as witnesses in cases civil or criminal. * * * The meaning of the term '*crimen falsi*,' which was borrowed from the Roman law, has not been defined with precision. It is generally accepted as embracing all offenses tending to pervert the administration of justice by falsehood or fraud."

The Supreme Court, in the case of *Fuller v. State*, 147 Ala. 37, 41 South. 775, held:

"At common law the conviction of a felony disqualified the witness, because the nature of the crime and the punishment rendered the witness infamous" citing, in support of this proposition, 16 Am. & Eng. Ency. Law (2d Ed.) 245, and *Sylvester's Case*, 71 Ala. 23.

And in the same opinion the court said:

"But, aside from these considerations, we entertain the opinion that a conviction for a felony made so by statute, which was not a crime at common law, may be shown for the purpose of affecting his credibility as a witness under section 1795 of the Code. *Murphy v. State*, 108 Ala. 10, 18 South. 557; *Taylor v. State*, 62 Ala. 164, 165. This conclusion is not opposed to any of our cases. There are doubtless expressions in some of them which are calculated to mislead upon a mere cursory reading; but a careful examination of them will disclose that they support, rather than militate against, our conclusions. Their misleading tendencies grow out of a discussion of the nature of the act for which the conviction is had, with respect to whether that act was at common law of the nature of the *crimen falsi*. Where the conviction is for a felony, the question of whether the act or offense is of the nature of the *crimen falsi* is wholly impertinent and unimportant. That question can only arise where the conviction is for a misdemeanor, and only becomes important in that class of cases." *Fuller v. State*, 147 Ala. 38, 41 South. 776.

In short, the conviction of a felony carries with it the stigma of infamy.

[7] "Moral turpitude" is defined:

"Anything done contrary to justice, honesty, principle, or good morals; an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." 27 Cyc. 912; 5 Words & Phrases, p. 4580; *State v. Mason*, 29 Or. 13, 43 Pac. 651, 54 Am. St. Rep. 772; *Gillman v. State*, 165 Ala. 138, 51 South. 722.

We have no doubt that the conviction of any crime that subjects one to the stigma of infamy and justifies his confinement in the penitentiary as a punishment for the offense and the protection of society from the evil influences of his conduct involves moral turpitude within the meaning of section 4008 of the Code, and that proof of such conviction is admissible to discredit his testimony. *Roden v. State*, 3 Ala. App. 197, 58 South. 71;

Roden v. State, 5 Ala. App. 247, 59 South. 751; Wingate v. State, 1 Ala. App. 40, 55 South. 953; Murphy v. State, 108 Ala. 10, 18 South. 557; Waters v. State, 117 Ala. 108, 22 South. 490; Clifton v. State, 73 Ala. 473; Prior v. State, 99 Ala. 196, 13 South. 681. The question of credibility, under all the evidence, is one for the jury; but it is proper that they should be allowed to consider the fact of such conviction in passing upon the weight of the testimony. The court erred in sustaining the objection of the state to the question, and for this error the judgment must be reversed.

[8] The question of allowing the state to examine a witness who had not been placed under the rule was a matter within the sound discretion of the trial court, and it is thoroughly settled by the decisions of this court, and of the Supreme Court, that the exercise of discretion by the trial court will not be reviewed unless the record presents a case of gross abuse. No such abuse is shown by the record in this case. Johnson v. State, 8 Ala. App. 14, 62 South. 450.

[9] On cross-examination of the witness Oscar Carroll, he testified that he was before the grand jury and there testified that he did not buy any whisky or beer from the defendant, and that he did not tell Mr. Sellers, after he had been before the grand jury, that he bought beer from the defendant, but that the grand jury did not ask him about buying beer. For the purpose of impeaching this witness, the court allowed the solicitor to show by the witness Sellers that the witness Carroll stated to Sellers that he (Carroll) had testified before the grand jury that he did not buy any whisky from the defendant, but that the grand jury did not ask him about beer, and that, if they had asked him about beer, he would have told them that he bought beer. This evidence was clearly admissible to impeach the witness Carroll. It was contradictory of the testimony that he had given to the effect that he did not buy any beer from the defendant. If the defendant sold to the witness Carroll spirituous, vinous or malt liquors without license and contrary to law as charged in the indictment, he was guilty, and, if the defendant's witness made contradictory statements as to this fact, it was a material fact upon which he could be impeached. Harris v. State, 96 Ala. 24, 11 South. 255.

[10] There was no error in allowing the witness Sellers to testify that he had not attempted to go around and pay the witnesses and drum them up to come to court. This evidence was in rebuttal of the evidence offered by the defendant tending to show that the witness Sellers had unduly interested himself in fostering the prosecution.

[11] There was evidence tending to show that the defendant, within 12 months before the finding of the indictment, sold to the

state's witness Sol Arrington 2½ pints of liquor, for which Arrington paid him 35 cents each; that the defendant had a store connected with his house; and that he bought the whisky from the defendant at his house. There was also evidence showing that the defendant kept beer on ice in his store. This proof made the defendant's guilt or innocence a jury question. The affirmative charge requested by the defendant was properly refused. Patterson v. State, 8 Ala. App. 422, 62 South. 1023; Kinsaul v. State, 8 Ala. App. 405, 62 South. 990; Stokes v. State, 5 Ala. App. 159, 59 South. 310; Bell v. State, 2 Ala. App. 224, 57 South. 154.

[12] It requires no argument to demonstrate that the other written charge requested by the defendant was properly refused. This charge merely asserts that the jury should not convict the defendant without a reasonable belief of his guilt, although such reasonable belief might not be sufficiently strong to exclude a reasonable doubt of defendant's innocence. Besides being self-contradictory, this charge is argumentative.

For the error above pointed out, the judgment of the city court must be reversed, and the cause remanded.

Reversed and remanded.

(12 Ala. App. 148)
BENJAMIN v. STATE. (No. 184.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

1. CRIMINAL LAW §417—EVIDENCE—DECLARATIONS MADE OUT OF DEFENDANT'S PRESENCE.

In a prosecution for larceny, testimony of the state's witness that some one had told him over the phone that defendant, one of his porters, was down there with goods which the speaker was sure had been stolen, and was trying to dispose of them, not made in the defendant's presence, was inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 950-967; Dec. Dig. § 417.]

2. CRIMINAL LAW §1169—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In such case, the action of the court in excluding such evidence cured the error in its admission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 8088, 8130, 3137-3143; Dec. Dig. § 1169.]

3. CRIMINAL LAW §401—SECONDARY EVIDENCE—IDENTITY—PRICE TAG.

In a prosecution for larceny of goods, including a lady's dress, from which, when found, the ticket bearing the price mark (\$35) had been removed, evidence that after defendant's arrest there dropped from his clothes a ticket like that which had been on the dress bearing the price mark (\$35), permitted parol evidence that the ticket found on defendant looked like the one missing from the dress; such ticket being a matter of description and identity and susceptible of parol proof, and not a document, itself the best evidence of its contents and excluding parol evidence until its loss had been shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 884; Dec. Dig. § 401.]

4. CRIMINAL LAW ⚡745—PROOF—AFFIRMATIVE CHARGE.

In a prosecution for larceny, where there was evidence which if believed by the jury was sufficient in its inferences to overcome prima facie the presumption of innocence, the general affirmative charge for defendant was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1718; Dec. Dig. ⚡745.]

5. CRIMINAL LAW ⚡789—INSTRUCTIONS—REASONABLE DOUBT.

In such prosecution, defendant's requested charge that the jury could not convict without a reasonable belief of his guilt, and that even such belief might not be sufficiently strong to exclude a reasonable doubt to the contrary, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1851, 1880, 1904-1922, 1960, 1967; Dec. Dig. ⚡789.]

Appeal from City Court of Montgomery; Armstead Brown, Judge.

Clem Benjamin was convicted of grand larceny, and he appeals. Affirmed.

The facts sufficiently appear. The following is charge 9:

The jury should not convict defendant without a reasonable belief of his guilt, and even such reasonable belief might not be sufficiently strong to exclude a reasonable doubt to the contrary.

L. A. Sanderson, of Montgomery, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

THOMAS, J. Defendant was convicted of grand larceny, and on appeal his counsel urge that the lower court committed error in the admission of evidence, in two particulars, and in refusing written charges 9 and 12.

[1] Clearly, the court was, as is first insisted, in error in permitting the state's witness Sims to testify that some one told him (witness) over the phone that:

"There is one of your porters [defendant] down here with goods. I am sure he has stolen them and trying to dispose of them. If I turn the negro up, will you pay us for it?"

The court was probably led into the error of admitting this evidence upon the assumption that the person talking was a police officer, and that the defendant had been arrested and was within the presence and hearing of the officer at the time the latter was so talking over the phone and therein charging defendant with crime. There was some basis for such an inference at the time the message was let in, evidently misleading also the defendant's counsel, which we judge from the fact that one of the objections interposed to it by him was "that it was a declaration made by a third party in the presence of defendant."

[2] Later, it developed that defendant was not present; and thereupon the court on motion of defendant's counsel excluded and ruled out from the consideration of the jury

this telephone message, and thereby cured the error of admitting it.

[3] It appears that the defendant was a porter in the store from which the goods were stolen, and that, among the articles taken, was a lady's dress, which was found, on the day the defendant was arrested, concealed behind the store, and that, when found, the ticket bearing the price mark (\$35), which had formerly been on the dress, had been removed from it; and one of the state's witnesses was permitted to testify, over defendant's objection, that after defendant was arrested, and while he was being carried to jail, there dropped from his clothes a ticket like that that had been on the dress, bearing the price mark \$35.

The insistence here of defendant's counsel, which is predicated upon his objection in the lower court raising that point, is that the ticket itself was the best evidence of its contents, and that secondary evidence of such contents was not admissible until loss of the ticket had been shown. This is undoubtedly the rule with respect to documents; but counsel overlook the fact that there are certain writings and inscriptions which cannot be properly classed as documents, and to which the rule is not applicable, but which the law regards simply as matters of description and identity and as susceptible, primarily, of parol proof. Among writings that have been held to be of this class are a direction on a parcel, words written on the tag of a valise, labels attached to jugs or decanters, and indicating their contents, etc.; and we are clear in the opinion, and so hold, that the ticket here in question properly falls within such class, and consequently that the court did not err in admitting parol evidence to the effect that the ticket found on the prisoner looked like the one that was missing from the dress and that each bore the price mark \$35. 17 Cyc. 483, and cases there cited; Hester v. State, 103 Ala. 83, 15 South. 857; 1 Mayf. Dig. 322, § 8, and page 336, § 27; Mitchell v. State, 94 Ala. 68, 10 South. 518; Spivey v. State, 26 Ala. 90; Watson v. State, 63 Ala. 19; Duffie v. Phillips, 31 Ala. 571; Johnson v. Cunningham, 1 Ala. 249.

[4, 5] As there was evidence, which, if believed by the jury, was sufficient in its inferences to overcome prima facie the presumption of innocence, the court did not err in refusing charge 12, which was the general affirmative charge requested by defendant. Jones v. State, 90 Ala. 628, 8 South. 383, 24 Am. St. Rep. 850. Nor did the court commit error in refusing written charge 9. Gus Moore v. State (Ala. App.) 67 South. 789.

We have discussed only the errors urged, but have examined the entire record. As we find no error, the judgment appealed from is affirmed.

Affirmed.

(12 Ala. App. 546)

AMERICAN TRUST & SAVINGS BANK v. O'BARR. (No. 291.)(Court of Appeals of Alabama. Nov. 10, 1914.
On Rehearing, Jan. 21, 1915.)**1. GARNISHMENT —13—PROPERTY SUBJECT—PROPERTY RECOVERABLE BY DEBTOR.**

Plaintiff cannot garnish any fund or property that the defendant debtor could not recover in an action *ex contractu* against the garnishee, except that plaintiff can so reach such property in the hands of the garnishee when it has been fraudulently assigned or conveyed by the defendant debtor to a third person, although, on account of such assignment, the debtor himself could not recover it of the garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 21-24; Dec. Dig. —13.]

2. GARNISHMENT —51—ASSIGNMENT BY DEBTOR—ACTION AGAINST GARNISHEE—SPLITTING CAUSE OF ACTION.

Where defendant debtor's assignment of funds in the hands of a named garnishee was not entirely fraudulent and void, the plaintiff's remedy was to garnishee the assignee, as to the excess coming into its hands, before payment thereof to the defendant debtor, for to allow a judgment for plaintiff against the garnishee for a part of the sum assigned and a judgment for the assignee for another part would be to split one cause of action into several.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97-101; Dec. Dig. —51.]

3. ASSIGNMENTS —12—VALIDITY—WAGES.

Acts 1911, p. 370, declaring all assignments of future wages or salaries void, does not include a contractor's assignment of the contract price for building railroads to become due in the future.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 20; Dec. Dig. —12.]

4. ASSIGNMENTS —86—RECORD.

Such assignment was valid as against the assignor's creditor without record, since the registration statutes have no applicability thereto.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 152-154; Dec. Dig. —86.]

5. ASSIGNMENTS —41—VALIDITY—STATUTES.

Code 1907, § 4287, declares all assignments of goods or things in action, "made in trust for the use of the person making the same," void against existing and subsequent creditors, and section 4293 provides that all assignments of any real or personal estate "made with intent to hinder, delay, or defraud creditors" shall be void. Defendant debtor had funds in the hands of a named garnishee arising from the amounts due under a contract between defendant and the garnishee for construction work, but, before he had become indebted to plaintiff, assigned to claimant all sums due and payable under the contract, and the garnishee, assenting thereto, at time of process held a surplus over the amounts which the assignment was made to secure and more than sufficient to pay the debt. *Held* that, in the absence of fraud or insolvency, the mere fact that the assignment did not express that it was given as security did not make it void in toto, but only to the extent of the benefit reserved to the assignor, the excess over the amount necessary to pay the debt secured by the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 76, 77; Dec. Dig. —41.]

6. GARNISHMENT —51—ASSIGNMENT BY DEBTOR—GARNISHMENT AGAINST ASSIGNEE.

In such case the plaintiff might garnishee

such excess in the hands of the assignee, but not against the named garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 74, 97-101; Dec. Dig. —51.]

Brown, J., dissenting.

Appeal from Circuit Court, St. Clair County; J. E. Blackwood, Judge.

Action by G. E. O'Barr against one Turner, the Mitchell Mountain Coal & Iron Company, garnishee, American Trust & Savings Bank, assignee, claimant. Judgment for plaintiff and claimant appeals. Reversed and remanded.

Max J. Winkler and Victor H. Smith, both of Birmingham, for appellant. M. M. Smith, of Pell City, for appellee.

THOMAS, J. The appellee, O'Barr, commenced suit by original attachment against one Turner, in aid of which a writ of garnishment was then sued out and served upon the Mitchell Mountain Coal & Iron Company, as garnishee, who filed answer admitting an indebtedness of \$2,705.99, but suggesting the appellant, the American Trust & Savings Bank, as claimant. The latter, having been brought in by citation, propounded its claim to the fund, which was predicated upon an assignment to it of the same by the defendant in attachment, Turner. The plaintiff (appellee) contested the claim on the ground that the assignment was fraudulent and void as to him; and, from a judgment in plaintiff's favor, the claimant appeals, assigning, among other alleged errors, the action of the court in giving the general affirmative charge for plaintiff.

The evidence, without dispute, disclosed the following facts: The defendant, Turner, became indebted to the plaintiff in April, 1913, in the sum of \$76.36, for the recovery of which the suit was brought on June 21, 1913. The fund (\$2,705.99) in the hands of the garnishee at the time of the service of the garnishment was the balance due under a contract between defendant, Turner and the garnishee, executed on August 19, 1912, whereby Turner, for a stipulated price, payable as the work progressed, was to construct five miles of railroad for the garnishee, furnishing all necessary labor and material. The road had been completed at the time of the service of the garnishment. Shortly after the making of this contract between the defendant Turner and the garnishee, and long before said Turner became indebted to the plaintiff, he (Turner) on August 26, 1912, for a recited consideration of "one dollar and other valuable and sufficient considerations in hand paid," transferred and assigned in writing to the American Trust & Savings Bank (the claimant here) all sums then due or that might thereafter become due and payable to him under said contract with garnishee. The garnishee was notified of the assignment and had assented to the same and had

made many payments under the contract to the assignee long before the issuance and service of the garnishment writ. This transfer and assignment was absolute in form; but it appears from the evidence, without dispute, that it was in reality given merely as security for an advance of money (\$800) then made by said bank to said Turner, and for such future advances as it might thereafter make him—all of which, at the time of the service of the garnishment, aggregated something over \$12,000. It appears, however, that the sum (\$2,705.99) in the hands of the garnishee at the time of the service of the writ, when added to what the garnishee has already paid the claimant under the assignment, will more than repay (by \$135) the claimant for all advances made by it to defendant Turner.

[1] While this excess is fully adequate to more than pay the debt (\$76.36) for which plaintiff brought his suit against defendant Turner, yet it cannot be reached under a writ of garnishment against the garnishee here, unless the said assignment by said Turner to the claimant bank is fraudulent and void in toto as against the plaintiff, for it is a general rule of law that the plaintiff cannot reach and subject to the payment of his debt by process of garnishment any funds, property, or demands that the defendant debtor could not recover in an action (ex contractu) against the garnishee; the rule being subject, however, to an exception, which is, that the plaintiff can so reach such assets in the hands of the garnishee when they have been fraudulently assigned or conveyed by the defendant debtor to a third person, although, on account of such assignment, the debtor himself could not recover them of the garnishee. *Alexander v. Pollock*, 72 Ala. 137; *Cunningham v. Baker*, 104 Ala. 168, 16 South. 68, 53 Am. St. Rep. 27; 3 Mayf. Dig. 892.

[2] If, therefore, the assignment in the present case is not fraudulent and void in toto as against the plaintiff, then, although the amount assigned is in excess of what is sufficient to fully pay the debt due the assignee (claimant here), the plaintiff's remedy is to garnishee the assignee and thereby reach the excess sum that will come into its hands, as a result of the assignment, before such excess is paid over to the defendant (*Henderson v. Ala. Gold Life Ins. Co.*, 72 Ala. 32), for, if the assignment is not so entirely fraudulent and void, then to sustain the present garnishment would be to permit the plaintiff to obtain a judgment against the garnishee here for a part of the sum assigned, which would result in the splitting up of a single cause of action against the garnishee, who before the garnishment had, by accepting and assenting to the assignment, bound itself to pay the whole fund to the assignee. Hence, to hold that the plaintiff may recover a part and the assignee a part would be to hold that one cause of ac-

tion may be split into several. *Kansas City, M. & B. R. Co. v. Robertson*, 109 Ala. 298, 19 South. 432, and cases cited.

[3] The fund assigned was not, as insisted by plaintiff's counsel, wages or salary within the contemplation of Gen. Acts 1911, p. 370, declaring void all assignments of wages or salaries to be earned in the future; but was, as seen, the contract price for building five miles of railroad and was to become due in the future under an existing contract, as described, and as such had the character of assignability. *Payne v. Mobile*, 4 Ala. 333, 37 Am. Dec. 744; *Wellborn v. Buck*, 114 Ala. 279, 21 South. 786; *Harrison v. L. & N. R. Co.*, 120 Ala. 42, 23 South. 790.

[4] Nor was it necessary, as insisted, to the validity as against plaintiff of such assignment that it be recorded, since our registration statutes have no applicability to such an assignment. *Rowland & Co. v. Plummer*, 50 Ala. 182.

There is no evidence whatever tending to show or to afford any inference that there was any actual fraud or mala fides in the transaction between defendant and claimant; hence, the only question in the case is as to whether or not there was any constructive or legal fraud that would vitiate the assignment. Section 4287 of the Code declares that:

"All deeds of gift, all conveyances, transfers, and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors existing and subsequent, of such person."

In the construction of this section our Supreme Court have said incidentally that an assignment absolute in form of a chose in action, when intended merely as security for a debt, is, without more, void as against the creditors of the assignor, because (quoting the language of the court) "there is a reservation of a benefit to the transferor, a trust for his use" (*Truitt v. Crook*, 129 Ala. 379, 30 South. 618); but the court did not declare to what extent such an assignment in such a case is void, whether in toto or only to the extent of the benefit reserved to the assignor, hence we are not in conflict with that opinion, but in entire harmony with the terms of the statute, when we hold that, in the absence of actual fraud—which, if it existed, would, of course, taint and vitiate the entire transaction—such an assignment is void only to the extent of the benefit reserved to the assignor, the fund that under the assignment is to be held by the assignee in trust for the use of the assignor, which is the excess over and above the amount necessary to pay the debt secured by the assignment. *Hayes v. Westcott*, 91 Ala. 143, 8 South. 337, 11 L. R. A. 488, 24 Am. St. Rep. 875; *Bank v. Kennedy*, 91 Ala. 470, 8 South. 652; *Ruse v. Bromberg*, 88 Ala. 619, 7 South. 384; *Caldwell v. King*, 76 Ala. 149.

This excess may, of course, at any time before it has been paid to the assignor debtor

by the assignee in discharge of the trust, be reached by any creditor of the assignor, whether his debt existed at the time of the assignment or was created subsequently thereto, because such excess is and remains the property of the debtor, though held by another under an assignment in trust for the debtor's use. The law (Code, § 4287) declares such trust void, denying to the debtor the right to lock up for his own use, by a trust, property which otherwise would be liable for his present debts, whether such debts were existing at the time or arose subsequent to the creation of the trust. Code, § 4287; *Sandlin v. Robbins*, 62 Ala. 477. Such a trust, or any other trust created by the debtor for his own use or benefit is, under that statute, void at the option of such creditors, existing or subsequent, irrespective of whether the debtor was or is insolvent, and regardless of whether or not there was any fraudulent intent on his part or on the part of the assignee. *Roden & Co. v. Norton*, 128 Ala. 138, 29 South. 637.

But that statute (Code, § 4287) in and of itself operates, according to its plain terms as we interpret them, no further than upon the trust, declaring, as seen, that:

"All deeds of gift, all conveyances, transfers, and assignments * * * made in trust for the use of the person making the same, are void [as] against [his] creditors, existing and subsequent."

Therefore, if the conveyance or assignment made by the debtor has, as here, other functions than to create a trust for the use of the debtor, then, so far as the statute cited is concerned, the conveyance or assignment will be upheld to the extent of its valid functions, and vitiated or destroyed at the instance of the assignor's creditors only to the extent of the trust thereby created for his use or benefit, unless, of course, the two features are so intimately interwoven, which is not the case here, as not to be separable in their operation and effect; but which is the case where a debtor by a conveyance, absolute in form but intended merely as security for a debt, transfers his entire stock of goods to a creditor and is permitted to remain in possession and sell the property in the ordinary course of trade for his own benefit. In such latter case, the statute cited (Code, § 4287) vitiates the entire transaction regardless of the solvency or insolvency of the debtor and regardless of fraudulent intent or not, and makes all of the goods subject to the demands of both existing and subsequent creditors, because the trust for the debtor's use extends to every part and parcel of the goods and in every true sense they are his property. *O'Neil v. Birmingham Brewing Co.*, 101 Ala. 383, 13 South. 576.

The last cited case (*O'Neil v. Birmingham Brewing Co.*) is one of the only three cases cited in the case of *Truitt v. Crook*, supra, in support of the general declaration there

made that, under section 4287 of the Code, an assignment absolute in form of a chose in action, when intended only as security for a debt, was, without more, void. The difference between the two cases is too obvious to require further discussion.

The other two cases cited in *Truitt v. Crook* are those of *Bryant v. Hall*, 21 Ala. 264, and *Steiner v. Scholze*, 114 Ala. 88, 21 South. 428. Each of these cases held—the latter only as dicta—that such an assignment is void in toto; but the principle upon which those cases proceeded was not that as declared in section 4287, but was that as declared in that other common-law doctrine which is embodied in another section of the Code (section 4293), which provides that:

"All conveyances, or assignments in writing, or otherwise, of any estate * * * in real or personal property [which has been held to include choses in action—*Hall v. Ala. Term. Co.*, 143 Ala. 464, 39 South. 285, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363], and every charge upon the same, made with intent to hinder, delay, or defraud creditors, * * * are void."

Under this section, where the assignor is insolvent or embarrassed at the time of the assignment and the assignee has knowledge of the fact, or of facts that would put him on inquiry, an assignment, absolute in form, but intended merely as a security for a debt, is, like a deed made under such circumstances as security for a debt, entirely and absolutely void as against creditors, and this irrespective of whether the assignor and assignee intended or not to "hinder, delay, or defraud" the creditors of the assignor, because the necessary effect of the transaction was to do so, and the law, therefore, conclusively presumes in such case that the parties must have intended and did intend what they must and should have known would be the inevitable consequences of their act, the "hinder, delay, or defraud" of such creditors, in that by the form of the paper the assignor and assignee had concealed from such creditors assets belonging to the assignor debtor which were liable to the satisfaction of their debts and which otherwise could have been reached, had concealed by the assignment, absolute in form, the fact of the assignor's equity in the property, his right to the excess of its value over and above the amount of it required to pay the debt secured, which if the assignment had on its face expressed its true character, would have been disclosed to the creditors, and could have been reached and subjected to their debts.

[6] The invalidity of the assignment as an entirety rests, therefore, not upon section 4287 of the Code, nor upon the fact that by the assignment a benefit was reserved to the assignor, but upon section 4293 of the Code, and upon the fact that by the form of the assignment the fact of the reservation of such benefit was concealed—secretly reserved—

naturally resulting in the hiding out and locking up from the creditors of that much of the assets of the debtor which would have been otherwise, had the assignment, like a mortgage, revealed its true character, that it was merely given as a security for a debt. The evil intent to "hinder, delay, or defraud," whether actual or only imputed, taints the whole transaction and vitiates the assignment entirely. The cases of *Bryant v. Hall* and *Steiner v. Scholze*, supra, did not fully express these principles, but we think them the true basis of those decisions. *Sims v. Gaines*, 64 Ala. 392; *Birmingham Dry Goods Co. v. Roden*, 110 Ala. 516, 18 South. 135, 55 Am. St. Rep. 85; *Pugh & Stone v. Harwell & Clark*, 108 Ala. 494, 18 South. 535.

In the present case it does not appear that the assignor was at the time of the making of the assignment, before, or afterwards insolvent or in embarrassed circumstances, or, if he had been or was or is, that the assignee had any knowledge of it or was in possession of any facts that would impose on it the duty of inquiring, hence, a material element of the facts upon the existence of which the law would impute an intent to "hinder, delay, or defraud" is wanting. This being true, will the law then vitiate the whole transaction at the instance of a subsequent creditor merely because the assignment failed to express its real character, that is, that it was given merely as a security, when there was no actual intent to hinder, delay, or defraud and when there exists no insolvency or failing condition of the assignor known to the assignee, or other facts, from which the law would conclusively infer such an intent, and when the only benefit reserved to the assignor is one that could have been lawfully reserved, if the assignment had expressed it rather than have left it to verbal understanding, and when this benefit can as easily be separated from the balance of the fund assigned as it could have been if the assignment had expressed its real character? In such a case, will the law go further than to say that the assignment absolute in form is void only to the extent of the benefit reserved to the debtor, and permit the creditors to reach this benefit, thereby making the assignment operate according to its real purpose rather than destroying it entirely and visiting harsh consequences for an act innocently done, and which has not in fact occasioned any harm to the complaining creditor, whose debt was created subsequent to the assignment?

If the case of *Truitt v. Crook*, supra, be construed as meaning to hold that every assignment, absolute in form, of a chose in action, when given as security for a debt, is void in toto merely because of the benefit reserved to the assignor and irrespective of any question of fraud vel non, then, unless that case should be overruled, our banks

must change their methods of doing business, and, instead of following the common practice of having a borrower indorse negotiable paper and other securities which are put up as collateral for a loan, have him sign a transfer or assignment, expressing in due and ancient form the fact that they are indorsed or otherwise transferred merely as security, otherwise the indorsement or transfer could be vitiated at any time at the instance of any creditor, existing or subsequent. *O'Neil v. Birmingham Brewing Co.*, 101 Ala. 383, 13 South. 576.

We do not, as said, understand the court as intending to go that far, but only as intending to hold that in the absence of actual fraud the assignment is void to the extent only of the benefit reserved, provided such benefit is, as here, of a nature separable; and if it is not, or if there is actual fraud in the transaction—actual evil intent, or an act to which the law necessarily imputes such intent, instances of both of which we have pointed out—then the assignment is void in toto. *Hayes v. Westcott*, 91 Ala. 143, 8 South. 337, 11 L. R. A. 488, 24 Am. St. Rep. 875; *Bank v. Kennedy*, 91 Ala. 470, 8 South. 652; *Ruse v. Bromberg*, 88 Ala. 619, 7 South. 384; *Caldwell v. King*, 76 Ala. 149.

We must admit that the subject is invested with much confusion and no little difficulty, due in part to its character, due in part to many loose and inapt and conflicting expressions in our opinions in dealing with it, which we could not hope, and will not attempt, to harmonize and reconcile, and due in further part to a failure on the part of some of the judges, in dealing with it in their opinions, to keep in mind in many instances the difference in the purpose and in the field of operation of the two sections of the Code we have discussed. Sometimes the invalidity of a conveyance or assignment is ascribed to one section when, it seems to us, it should have been ascribed to another, and vice versa, and sometimes it is ascribed to one section when, it seems to us, both have operated conjunctively to produce the result.

[6] However this be, we shall hold, until clearer light is afforded us, that our Supreme Court in the case of *Truitt v. Crook*, supra, meant otherwise, that an assignment, as that here, under facts as those here, is void only to the extent of the benefit reserved to the assignor (authorities last cited), and that this benefit is to be reached by garnishment against the assignee and not against the garnishee, who, before the garnishment, had assented to the assignment and bound itself to pay the whole fund to the assignee. *Henderson v. Gold Life Ins. Co.*, 72 Ala. 32; *Kansas City, M. & B. R. R. Co. v. Robertson*, 109 Ala. 298, 19 South. 432.

It follows that the trial court erred in giving the affirmative charge for plaintiff and

in refusing it to the claimant. The judgment is therefore reversed.

Reversed and remanded.

On Rehearing.

PER CURIAM. Rehearing denied.

BROWN, J. (dissenting). The transfer of the chose in action from Turner, the defendant, to the American Trust & Savings Bank is absolute in form on a recited consideration of "one dollar and other valuable and sufficient consideration in hand paid." The evidence shows without dispute that the sole purpose of the transfer was to secure an indebtedness due from Turner to the bank, and for which the bank held his obligation, that the effect of the transfer was not to satisfy the indebtedness of Turner, but to secure an existing indebtedness and to secure any future advances in money that the bank might make to Turner. This brings the transfer within the very letter of section 4287 of the Code, which provides:

"All deeds of gift, all conveyances, transfers, and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same, are void against creditors existing or subsequent, of such person." *Truitt v. Crook*, 129 Ala. 377, 30 South. 618; *Sandlin v. Robbins*, 62 Ala. 477; *Taylor v. Dwyer*, 131 Ala. 91, 32 South. 509; *Roden & Co. v. Norton & Co.*, 128 Ala. 129, 29 South. 637; *Birmingham Dry Goods Co. v. Roden & Co.*, 110 Ala. 516, 18 South. 135, 55 Am. St. Rep. 35.

The transfer is void without reference to any fraudulent intent. *Hill v. Rutledge*, 83 Ala. 162, 4 South. 135; *Sims v. Gaines*, 64 Ala. 392; *Bryant v. Young, Hall, et al.*, 21 Ala. 264. The purpose of the statute is to compel such transfers to express the truth and to avoid secret trusts; and while no doubt a legal transfer can be made which expresses on its face a purpose to operate as a mere security for a debt, and would be valid, yet, when it goes further and purports to be an absolute transfer when in fact it is not, it is brought within the influence of the statute, and is absolutely void as to creditors of the transferor, and as between the plaintiff, who is a creditor, although he became such subsequent to the date of the transfer, the defendant (Turner), and the Mitchell Mountain Coal & Iron Company (the garnishee) the Mitchell Mountain Coal & Iron Company was the debtor of Turner, and the funds in its hands were subject to the writ of garnishment of the plaintiff. As between Turner and the bank, of course, the transfer was valid and binding, where the right of creditors is not involved, and the bank would be entitled to collect from the Mitchell Mountain Coal & Iron Company all the indebtedness over and above an amount sufficient to satisfy the plaintiff's demand and the costs which he recovered.

In my opinion, the ruling of the circuit court, which is in accordance with the views above expressed, was correct, and the judgment of that court should have been affirmed.

(12 Ala. App. 253)

WRIGHT v. STATE. (No. 696.)

(Court of Appeals of Alabama. Dec. 15, 1914. Rehearing Denied Jan. 12, 1915.)

1. CRIMINAL LAW §1192—JURISDICTION OF COURT—CONTINUANCE UNTIL SUCCEEDING TERM OF COURT.

Where, on appeal by accused from a conviction, the sentence of the trial court was annulled and the cause remanded with directions to the trial court to resentence accused, the proceedings remained undetermined in the trial court, and when it adjourned for the term, after receiving the mandate, the case was continued by operation of law to the next term, at which time the court could resentence accused in accordance with the mandate.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3231-3240, 3243; Dec. Dig. §1192.]

2. CRIMINAL LAW §1014—APPEAL—ORDERS APPEALABLE.

Under Code 1907, § 6244, authorizing any person convicted of a criminal offense to appeal from "the judgment of conviction to the Supreme Court," no appeal lies from a sentence to hard labor pronounced by the trial court in pursuance of a mandate of the Court of Appeals on appeal by accused from a judgment of conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2571; Dec. Dig. §1014.]

Appeal from Law and Equity Court, Walker County; T. L. Sowell, Judge.

Alf Wright was convicted of crime and, from a sentence to hard labor pronounced by the trial court in pursuance to a mandate of the Court of Appeals, he appeals. Dismissed.

See, also, 9 Ala. App. 79, 64 South. 173.

Finch & Pennington, of Jasper, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

BROWN, J. The appellant was indicted at the spring term, 1913, of the Walker county law and equity court for a violation of the prohibition law, and on the 7th of July thereafter was convicted of that offense, and a fine of \$50 assessed against him. Failing to pay the fine or to confess judgment therefor, he was sentenced to hard labor for a period of 20 days to pay the fine, and, as an additional punishment for the offense, to hard labor for the county at the rate of 75 cents per day for the payment of the costs; but the judgment of the court did not ascertain the number of days the defendant was required to serve for the payment of costs. From that judgment and sentence, he prosecuted an appeal to this court, and on the 18th day of December, 1913, the judgment was in all things affirmed, except as to the sentence to hard labor for the payment of costs; that part of the sentence being reversed and annulled, and the cause remanded, with direc-

tions to the trial court to have the defendant brought into court in order that a proper sentence might be pronounced against him for the payment of the costs. *Wright v. State*, 9 Ala. App. 79, 64 South. 173.

[1] The certificate embodying the mandate of this court was issued on the 20th of December, 1913, and was received and filed by the clerk of the trial court on the 24th day of December, during the same term of that court at which the judgment of conviction was rendered. The next term of the law and equity court began on the 1st day of January, 1914, and on the 5th of January, 1914, the defendant was brought into open court and a sentence pronounced against him, in accordance with the mandate of this court. There is in the record what purports to be a bill of exceptions, showing that the ground urged by the defendant why he should not be resentenced was that the law and equity court, having adjourned for the term at which the judgment of conviction was rendered, had no power at a subsequent term to impose the sentence in accordance with the mandate of this court, citing, in support of this contention, *In re Newton*, 94 Ala. 432, 10 South. 549.

We are not unmindful of the general rule that a court is without power to alter, vary, or annul its final judgments or decrees after the close of the term at which rendered, except for the correction of clerical misprisions or amendments, the evidence of which the record affords. *Sweeney v. Tritsch*, 151 Ala. 242, 44 South. 184. This rule, however, has no application when the continuity of the proceedings is maintained by an appeal regularly taken from such final judgment resulting in the annulment of such final judgment in any respect, and a remandment of the cause by the appellate court for further proceedings in accordance with the mandate of the appellate court. *State ex rel. Attorney General v. Gunter*, 66 South. 844.

When an appeal is taken from a judgment of a nisi prius court, it is the duty of the clerk of the trial court to retain the case on the docket, and if this is not done, in the event the case is remanded for further proceedings in the trial court, it is the duty of the clerk of the trial court to redocket the case, and when the court adjourns for the term, if a special order of continuance is not entered in that case, the continuity of the proceedings is preserved by a general order of continuance, which it is the duty of the nisi prius court to make. The record in this case does not purport to set out all the proceedings of the trial court, and in the absence of a positive showing in the record that the clerk of the trial court failed to perform his duty, this court would indulge the presumption that he did (*Jones on Evidence*, § 45), but it is not necessary to the validity of the proceedings in this case that this presumption be indulged. By the appeal and the re-

versal of the sentence of the trial court at the instance of the defendant and the remandment of the cause for proper sentence, the proceedings were still in fieri, and when the law and equity court adjourned for the term, the case was continued by operation of law until the next succeeding term. 4 Ency. Pl. & Pr. 830; *Greer v. McGehee*, 3 Port. 398; *Ex parte Driver*, 51 Ala. 41; *Ex parte Owens*, 52 Ala. 473; *Clemens v. Judson, Minor*, 395. This distinguishes the case from the case of *Ex parte Newton*, supra, relied upon by the appellant. In that case, the trial court rendered a judgment on the verdict of the jury, adjudging the defendant guilty and assessing the fine fixed by the verdict as a punishment for the offense, without imposing the alternative sentence to hard labor in default of payment of the fine and costs, and, immediately after the rendition of that judgment, the defendant took an appeal therefrom to the Supreme Court, and entered into a bond with surety for her appearance to abide the judgment of the Supreme Court. The judgment of the trial court was affirmed in the Supreme Court, and thereby the judgment of the trial court was merged into the judgment of affirmance. There being no remandment, as in this case, that was an end to the proceeding, and the trial court in that case had no authority at a subsequent term to impose the alternative sentence to hard labor in default of payment of the fine. We hold, therefore, that the law and equity court had authority, and it was its duty, to impose a sentence in accordance with the mandate of this court. *State ex rel. Attorney General v. Gunter*.

[2] Section 6244 of the Criminal Code, giving the right of appeal to persons convicted of crime, provides:

"Any person convicted of a criminal offense in the circuit court, or other court from which an appeal lies directly to the Supreme Court, may appeal from the judgment of conviction to the Supreme Court."

The appeal in this case is from the sentence to hard labor pronounced by the court against the defendant for the payment of the costs after the cause was remanded by this court to the trial court with directions to pronounce that sentence, and the Attorney General has made motion to dismiss the appeal on the ground that that sentence will not support the appeal. The statute only authorizes an appeal from the judgment of conviction, and the defendant has exercised that right by his first appeal to this court, and the judgment of conviction has been affirmed. No appeal is authorized by the statute from the sentence to hard labor pronounced by the trial court, in pursuance of the mandate of this court (*Allen v. State*, 141 Ala. 35, 37 South. 393), and the motion of the Attorney General to dismiss the appeal is granted.

Appeal dismissed.

(12 Ala. App. 258)

GORDEN v. STATE. (No. 266.)

(Court of Appeals of Alabama. Feb. 11, 1915.)

INTOXICATING LIQUORS — 238 — OFFENSES — QUESTION FOR JURY.

In a prosecution for possession of liquor for illegal use or disposition, evidence held not to overcome presumption of innocence, so that the refusal of the general charge for defendant was error, and a conviction would be reversed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. 238.]

Appeal from Law and Equity Court, Morgan County; Thomas W. Wert, Judge.

Jim Gorden, alias, etc., was convicted of an offense against the liquor laws, and he appeals. Reversed and remanded.

Tidwell & Sample, of New Decatur, for appellant. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. It was shown by the state's evidence in this case that the defendant had been to a "wet" town, where the beverages prohibited under the laws enacted to suppress the evils of intemperance are legally sold; that he was returning to his home, located in a "dry" town, where such beverages were not legally sold, and carried with him 13 pints of whisky and 6 bottles of beer in a suit case, and had in his pocket a half-emptied bottle of whisky and a whisky glass, all of which he had procured in the town nearest his home where such liquors were legally sold. An officer stopped him while directly en route from the "wet" town to his home in the "dry" town, searched him and the suit case, with the result that in the suit case and on his person the above-stated amount of whisky and beer was found. This was the substance of the state's evidence. The defendant as a witness in his own behalf testified that when stopped and searched he had been to the "wet" town to buy the whisky and beer for his personal consumption; that the dealer from whom he bought it gave him the glass as lagnappe; that he had never sold prohibited beverages of any kind, and never offered for sale or kept for sale such liquors. This was the substance of the defendant's testimony.

We think the court was in error in refusing the general charge requested by the defendant. The defendant had a right to buy at a regular dealer's, where it is not unlawful to sell such liquors, and carry to his own home for his personal consumption, the quantity shown by the evidence in this case that he had purchased and was carrying to his home. There is nothing in the quantity or packages he is shown to have had that, under the circumstances, furnishes an inference that the liquor was purchased to be kept for illegal use or disposition. There was no other evidence to support an inference of the defendant's guilt of the offense charged. The

facts proven not being sufficient to overcome the prima facie presumption of the defendant's innocence, it was error to refuse the general charge requested in his behalf, and the judgment of conviction must be reversed. See *Perry v. State*, 65 South. 683, and authorities there cited.

Reversed and remanded.

(12 Ala. App. 453)

MITCHELL v. BLAND. (No. 243.)

(Court of Appeals of Alabama. Nov. 10, 1914.

Rehearing Denied Jan. 12, 1915.)

1. APPEAL AND ERROR — 196 — DECISIONS REVIEWABLE — RULINGS ON MOTION TO STRIKE.

Rulings on motion to strike certain evidential averments from a complaint will not be reviewed, but the questions must be presented by objection to the evidence, or by requesting charges to the jury.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1247, 1489; Dec. Dig. 196.]

2. PLEADING — 204 — DEMURRER — SUFFICIENCY.

A demurrer to a part of a count was insufficient.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 486-490; Dec. Dig. 204.]

3. APPEAL AND ERROR — 273 — EXCEPTIONS — SUFFICIENCY.

Exceptions in form, "Plaintiff objected and moved to exclude about merchandise; motion and objection sustained; defendant excepted;" and, following a series of answers, "Defendant objected to the question and answer concerning the changing of the name on the account book; overruled; defendant excepted"—were too general and indefinite.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1590, 1606, 1620-1623, 1625-1630, 1764; Dec. Dig. 273.]

4. APPEAL AND ERROR — 272 — EXCEPTIONS — SUFFICIENCY.

Exceptions not showing when they were taken presented no question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1611-1619; Dec. Dig. 272.]

5. APPEAL AND ERROR — 275 — EXCEPTIONS — RULING OF COURT.

Exceptions not showing any ruling of the court, and based on motions to exclude or objections to evidence not assigning any grounds, presented no question for review.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1566, 1567, 1647; Dec. Dig. 275.]

6. APPEAL AND ERROR — 525 — ASSIGNMENT OF ERROR — INSTRUCTIONS.

The refusal of charges copied in the record, but not incorporated or mentioned in the bill of exceptions, cannot be made the basis of assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2376-2378; Dec. Dig. 525.]

Appeal from City Court of Gadsden; John H. Disque, Judge.

Action by Pearl Bland against W. J. Mitchell, in trespass and conversion. Judgment for plaintiff, and defendant appeals. Affirmed.

Hugh H. White, of Gadsden, and J. S. Franklin, of Alabama City, for appellant. McCord & Davis, of Gadsden, for appellee.

CRUM, J. The only assignments of error relating to rulings of the trial court on the pleadings are in each instance to the effect that the court erred in not sustaining certain subdivisions of certain counts "of defendant's motion and demurrer." The defendant had moved the court to strike from one of the counts of the complaint certain averments intended as elements of damage. At the foot of this motion is written: "Defendant also assigns the above grounds as demurrers to the sufficiency of said count." The motion and the demurrer were at the same time severally overruled. Unless there was error in each of these rulings, the assignments, of course, cannot prevail.

[1] It has been repeatedly held that such rulings on similar motions would not be reviewed; that the question must be presented by objections to the evidence or by requesting charges to the jury.

[2] The demurrer, having been addressed, as it was, to a part of the count, was manifestly properly overruled. We do not, however, deem the averments pointed out at all inappropriate to the action.

[3-5] The rulings with respect to admission and rejection of evidence sought to be made the basis of assignments of error cannot be considered. As shown by the bill of exceptions, the objections and exceptions are entirely too general and indefinite. For illustration, the bill recites:

"Plaintiff objected and moved to exclude about merchandise. Motion and objection sustained. Defendant excepted."

And following a series of answers:

"Defendant objected to the question and answer concerning the changing of the name on the account book. Overruled. Defendant excepted."

It does not appear when the exception was taken. For aught appearing, construing the bill most strongly against the appellant, it may have been taken at some subsequent time during the progress of the trial. Nor does it appear, except perhaps in one instance, that there was any ruling by the court upon the questions presented, and in none of appellant's motions to exclude or objections to the evidence were there any grounds assigned. The particular evidence to which objection was made, and upon which the ruling of the court was invited, was not sufficiently pointed out. The trial court cannot thus be put in error.

[6] The giving of two special charges, requested presumably by appellee, is assigned as error. While these charges were by the clerk copied in the record, they are not incorporated or mentioned in the bill of exceptions, and hence their refusal cannot be made the basis of assignments of error. Alabama

Construction Co. v. Wagnon Bros., 137 Ala. 388, 34 South. 352.

We have, notwithstanding what has been said, carefully examined the entire record in this case, and we are clearly of the opinion that no substantial right of appellant was in any manner injuriously affected by any ruling of the trial court of which he seeks to complain.

Affirmed.

(12 Ala. App. 474)

JONES v. BIRMINGHAM RY., LIGHT & POWER CO. (No. 522.)

(Court of Appeals of Alabama. Jan. 12, 1915. Rehearing Denied Feb. 2, 1915.)

1. DEATH \S 78—ACTIONS FOR DEATH OF CHILDREN—DAMAGES RECOVERABLE.

The damages recoverable under Code 1907, \S 2486, authorizing actions for death of a minor child and a recovery of such damages as the jury may assess, are punitive, whether the wrongful act or omission complained of as causing the death was simple negligence or was wanton and willful, but the jury in fixing the amount of the damages may consider whether the wrongful act was wanton and willful or merely a negligent one.

[Ed. Note.—For other cases, see Death, Cent. Dig. \S 97; Dec. Dig. \S 78.]

2. NEGLIGENCE \S 11—"WANTONNESS."

"Wantonness" is such an entire want of care as to raise a presumption that the one in fault is conscious of the probable consequences of his carelessness and is indifferent to the danger of injury to the person or property of another, and unless an act is done, or omitted to be done, under such circumstances known to the party that his conduct is likely to, or probably will, result in injury, and through reckless indifference to consequences he consciously and intentionally does a wrongful act, the injury cannot be said to be wantonly inflicted.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. \S 13; Dec. Dig. \S 11.]

For other definitions, see Words and Phrases, First and Second Series, Wantonness.]

3. STREET RAILROADS \S 95—OPERATION—CARE REQUIRED.

A motorman, seeing a child on the street in a place of safety in charge of a grown nurse, may assume that the nurse will not permit the child to cross the track in dangerous proximity to the approaching car, and may act on such assumption until it becomes reasonably apparent that the nurse is negligent and will likely permit the child to go on or dangerously near the track, and the motorman, operating the car slowly and cautiously, is not guilty of wantonness in inflicting an injury on the child running on the track unless he actually discovered that the child was beyond the control of the nurse and in a position of peril in time to have taken action to avoid the injury to the child.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 179, 180, 202; Dec. Dig. \S 95.]

4. STREET RAILROADS \S 114—INJURIES TO CHILDREN ON TRACK—WANTONNESS—EVIDENCE.

Evidence held not to justify a finding that a motorman operating a car running over a child was guilty of wantonness.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. \S 239-250; Dec. Dig. \S 114.]

5. NEW TRIAL §108—GROUNDS—NEWLY DISCOVERED EVIDENCE.

A plaintiff, suing for negligent and wanton injury to his intestate, causing death, and recovering a judgment for simple negligence, is not entitled to a new trial on the ground of newly discovered evidence not showing wanton injury.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 228, 227; Dec. Dig. §108.]

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by J. T. Jones, as administrator, against the Birmingham Railway, Light & Power Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

Harsh, Beddow & Fitts, of Birmingham, for appellant. Tillman, Bradley & Morrow, and Frank M. Dominick, all of Birmingham, for appellee.

THOMAS, J. This is an appeal by appellant from a judgment in favor of himself for \$500, rendered in a suit brought by him as administrator under the homicide statute (Code, § 2486) for the death of his intestate, a child, which resulted from its being run over by a street car operated by defendant's motorman. The complaint contains two counts, the first being predicated upon simple negligence, and the second upon willful and wanton injury. The court at the request of the defendant, appellee here, charged affirmatively against plaintiff, appellant, as to the second mentioned count. Consequently the verdict returned in appellant's favor for \$500, upon which the judgment from which he now appeals was founded, was returned under the first-mentioned count, under which the jury, in assessing the damages, were confined, of course, to the consideration of the question of simple negligence only.

[1] Although the law is that the only kind of damages recoverable in this character of action is punitive, and this irrespective of whether the wrongful act or omission, complained of as causing the death, be wanton and willful or merely negligent (L. & N. R. Co. v. Street, 164 Ala. 155, 51 South. 306, 20 Ann. Cas. 877; R. & D. R. Co. v. Freeman, 97 Ala. 289, 11 South. 800), yet the jury, in fixing the amount of such punitive damages, which is a matter left to their sound discretion, have a right to consider the character of the act that produced the death—that is, as to whether it was malicious or merely a negligent one—because, punishment, and not compensation, being the design of the statute under which the action is brought, the degree of it should be measured by the extent of the offender's culpability. Code, § 2486. Certainly a jury would be disposed to assess, and would have authority to assess, greater punitive damages where such act was malicious than where it was merely negligent. Hence, if in this case there was any evidence from which the jury might have in-

ferred that the injury from which plaintiff's intestate died was wantonly or willfully inflicted, then the court erred to the prejudice of plaintiff in charging out the said second count of the complaint.

The appellee, however, insists that we are not called upon in this case to determine whether there was or not such evidence, and this for the reason that the appellant consented for the court to give at appellee's request a written charge, numbered 9, which in effect, it is urged, assumed that the only question in the case was one of simple negligence. This charge, numbered 9, reads as follows:

"The court charges the jury that unless you believe from the evidence that the motorman, on the occasion plaintiff complains of, negligently failed to keep a proper lookout, you should return a verdict for the defendant."

The bill of exceptions contains the following recital as to the circumstances under which this charge was given, to wit:

"The charges numbered 2 [immaterial here] and 9 [the one quoted], respectively, were at first refused by the court, and the court wrote upon each of the charges: 'Refused. Ferguson, Judge.' And thereupon in open court, and in the presence of the jury and before it retired, the plaintiff by his counsel consented that the court give the two said charges, 2 and 9, to the jury, and the court then wrote upon said two charges the words: 'Given. Ferguson, Judge. Consented'—and gave said two charges, 2 and 9, to the jury by consent of plaintiff's counsel."

It is contended by the appellee, therefore, that, since the expression of one thing is the exclusion of the other, the said charge 9, when properly construed, asserts in effect that under the evidence in this case the only basis on which the jury could find for the plaintiff would be a belief on their part from the evidence that defendant's motorman "negligently failed to keep a proper lookout" on the occasion of the injury to plaintiff's intestate, and that such charge consequently withdrew from the jury, with the consent of the plaintiff, the consideration of any question of willful or wanton injury; hence that, even if there was any evidence warranting such a consideration, the plaintiff, as the result of such consent, is not in a position to complain either of the action of the court in giving the charge mentioned (from which he considerably refrains), or of its action in charging out said count 2, which he strenuously urges as error, insisting that, although there was no evidence of willful injury, there was evidence of wanton injury. Whether he, by consenting to such charge 9, is foreclosed from making this insistence we refrain from deciding (Ex parte McNeil [Sup.] 63 South. 992), for the reason that in our opinion there is no merit in the insistence itself; it being clear to our minds that there is nothing in the evidence that would support a finding of wantonness.

[2] Wantonness is "such an entire want of

care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness and is indifferent or worse to the danger of injury to the person or property of another" (Wilkinson v. Searcy, 76 Ala. 180); and "unless an act is done, or omitted to be done, under circumstances * * * known to the persons, that his conduct is likely to, or probably will, result in injury, and through reckless indifference to consequences he consciously and intentionally does a wrongful act, * * * the injury cannot be said to be wantonly inflicted." So. Ry. Co. v. Bunt, 131 Ala. 595, 32 South. 508; L. & N. R. R. Co. v. Mitchell, 134 Ala. 286, 32 South. 735; B. R. L. & P. Co. v. Brown, 150 Ala. 329, 43 South. 342.

[3, 4] It appears here that the accident occurred on Tuscaloosa avenue in a residential portion of the city of Birmingham, at a point thereon where there are two parallel car tracks imbedded in and level with the street, which is straight and which runs east and west; that the car which struck the child was on the south one of these tracks going east along said street at the time of the accident; that just before the accident, and as the car was approaching the point where the accident occurred, the motorman saw the child, but the child was in charge of a grown nurse and was not then in a position of peril, being with its nurse in the street near the curb of the sidewalk on the north side of the street and standing at a fruit wagon which had stopped there in front of the residence of the child's parents; that the car was going at a low rate of speed, and the child, escaping the attention of its nurse, came from the fruit wagon across the north car track and into the said car as it was approaching on said south car track, being struck by the northeast corner of the car, knocked down, and one of its legs run upon by the front wheel of the car on that side. The motorman had a right to assume that the nurse would discharge her duty and would pay proper care and attention to the child and not permit it to play, or to attempt to cross the track, in dangerous proximity to the approaching car; and the motorman had a right to act on such assumption until it became reasonably apparent that the nurse was neglecting such duty and would likely permit the child to go on or dangerously near said track; and, even then, operating, as he was, the car slowly and cautiously, before he could be guilty of wantonness in inflicting the injury, he must have actually discovered that the child was beyond the control of its nurse and in a position of peril in time to have taken preventive action to avoid the injury.

No witness gives the distance from the car track where the child was struck to the point in the street where it was with its nurse at the fruit wagon when the motorman first discovered it, except to say that, between this track where the child was struck and the

curb of the street on the north side, the distance was such as to allow room for the other parallel car track mentioned, and room between it, the latter track, and the curb for the comfortable and safe passage of a vehicle. In this last-named space was standing, we assume, the fruit wagon, at which the child and nurse were. At what point they were about the wagon is left to conjecture, but wherever they were, they could not have been many feet from the track where the accident occurred, and it could not have taken many seconds of time for the child to leave, as it did, its nurse at the wagon and to cross, as it did, the other track and to come to the track where it was struck just as it reached it by the front corner of the passing car. There is nothing to show that the motorman saw the peril of the child—saw it beyond the control of the nurse and coming to the track—until the very moment that he applied the brakes and stopped the car, which was too late to prevent the injury. Negligence might, but wantonness cannot, under the circumstances here, be predicated upon his duty to see or upon the fact that he might have seen. Although the street at this point was a thickly settled residential section, it does not appear that the motorman was operating the car at a reckless rate of speed, but on the contrary, that he was with due regard to the conditions moving it, as all the witnesses testified, at a slow rate, some four or five miles an hour; therefore the fact that, in keeping, as it appears he did, a lookout ahead he either failed for a moment in his attention, or had for a moment his attention drawn elsewhere so that he did not see the child the moment it left the nurse in coming towards the track, furnishes no basis for a charge of wantonness, when up to that moment the child was not in peril and it was natural and reasonable to suppose that the nurse would prevent it from getting in a position of peril. Every fact and circumstance in the case is entirely consistent with the motorman's statement that he did not see the child until it was right at the car; and the nurse herself swore that it all happened so quick that she did not miss the child from her side at the wagon until somebody screamed, when she turned and saw the child had been struck.

This case, it seems to us, may be so easily differentiated as to the facts to which the law is applied from the many cases cited by appellant in his brief as not to necessitate a detailed discussion of those cases.

[8] The only other error assigned is predicated upon the action of the court in overruling plaintiff's motion for a new trial based on alleged newly discovered evidence. Nothing more need be said with reference to this than that none of the alleged newly discovered evidence tended to show that the injury to plaintiff's intestate was willfully or wantonly inflicted, by defendant's motorman; consequently there was no injury, if error, on

the part of the court in overruling the motion, since the jury had already found in plaintiff's favor on the question of simple negligence and assessed damages accordingly. *Randle v. Birmingham Railway, L. & P. Co.*, 169 Ala. 314, 53 South. 919.

The judgment appealed from is affirmed. Affirmed.

(12 Ala. App. 300)

Ex parte CREWS. (No. 848.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

1. CRIMINAL LAW §1216 — SUSPENSION OF SENTENCE BY BAIL ON APPEAL.

Under Code 1907, § 6249, providing that execution of sentence on conviction of felony must be suspended pending appeal, as amended by Acts 1911, p. 113, providing that, if sentence is for a term not exceeding five years, the judge must direct the clerk to admit the defendant to bail, and under Acts 1911, p. 626, providing that in all felony cases where the defendant is sentenced for five years or less, and an appeal is taken, such defendant shall be entitled to bail pending appeal, where petitioner was sentenced to three years in the penitentiary for assault with intent to murder, appealed, and was released on bail without any formal suspension of sentence being entered by the court, he is not entitled to have the time he is out on bail credited on his term of imprisonment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.]

2. CRIMINAL LAW §1216 — SUSPENSION OF SENTENCE BY BAIL ON APPEAL.

Under Acts 1911, p. 626, providing that, pending appeals in felony cases where the sentence was for less than five years, the judge must direct the clerk to admit the defendant to bail, if the sheriff had no authority to release petitioner on bail until the court first entered an order suspending sentence, petitioner, having been unlawfully released, had made an escape, so that the time for which he was at large was not to be deducted from the term of his sentence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3310-3319; Dec. Dig. § 1216.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Appeal by the State from an order discharging petitioner, Porter Crews, from confinement in the penitentiary on a writ of habeas corpus. Reversed and remanded.

R. C. Brickell, Atty. Gen., for appellant. J. Paul Jones and William M. Spencer, Jr., both of Birmingham, for appellee.

THOMAS, J. This is an appeal by the state from an order of the judge of the Tuscaloosa city court, entered on November 14, 1914, and discharging on writ of habeas corpus the petitioner, Porter Crews, from confinement in the penitentiary, to which he had been lawfully sentenced by the circuit court of Dale county for a term of three years upon his conviction in that court, on July 28, 1911, of the offense of an assault with intent to murder—a felony under the statute (Code, § 6309).

[1] The basis on which the petitioner

claimed his right to a discharge, and the theory upon which the judge acted in granting it, was that the petitioner was entitled under the law to have deducted from his sentence the time during which he was out on bail after his conviction in the said circuit court of Dale county and pending his appeal from that conviction to the Supreme Court. If this time is to be deducted, to wit, from July 28, 1911, when the petitioner was so convicted, to January 15, 1913, after his case on appeal was finally disposed of by the Supreme Court by a dismissal there, and when his service in the penitentiary actually commenced, then clearly his said sentence of three years had expired at the time he filed his petition for habeas corpus on September 25, 1914, and he was therefore entitled to be released from the imprisonment. On the contrary, if such time while he was so out on bail is not to be deducted, then the term of the sentence had not expired, and will not expire for some time yet to come, and there was consequently no authority of law for granting the order of discharge. *Weinard v. State*, 149 Ala. 59, 42 South. 991.

In the allegations of the petition for the writ of habeas corpus, and in the agreed statement of facts upon which such application was heard and determined, it appears that, although the prisoner on his said trial in the said circuit court of Dale county reserved for the decision of the Supreme Court questions of law, and upon his said conviction in said circuit court on said July 29, 1911, then duly prayed an appeal to the Supreme Court and then, in order to secure his release pending such appeal, duly executed and delivered to the sheriff a bail bond in an amount and conditioned in all respects as required by law, yet it further appears that the lower court wholly failed to make or have entered any order suspending the execution of its sentence pending such appeal.

This latter fact—the failure of the court to make and have entered an order suspending the sentence—is the sole foundation for the petitioner's contention that the time he was so out on bail should be treated as if he were actually serving the sentence, and should therefore be deducted therefrom in computing and arriving at a determination of the time when that sentence expires. In support of this contention we are cited to the case of *White v. State*, 134 Ala. 197, 32 South. 320, followed in *Viberg v. State*, 138 Ala. 100, 35 South. 53, 100 Am. St. Rep. 22, which, in construing section 4318 of the Code of 1896, now section 6249 of the present Code (1907), held that an appeal did not ipso facto suspend the sentence, but that it was necessary to that end that an order of suspension be actually made by the lower court and entered upon its minutes.

At the time that decision was rendered, however, our statutes did not in any case,

as appears from reading the section of the Code cited, though they do now where the sentence is for five years or less (Acts 1911, pp. 113, 626), authorize the release on bail, pending an appeal to the Supreme Court, of a person that had been convicted of a felony; but at that time only persons convicted of misdemeanors were allowed bail pending such appeal. Code 1896, § 4319; Code 1907, § 6250. Subsequent to said decision, and prior to the conviction in this case, which, as said, was for a felony, said section 4318 of the Code of 1896, construed in said decision, became section 6249 of the present Code, and the latter had been expressly amended by an act approved March 11, 1911. Before such amendment the section, as it was construed in said decision, read as follows:

"When any question of law is reserved in case of a felony, and it shall be made known to the court that the defendant desires to take an appeal to the Supreme Court, judgment must be rendered against the defendant, but the execution thereof must be suspended pending the appeal, and the defendant held in custody." Code, § 6249.

Consequently, the Supreme Court very properly held in the case cited that an appeal alone did not suspend the sentence, but that an order of court was, in connection with the appeal, essential to such a suspension in a felony case. *White v. State*, supra. The amendment by the act mentioned wrought a change in this statute by adding immediately after the last words of the section as above quoted the following additional words:

"Provided, that if the sentence is for a term not exceeding five years the judge must direct the clerk of the court in which the conviction is had to admit the defendant to bail, in a sum to be fixed by the judge, with sufficient surety, conditioned upon his appearance at the next term of the court and from term to term thereafter, to abide such judgment as may be rendered on the appeal." Gen. Acts 1911, p. 113.

This amendatory act was approved, as said, on March 11, 1911; and later, to wit, on April 22, 1911, another act—an original statute on the same subject—was also approved, which reads as follows:

"That in all felony cases where the defendant is sentenced to the penitentiary for a period of five years or less and an appeal is taken, pending such appeal the defendant shall be entitled to bail in such sum as may be prescribed by the court as sufficient surety, conditioned for his appearance at the next term of the court in which the conviction was had, and from time to time thereafter, to abide such judgment as may be rendered on the appeal." Acts 1911, p. 626.

And we may add, *par parenthesis*, also that by an act approved August 24, 1909, the Legislature likewise amended, in similar purport, section 6262 of the Code of 1907, so as to provide that when a defendant, convicted of any offense, whether misdemeanor or felony, where the sentence does not exceed five years, seeks by writ of error a review of the judgment of conviction, he shall also be entitled to bail pending the hearing. Acts Sp. Sess. 1909, p. 62.

It is plain that the object of these sev-

eral legislative enactments was to so amend existing law, which up to such time allowed bail after conviction only in misdemeanor cases when the defendant either appealed (as provided in sections 6243 and 6250 of the Code of 1907) or carried his case up to the higher court by writ of error (as provided in sections 6258 and 6262 of the Code of 1907), so as to allow the same right to a defendant convicted of a felony, where the sentence was for five years or less, whether he appealed under section 6243 or secured a writ of error under section 6258.

While, even since these amendments, it would seem that, where a defendant convicted of a felony, and receiving a sentence not exceeding five years, appeals or obtains a writ of error to review the judgment, but fails to avail himself of the privilege allowed by the law, and declines to make bail, and thereby to obtain his release from custody pending the hearing on such appeal or writ of error, it would probably be necessary to a suspension of the sentence that the court enter an order to that end (*White v. State*, supra); yet, where a defendant, as here, does avail himself of that privilege, and does make bond, and does secure his release from custody, such, we are clearly of opinion, does operate to suspend the execution of his sentence, at least to such an extent that he is not entitled to have such time that he is so out on bail credited on his term of imprisonment. *Ex parte Jones*, 41 Cal. 209; *Ex parte Green*, 86 Cal. 427, 25 Pac. 21; *Com. v. Spencer*, 9 Kulp. (Pa.) 159; *State v. Grottkau*, 73 Wis. 589, 41 N. W. 80, 1063, 9 Am. St. Rep. 816.

[2] By force of the last statute passed on the subject (Gen. Acts 1911, p. 626, cited), it would seem that, when the court fixes the amount of bail, as the law therein requires him to do, and the defendant executes bail in that amount, with sureties satisfactory to the sheriff, he is lawfully entitled to be released from the custody of the sheriff pending the appeal, even though no order suspending the sentence he made or entered by the court; and, if so, it must follow that the giving of the bail, when the amount has been so fixed by the court, operates, in connection with the appeal, to lawfully suspend the sentence pending the appeal; but, however this may be, and even if we concede that the sheriff had no authority to release the petitioner on his giving the prescribed bail until the court first made and entered an order suspending the sentence (*Evans v. State*, 63 Ala. 195), and that, therefore, the sheriff was guilty of an escape in letting the petitioner at large upon such bail, yet it does not follow that the petitioner is entitled to have such period that he was so at large credited upon his sentence; and this because the prisoner, having been unlawfully released by consent of the sheriff, was himself an escape (Code, § 6869; 11 Am. & Eng. Ency. Law [2d Ed.] 296), and the law is that the time during which a convict is

at large as an escape is not to be deducted from the term of his sentence (25 Am. & Eng. Ency. Law [2d Ed.] 327).

However treated, therefore, whether the petitioner lawfully or unlawfully procured his release from confinement, he actually and in fact accomplished a suspension of his sentence during the time he was so out on bail, and, having done so, he is in no position to complain of a failure of the court to make and enter the order authorizing such suspension.

It follows that the order and judgment appealed from discharging the petitioner must be reversed, and the application of the prisoner must be denied, and the prisoner remanded to the custody of the proper authorities to serve out his sentence in accordance with the holdings herein expressed.

Reversed and rendered.

(12 Ala. App. 153)

BOYD v. STATE. (No. 811.)

(Court of Appeals of Alabama. Feb. 9, 1915.)

1. CRIMINAL LAW §1144—PLEA IN ABATEMENT—IRREGULARITY IN DRAWING GRAND JURY—ABANDONMENT OF PLEA.

A plea in abatement to an indictment because of irregularity in drawing the grand jury is deemed abandoned, where the record does not show any action thereon by the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §1144.]

2. INDICTMENT AND INFORMATION §110 — FOLLOWING LANGUAGE OF STATUTE.

An indictment for burglary in the language of the form prescribed by Code 1907, § 7161, form 28, which follows the language of the statute creating and defining the offense (Code 1907, § 6417), is sufficient.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 239-294; Dec. Dig. §110; Burglary, Cent. Dig. § 31.]

3. BURGLARY §41—ELEMENTS OF OFFENSE—VALUE OF GOODS STOLEN.

On a trial for burglary of a railroad car, evidence that part of the goods stolen were sold by accused and his associates to third persons a few hours after the burglary was sufficient proof that the articles stolen were of value as alleged in the indictment.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. §41.]

4. BURGLARY §2—VALUE OF GOODS STOLEN.

The stealing of goods of any value from a railroad car is "burglary," and the value of the goods is not an element of the offense.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 1-3; Dec. Dig. §2.]

For other definitions, see Words and Phrases, First and Second Series, Burglary.]

5. BURGLARY §41 — VALUE OF GOODS STOLEN.

That goods stolen from a railroad car, essential to constitute burglary, had some value, may be proved by direct or circumstantial evidence.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 94-103, 109; Dec. Dig. §41.]

Appeal from Circuit Court, Shelby County; Hugh D. Merrill, Judge.

John Boyd was convicted of crime, and he appeals. Affirmed.

Acuff & Pitts, of Columbiana, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

PELHAM, P. J. [1] A plea in abatement to the indictment, going to irregularity in drawing the grand jury that returned it, is set out in the record, but the transcript is entirely silent with respect to what disposition, if any, was made of the plea, and, in the absence of any judgment or ruling of the court on the plea, nothing is presented for review with respect to it. No action being shown to have been taken on the plea, nor what disposition was made of it, on appeal it will be treated as abandoned. *Harris Transfer Co. v. Moor*, 10 Ala. App. 469, 65 South. 416.

No objection can be taken to an indictment on any ground going to the formation of the grand jury that found the same except by plea in abatement. *Jury Law (Acts 1909, p. 315, § 23)*. The court properly overruled the defendant's motion to quash the indictment for the alleged irregularity in the formation of the grand jury set up in the motion, for, even if considered on its merits, the motion was not well taken. Under the usual rule of excluding one and including the other of the two days in making the count, the jury was not drawn prior to 20 days before the beginning of the term of the circuit court to which the indictment was returned.

[2] The first count of the indictment, charging burglary, to which the demurrers interposed by the defendant were overruled, is in the exact language of the form prescribed by the Code. See Criminal Code, p. 665, form 28, which follows the language of the statute creating and defining the offense. Code, § 6417. It has been repeatedly held that, when an indictment is drawn in strict conformity with the directions given in the Code, it is sufficient. See discussion of the subject in *Jones' Case*, 136 Ala. 118, 34 South. 236.

[3] The evidence showing that part of the goods stolen were sold to different parties a few hours after the burglary by the defendant and his associates jointly indicted with him was sufficient proof of the articles stolen being things of value, as alleged in the indictment. One witness testified in this connection that he paid the defendant \$8 for some of the goods.

[4] The value of goods in the designated place (a railroad car) is not an element of the offense; the stealing of such goods of any value from a railroad car is burglary, irrespective of the value. *Rose v. State*, 117 Ala. 77, 23 South. 638.

[5] It is not necessary that the goods stolen must be positively proven to be of value by direct evidence; it may be made to ap-

pear by circumstantial proof. Miller v. State, 77 Ala. 41.

No reversible error being shown by the record, an affirmance of the judgment will be ordered.

Affirmed.

(69 Fla. 127)

DICKERSON et al. v. LANKFORD.

(Supreme Court of Florida. Feb. 9, 1915.)

(Syllabus by the Court.)

1. CONTRACTS — 274 — ABANDONMENT BY AGREEMENT—RIGHT TO RECOVER.

In an action at law, where one of the counts of the declaration is based upon a special contract, where the testimony clearly establishes the fact that such contract was never carried out or completed, but that the same was abandoned by agreement between the plaintiff and the defendants and another contract made, there can be no recovery under such count.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1202-1206; Dec. Dig. 274.]

2. WORK AND LABOR — 28 — SERVICE OF ARCHITECT—COMPENSATION—EVIDENCE.

In an action at law, where the plaintiff seeks to recover for services rendered as an architect, in the absence of any evidence as to the value of such services, the plaintiff is not entitled to recover.

[Ed. Note.—For other cases, see Work and Labor, Cent. Dig. §§ 47-49; Dec. Dig. 26.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by J. A. Lankford, surviving partner of J. A. Lankford & Bro., against J. H. Dickerson and others. Judgment for plaintiff, and defendants bring error. Reversed.

E. J. L'Engle and P. L. Gaskins, both of Jacksonville, for plaintiffs in error. F. W. Butler and F. E. Jennings, both of Jacksonville, for defendant in error.

SHACKLEFORD, J. J. A. Lankford, as the surviving partner of J. A. Lankford & Bro., a firm of architects in Washington, D. C., brought an action at law against "J. H. Dickerson, A. J. Junius, A. L. Lewis, members, officers, and trustees of the Grand Lodge Free and Accepted Masons and trustees of Temple Fund and property of the Most Worshipful Union Grand Lodge of the Most Ancient and Honorable Fraternity of Free Masons of Florida, A. L. Lewis, as Grand Secretary, and A. J. Junius, as Grand Treasurer, and J. H. Dickerson, D. D. Powell, Newton Cole, and E. W. Larkins, as members of board of directors of Masonic Benefit Association," to recover for architectural services rendered the defendants in connection with the erection of the negro Masonic Temple in the city of Jacksonville. No errors are assigned on the pleadings. The amended declaration consists of one main count, which is unnecessarily long and excessively particular in details, and also of the common counts, to which the defendants filed a number of pleas, upon all of which issue was joined, and a trial was had before

a jury, which resulted in a verdict being rendered in favor of the plaintiff for the sum of \$5,000. During the trial and prior to the verdict, the plaintiff moved the court to dismiss the cause as to D. M. Baxter and Newton Cole, two of the defendants, which motion was granted. The following judgment was entered upon the verdict:

"It is therefore considered by the court that the plaintiff J. A. Lankford, surviving partner of the late partnership of J. A. Lankford & Bro., do have and recover of and from the defendants J. H. Dickerson, A. J. Junius, A. L. Lewis, members, officers, and trustees of the Grand Lodge Free and Accepted Masons and trustees of Temple Fund and property of the Most Worshipful Union Grand Lodge of the Most Ancient and Honorable Fraternity of Free Masons, of Florida, A. L. Lewis, as Grand Secretary, A. J. Junius, as Grand Treasurer, and J. H. Dickerson, D. D. Powell, and E. W. Larkins as members of board of directors of Masonic Benefit Association, the sum of \$5,000, for his damages herein sustained, besides the sum of \$— for his costs herein expended, for which let execution issue."

The defendants filed a motion for a new trial, containing 61 grounds, upon which the following order was made:

"Unless the plaintiff shall as of this date enter a remittitur for so much of the amount of the verdict as is in excess of \$3,000, this motion will be granted. In case said remittitur is so entered the motion will be denied."

Thereupon the plaintiff filed his remittitur, pursuant to such order, which the trial court accepted, and overruled the motion for a new trial, to which ruling the defendants excepted. This judgment, which now stands for \$3,000 the defendants have brought here for review.

We think that the trial court correctly charged the jury to the effect that there had been no proof adduced which would entitle the plaintiff to recover under the second, fourth, fifth, sixth and seventh counts of the declaration; therefore only the first, third, and eighth counts remained for consideration. The first count alleges the making of a certain specified contract between the firm of J. A. Lankford & Bro., of which the plaintiff was a member, and J. H. Dickerson, acting for himself and also for the other defendants, by which the firm of J. A. Lankford & Bro. were to prepare the plans and specifications and to supervise the erection of a Masonic Temple in the city of Jacksonville, for which services the defendants were to pay such firm 5 per cent. of the cost of the erection of such building, which cost was estimated would be \$100,000. Such count then contains the following allegation:

"And plaintiff avers that thereupon he commenced work upon the plans and specifications for the erection and construction of said Masonic Temple as he agreed so to do, and continued thereat until, to wit, the month of October, 1908, at which time he submitted to the defendants in the city of Jacksonville, Fla., such prospective plans and specifications, and which were by the defendants, and in all things, approved and accepted, and thereupon, under the instruction of said defendants upon the acceptance by

them of said prospective plans, the defendant prepared the plans and specifications for the erection of said Masonic Temple, and delivered the same to the defendants during the middle of the year 1909, which were by said defendants accepted as and for the plans and specifications so prepared by the plaintiff, in pursuance of said verbal agreement theretofore entered into between the plaintiff and the defendant Dickerson, acting for and on behalf of the defendant herein, and thereafter under and by the terms of said verbal agreement, the plaintiff continued in the employment of the defendants, working out the details for the erection and construction of said Masonic Temple until, to wit, the month of March, 1912, when for reasons unknown to the plaintiff, the defendants wrongfully and illegally without cause employed other architects to prepare other plans and specifications for the erection of said building, and declined and refused to comply with the terms of the verbal agreement, as heretofore set forth, existing between the defendants and plaintiff, and refused and neglected to pay the plaintiff for his services in that behalf.

"And plaintiff alleges that in all manners and ways he has performed and complied with each and every the stipulations, agreements, and requirements on his part to be performed, and still stands ready to so comply in every part."

The third count claims the sum of \$6,800 for work done and materials furnished by the plaintiff for the defendants at their request. The eighth count is as follows:

"8. And in a like sum for that the plaintiff, at the request of the defendants, had, before said date, March 31, 1912, done and bestowed certain services in and about the business of said defendants, and for them, J. H. Dickerson, for and on behalf of the defendants, promised the plaintiff to pay him on request so much money as he therefor reasonably deserved to have, and the plaintiff avers that he then and there reasonably deserved to have therefor the sum of \$6,800."

[1, 2] A careful examination of the evidence adduced discloses that, according to the plaintiff's own testimony, the special contract declared upon in the first count was never carried out or completed, but that the same was abandoned by agreement between the plaintiff and the defendants, and another contract made, by which the plaintiff was to act as consulting, instead of supervising, architect, and that the plaintiff did act as such consulting architect for a period of some months. We see no useful purpose to be accomplished by setting out or discussing the evidence. We are clear that the first count was not sustained by the proofs, and that there could be no recovery thereunder. We further find that no evidence was introduced as to what compensation the plaintiff was to receive under the second contract, as to what his services were reasonably worth under the first contract for preparing the plans and specifications, or what his services were reasonably worth for acting as consulting architect under the second contract. This being true, it follows that there could be no recovery under the two remaining counts, the third and the eighth. In other words, we are of the opinion that the evidence fails to support the verdict, or the judgment as finally rendered, for which rea-

son the judgment will have to be reversed and a new trial awarded. Having reached this conclusion, there is no occasion for a further discussion of the assignments.

Judgment reversed.

TAYLOR, C. J., and COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

(69 Fla. 136)

CITY OF KEY WEST v. BALDWIN.

(Supreme Court of Florida. Feb. 9, 1915.)

(Syllabus by the Court.)

1. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — NEGLIGENCE — LIABILITY OF CITY.

Where the charter act of a city provides that a city council shall have power to regulate and provide by ordinance for the grading and construction of sidewalks, and the paving and repair thereof by the owner of property alongside and abutting on such sidewalks, and providing that in the event the property owner whose duty it is to construct or repair the sidewalk on which his property abuts fails to comply with the ordinance, the city may cause the same to be constructed or repaired, and the property owner shall be liable to the city for the cost of such work, and the same shall be a lien on such property, also requiring the city to keep the streets and sidewalks free from obstructions and in good condition, such provisions do not relieve such city of its duty to exercise reasonable diligence in repairing defects in sidewalks, nor from liability for negligence in the discharge of such duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1588; Dec. Dig. ¶ 756.]

2. TORTS — ACTION EX DELICTO — PLEA OF NOT GUILTY — EFFECT.

In an action arising ex delicto, the plea of not guilty does not deny matters of inducement alleged in the declaration.

[Ed. Note.—For other cases, see Torts, Cent. Dig. § 33; Dec. Dig. ¶ 26.]

3. PLEADING — PLEA — GENERAL ISSUE.

A plea which contains no matter that cannot be taken advantage of under the general issue should be treated as the general issue.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 240; Dec. Dig. ¶ 115.]

4. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — DEFENSE.

Contributory negligence is matter of defense.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. ¶ 113.]

5. MUNICIPAL CORPORATIONS — DEFECTIVE SIDEWALKS — PERSONAL INJURIES — EVIDENCE.

In an action for personal injuries caused by a defective sidewalk, the evidence showed that the sidewalk where the plaintiff fell was four or five inches lower than the one on which she had been walking; that the depression was not gradual, but abrupt; that at night the lights shining upon the sidewalk made the whole surface appear to be smooth; and that the plaintiff stepped into this depression and fell, sustaining injury. Held, such facts prima facie show an actionable defect in the sidewalk.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1745-1757; Dec. Dig. ¶ 821.]

6. APPEAL AND ERROR §1050 — HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence which is harmless is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1063, 1069, 4153-4157, 4166; Dec. Dig. §1050.]

7. EVIDENCE §364 — DOCUMENTARY EVIDENCE—MORTALITY TABLES.

Upon the question of the probable duration of the earning capacity of one permanently injured, the American Mortality Tables are admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1520; Dec. Dig. §364.]

8. APPEAL AND ERROR §216—PRESENTATION BELOW—INSTRUCTION—DUTY TO REQUEST.

A party, desiring a charge to be given upon a question of law, should request such instruction as he may consider appropriate and desirable, else his complaint of the judge's failure to charge upon the desired point will not be heard.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. §216; Trial, Cent. Dig. § 627.]

9. DAMAGES §132—PERSONAL INJURIES—EXCESSIVE RECOVERY — SUFFICIENCY OF EVIDENCE.

Evidence examined, and found sufficient to support the verdict on the question of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. §132.]

Error to Circuit Court, Monroe County; M. F. Horne, Judge.

Action by Catherine Baldwin against the City of Key West. Judgment for plaintiff, and defendant brings error. Affirmed.

E. M. Semple, of Key West, for plaintiff in error. W. Hunt Harris, of Key West, for defendant in error.

ELLIS, J. Catherine Baldwin, the defendant in error, hereinafter referred to as the plaintiff, brought an action at law in the circuit court for Monroe county against the city of Key West, the plaintiff in error, hereinafter referred to as the defendant.

The action is for damages for personal injuries alleged to have been sustained by the plaintiff while walking along Duval street in the city of Key West in the nighttime.

The declaration alleges by way of inducement that the city of Key West, at the time the alleged injury to the plaintiff occurred, was a municipal corporation and existing under the laws of the state of Florida, and as such was clothed by the law of the state with powers and subject to the duty, among others, of keeping sound, safe, and suitable for public use and travel all its public streets, alleys, walks, and gutters, and particularly the street known as Duval street in said city; that pursuant to the authority granted by law, the defendant in December, 1912, raised the grade of Duval street, both the street proper and sidewalks upon each side thereof, by placing curbing to an established grade and by paving the street proper with brick, and by ordinance required the owners of adjacent property on each side of Duval street to build and construct sidewalks of concrete

in front of their respective properties on the new grade established for the sidewalks of said Duval street as defined by the line of curbstone on each side of the street; that according to the statutes of the state of Florida and the ordinances in such cases made and provided, in those cases where the property holders failed or refused to build and construct a sidewalk of concrete in front of their respective properties on said street according to the new grade, the defendant was authorized, and it became its duty to build and construct the sidewalk as aforesaid, and the cost of construction in law should become a lien upon said property so fronting on the street; that the owners of the property on the northeast side of Duval street for a distance of approximately 161 feet from the corner of Petronia and Duval streets built and constructed a sidewalk of concrete in accordance with the new grade for sidewalks as established by the defendant; that the heirs of Jas. R. Shackelford, deceased, the owners of the property fronting 50 feet on Duval street next adjoining the 161 feet above mentioned to the northwest, failed and refused to build and construct a new sidewalk conforming to the new grade for sidewalks on said street as established, and that the sidewalk in front of the said property of the heirs of Jas. R. Shackelford was, on the 5th day of December, 1913, approximately five inches below said established grade, and there was an abrupt break in the surface line of said sidewalk in front of said property, and that said sidewalk was approximately five inches below the established grade where it joined the 161 feet already constructed according to the grade aforesaid, which fact was well known to the defendant, and had been known to the defendant for 12 months previous to December 5, 1913, and that the defendant at different times during the said 12 months notified in writing the heirs of the said Jas. R. Shackelford to construct a new sidewalk in front of their said property on said Duval street according to the new grade established as aforesaid; that the heirs of the said Jas. R. Shackelford, notwithstanding said written notices and demands, failed and refused to construct a new sidewalk in front of their said property on said street of Duval. The declaration then alleges that:

"Said sidewalk on said December 5, 1913, and for approximately 12 months before said date, was there wrongfully and negligently suffered to be and remain below the aforesaid grade, in bad and unsafe repair and condition, and divers holes and pitfalls then and there being on said street and sidewalk, uncovered and exposed in the nighttime and dark, to be fallen into without warning by the travelers on said street and sidewalk, all of which was known to the defendant on the 5th day of December, 1913, and had been so known to said defendant for approximately 12 months previous to said date.

"Yet the said defendant, notwithstanding its duties as aforesaid, did not keep its streets sound and safe and serviceable for public use and trav-

el, but, on the contrary, knowingly, willfully, negligently, wrongfully, and unjustly permitted the sidewalk of the aforesaid street, known as Duval street, at the point aforesaid, to be and continue, with the knowledge aforesaid of said defendant, in an unsafe, dangerous, and defective condition as hereinbefore set forth, and for approximately 12 months next preceding the time of committing the grievance hereinafter mentioned.

"And the said plaintiff, on the said 5th day of December, 1913, being at said time 64 years of age, while walking along said Duval street, in a northeasterly direction, in the nighttime, at the point on said Duval street, on the northeast side thereof, approximately 161 feet from the corner of said Duval street and Petronia street, as hereinbefore set forth, as she had a right to do, and not apprehending any danger, necessarily and unavoidably stepped off of said sidewalk that was constructed according to the said established grade, onto the said sidewalk in front of the said property of the heirs of Jas. R. Shackelford, deceased, and by reason of said last-mentioned sidewalk being approximately five inches below the said established grade, which fact was not then known to plaintiff, said plaintiff necessarily and unavoidably tripped, stumbled, and fell against and upon said sidewalk, street, and ground with great force, and thereby, and as a result thereof, the left forearm of plaintiff was seriously wrenched, bruised, and sprained, her right arm was bruised and hurt, and her body otherwise bruised and wounded, and also by means of the premises, the said plaintiff became and was sick, sore, lame, and disordered, and so continued for a long time, and will so continue to the end of her life, during which said time, said plaintiff has suffered, and will continue to suffer, great pain and damage, and was hindered and prevented from performing and transacting her lawful affairs and work, and also by reason of the premises was obliged to pay and expend, and hath necessarily paid and expended, divers sums of money for treatment, medicines, and physician's services, in and about endeavoring to be healed and cured of the said wounds, hurts, sickness, and disorders.

"To the damage of the plaintiff, amounting to \$2,000.

"And therefore she brings this suit of trespass on the case."

On March 2, 1914, the defendant filed the following pleas: First, not guilty; second, the negligence of the plaintiff contributed to the damage and injury complained of; third, that the plaintiff's alleged damage and injury was not due to the negligence of the city of Key West, or any officer, agent, or servant thereof, but was entirely the result of an accident for which defendant was in no wise responsible; and, fourth, that the alleged damage and injury was caused by the negligence and improper conduct of the plaintiff, and not otherwise. According to the jurat of the notary public, the pleas were sworn to by the mayor of Key West, but it appears from the record that he did not sign the affidavit.

On the 10th day of June, 1914, at a term of the said court the cause was submitted to a jury on the issues joined between the parties.

The jury returned a verdict for the plaintiff and assessed her damages at \$2,000. Judgment was entered for the plaintiff on the verdict.

On the 11th day of June, 1914, and before

the judgment was entered, the defendant moved the court for a new trial on the following grounds:

"First, that the verdict is contrary to the law; second, that the verdict is contrary to the evidence; third, that the verdict is contrary to the weight of the evidence; fourth, that the verdict is contrary to the law and the evidence; fifth, that the verdict is beyond the value of the damages proved by the evidence; sixth, that the verdict is excessive; seventh, that the verdict is contrary to the charges of the court."

The motion was overruled, and the defendant took writ of error.

There are five assignments of error. The first is based upon the order of the court denying the motion for a new trial.

[1] It is contended that no duty devolved upon the city of Key West to build or construct sidewalks in the city, nor to repair or keep them in repair; that the city's authority extended only to requiring the owners of property abutting upon the streets to do so, and if the property owner failed or refused to comply with the requirements of the city ordinances relating to the construction of sidewalks, the city was relieved of its duty to exercise due diligence in keeping the same in good condition.

We do not agree with this contention. This court held in the case of the City of Pensacola v. Jones, 58 Fla. 208, 50 South. 874, that under section 1017 of the General Statutes, requiring abutting owners to construct uniform and substantial sidewalks around their several lots, and to keep the same in repair, did not relieve the city of its duty to exercise reasonable diligence in repairing defects in sidewalks, or its liability for negligence in the discharge of this duty.

Section 26 of chapter 5812, Laws of Florida 1907, entitled "An act to establish the municipality of Key West, provide for its government and prescribe its jurisdiction and powers," is as follows:

"The city council shall have power to regulate and provide by ordinance for the grading and construction of sidewalks and the paving of the same, and the repair thereof, by the owner or owners of the property alongside and abutting thereon, and if the owner or owners of any lot or lots, which shall be so required by ordinance to be constructed and paved aforesaid, shall fail to comply with the provisions of such ordinance within such time as may be prescribed therein and in accordance with the plans and specifications prescribed by such ordinance, the board of public works may contract for the construction, grading, paving or repairs of such sidewalks as the case may be, and the city shall pay for the same, and the owner or owners of the property abutting where said sidewalk has been constructed, graded or repaired, shall be liable for the actual cost of such construction, grading, paving or repairs, as the case may be, and the same shall be a lien upon said lot or lots and said lien may be enforced in the circuit court of Monroe county."

And section 32 provides:

"It shall be the duty of the board of public works to see that the streets and sidewalks are kept free from obstructions and that the same be kept in good condition."

These two sections of the Charter Act of the city of Key West not only bring the city within the general rule as to keeping its sidewalks in good condition as announced in the Pensacola case, but impose upon it that duty in specific terms.

[2] The allegations of the declaration that the city of Key West about December, 1912, raised the grade of Duval street, both the street proper and the sidewalks upon either side thereof, by placing curbing to an established grade and by paving the street proper with brick; and by ordinance required the owners of adjacent property on either side of Duval street to build and construct sidewalks of concrete in front of their respective properties on the new grade established for the sidewalks as defined by the line of curbstone; and as to the construction of the sidewalk in accordance with this new grade on the northeast side of Duval street for a distance of approximately 161 feet from the corner of Petronia street and Duval street; and as to the failure and refusal of the heirs of Jas. R. Shackelford, deceased, the owners of the property 50 feet front on Duval street, next adjoining the aforesaid 161 feet to the northwest, to build and construct a new sidewalk conforming to the new grade; and as to the notice by the city through its duly constituted officers, to the owners of the said property, to construct a new sidewalk in front of their said property at that point—are matters of inducement, which the plea of not guilty did not deny. *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 South. 318; *Jacksonville Electric Co. v. Sloan*, 52 Fla. 257, 42 South. 516.

[3] The third and fourth pleas set up no matter which could not have been taken advantage of under the general issue, and should be treated as the general issue. *Taylor v. Branham*, 35 Fla. 297, 17 South. 552, 39 L. R. A. 362, 48 Am. St. Rep. 249; *Engelke & Feiner Milling Co. v. Grunthal*, 46 Fla. 349, 35 South. 17.

[4] The second plea is one of contributory negligence, which is a matter of defense. *Hainlin v. Budge*, 56 Fla. 342, 47 South. 825; *Atlantic Coast Line R. Co. v. McCormick*, 59 Fla. 121, 52 South. 712; *City of Orlando v. Heard*, 29 Fla. 581, 11 South. 182.

The evidence was sufficient to support the allegation in the declaration as to the negligence of the city in the matter of exercising reasonable diligence in repairing the Duval street sidewalk at the point where the injury occurred. It was alleged in the declaration that the condition of the sidewalk, at the place the injury occurred, had existed for approximately 12 months prior to the date the injury was alleged to have occurred, and during all of that time the city knew of such condition and wrongfully and negligently suffered it to remain "below the grade aforesaid in bad and unsafe repair and condition." The evidence supported this allegation. It was shown that the board of public works of

the city knew that the sidewalk at the point in question was below the grade, and that it was necessary to have it brought up to a level; that the board had this knowledge in May, 1913, and that in that month the board gave notice to the heirs of Shackelford to construct a sidewalk at that point to conform to the new grade; that a grade had been established by the city is shown by the allegations in the declaration admitted by the pleas. The notice served by the board on the Shackelford heirs to construct a sidewalk in accordance with the specifications of the ordinance, which was also in evidence, announced the purpose of the board to have the sidewalk constructed in accordance with the law, and the costs would become a lien on the property if the owners failed to comply with the notice within 60 days. The knowledge of the defects in the sidewalk, was by this evidence shown to have been in the possession of the municipal body. Yet for four months after the expiration of the 60-day limit given by the notice, the corporation failed to take any steps to repair the sidewalk or place it in the condition required by the ordinance. But it is urged in behalf of the city, as we read the brief of counsel, that the plaintiff should have made it to appear, by allegation in the declaration and evidence to support it, that there was money in the hands of the treasurer of the city to meet the warrants to cover the expense of such work. If this defense was available, it is one which should have been pleaded by the defendant and proven. Rule 72 of the Rules of the Circuit Court in Common Law Actions; *Jacksonville Electric Co. v. Sloan*, *supra*. It was not pleaded, and therefore there was no issue on this point.

[5] It is contended that the inequality in the sidewalk at the point where the injury occurred was not sufficient to make the city guilty of negligence in permitting it to remain. The evidence shows that the sidewalk on which the plaintiff fell was four or five inches lower than the one on which she had been walking, and from which she stepped when she fell; that she sustained an injury when she fell; that the depression was not gradual, but it was a sharp depression or angle about four or five inches below the sidewalk from which she stepped. The injury occurred in the nighttime, the lights from across the street shining upon the sidewalk on the opposite side "made the whole surface appear to be smooth." We think the evidence was sufficient *prima facie* to show an actionable defect in the sidewalk. *Mayor & Aldermen of Birmingham v. Starr*, 112 Ala. 98, 20 South. 424; *Bieber v. St. Paul*, 87 Minn. 35, 91 N. W. 20.

The cases relied upon by the plaintiff in error are easily distinguishable from the case at bar, upon this point. In *Goodwyn v. City of Shreveport*, 134 La. 820, 64 South. 762, the sidewalk did not end abruptly, the depression was not more than 1½ inches and sloped at

an angle of 45 degrees toward the lower sidewalk; it was held that this was not such an inequality as to make the city guilty of negligence and liable to one injured by stumbling over it in the daytime. In *Shietart v. City of Detroit*, 108 Mich. 309, 66 N. W. 221, Judge Grant said the sole ground of negligence was the failure of the city to construct a sidewalk in front of the lot in a sparsely settled part of the city. The sidewalk was not out of repair; it had never been built. Hooker, J., concurring, said the condition was perfectly safe to all except the heedless; while Montgomery, J., dissenting, said that under the circumstances it was a question for the jury whether the constructed sidewalk was in a condition reasonably safe and fit for public travel. In the case of *Kawlecka v. City of Superior*, 136 Wis. 613, 118 N. W. 192, 21 L. R. A. (N. S.) 1020, it appeared that the city rebuilt a portion of the sidewalk on a bridge by nailing planks two inches in thickness to the upper side of the walk as theretofore constructed, and permitted the other portion of the walk to remain unchanged. This condition had existed nearly two months when the accident occurred. There was an abrupt drop of two inches going in one direction, and an ascent of two inches going in the other direction. The bridge was a half mile in length, and the sidewalk thereon was level from one end to the other. The court held the defect too slight to justify a recovery, but said:

The "question is always one for a jury, unless the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. When the conditions shown are such that different minds may draw different * * * conclusions, the jury, and not the court, must make the ultimate determination."

That view may be very well applied to this case.

The second assignment is based upon an instruction by the court to the jury as to the duty of the city under its charter in the matter of grading and constructing sidewalks. The charge was as follows:

"Under section 26, chapter 5812, the city council of the city of Key West has power to regulate and provide by ordinance for the grading and constructing of sidewalks and the paving and repair of the same by the owners of the property abutting thereon, and if the owner or owners of said abutting lots, which shall be so required by ordinance to be constructed and paved as aforesaid, shall fail to comply with the provisions of the ordinance relating to grading and construction of sidewalks within such time as may be prescribed by said ordinance and in accordance with the plans and specifications prescribed by such ordinance, it is the duty of the board of public works, acting for and on behalf of the city of Key West, to contract for the construction, grading, paving, or repairing of such sidewalks, as the case may be, and the cost thereof becomes a lien upon the abutting property."

This charge was not excepted to at the time it was given, nor in the motion for a new trial; we have considered it, however, and think there was no error in it. The fact that the city has power to regulate and provide by

ordinance for the grading and construction of sidewalks, and the repair thereof by the owners of property alongside and abutting thereon, and authorizing the city to contract for the construction, grading, or repairing of such sidewalks in the event the owners of the property alongside and abutting thereon fail to comply with the provisions of the ordinance requiring it to be done, "does not relieve the city of its duty 'to exercise reasonable diligence in repairing defects in * * * sidewalks,' or its liability for negligence in the discharge of this duty." *City of Pensacola v. Jones*, supra.

[8] A witness for the plaintiff named W. D. Cash, Jr., saw the plaintiff fall on the sidewalk when the injury is alleged to have occurred. He was asked certain questions, and replied as follows:

"Q. Did you examine the sidewalk there, Mr. Cash, to see if there was anything there to cause the fall—did you or did you not look? A. I turned around and cursed the sidewalk. Q. Why did you do it? A. Because it was such a piece of carelessness for a sidewalk of the main street to be in that condition."

The defendant's counsel moved the court to strike the foregoing answer on the ground that "it was not a fact, but that the witness was stating his opinion." The motion was denied, and this ruling is assigned as the third error. The assignment is not argued, but counsel for plaintiff in error insist that the court should have instructed the jury to give no weight to the answer of this witness. The opinion of the witness as to the carelessness involved in permitting such a condition to exist on a sidewalk of the main street, was not permissible under the rules of evidence, and the court should have directed the jury to disregard it, especially if a proper objection had been interposed to the question which elicited this objectionable reply. But the question here is: Was the refusal of the court to grant this obviously correct motion of the defendant to strike the answer reversible error? The witness himself, after expressing the opinion, described the condition of the sidewalk. It is true that it was for the jury to determine whether the condition of the sidewalk at the point where the injury occurred was a reasonably safe condition for travel in the ordinary modes by night, as well as by day. 4 *Dillon on Municipal Corporations*, p. 2998; *Brennan v. City of St. Louis*, 92 Mo. 482, 2 S. W. 481; *City of Americus v. Johnson*, 2 Ga. App. 378, 58 S. E. 518; *City of Anniston v. Ivey*, 151 Ala. 392, 44 South. 48; *Smith v. City of New York*, 17 App. Div. 438, 45 N. Y. Supp. 239. The undisputed facts are that there was, at the place where the injury occurred, an abrupt break or inequality in the sidewalk of from 3 to 5 inches, about 160 feet from the corner; that both the old and new sidewalks were of cement, and at night had the appearance of an unbroken or smooth surface. An abrupt, perpendicular depression of as much as 5 inches occurring in a sidewalk some dis-

tance from a corner was such an inequality as the jury were warranted in finding was not reasonably safe for travel by night. Independently of the witness' opinion as to carelessness, whether of the city or property owner he did not say, the jury had before it sufficient evidence from which to find that the city was guilty of negligence in permitting the defect to remain. We think the error was harmless.

The fourth assignment is based on the ruling of the court sustaining the objection of the plaintiff's attorney to the question, propounded by the defendant's attorney to the witness Harold Pinder, as to whether or not the board of public works received in 1913 the amount required by law that they should be paid according to the budget. There was no error in this ruling. There was no plea of the defendant presenting such an issue, and therefore the information sought by the question was irrelevant.

[7,8] The witness Hoffman was asked by the plaintiff's counsel, regarding the American Mortality Tables, the following question: "Q. Can you tell from that book the life expectancy of a woman 64 years of age?" To which question the defendant's counsel objected upon the ground "that Mortality Tables are not the proper way to introduce evidence regarding life expectancy of a person, and that the same is incompetent." This objection was overruled, to which ruling an exception was taken. The objection was properly overruled. The American Mortality Tables have been made up from the combined experience of the life insurance companies of America, and have been recognized by many courts as the standard throughout the United States, and are perhaps the best means known to the ascertainment of the probable duration of life. These tables show the probable duration of the life of a healthy person, but not the probable duration of one's earning capacity; but in order to estimate the probable duration of one's ability to earn money or to perform her own household duties and labors, it becomes necessary to ascertain the probable duration of her life, or as it is called, her life expectancy, and that, taken into consideration with all the other evidence in the case, the jury is required to determine the probable duration of the earning capacity of the person inquired about. Illinois Cent. R. Co. v. Houchins, 121 Ky. 526, 89 S. W. 530, 1 L. R. A. (N. S.) 375, 123 Am. St. Rep. 205; Mississippi & T. R. Co. v. Ayres, 16 Lea (Tenn.) 725; San Antonio & A. P. Ry. Co. v. Morgan (Tex. Civ. App.) 46 S. W. 672; Merrinane v. Miller, 157 Mich. 279, 118 N. W. 11, 25 L. R. A. (N. S.) 585. The counsel for plaintiff in error complains in his brief of the failure of the court to instruct the jury fully in connection with the Mortality Tables, and as to how they should be used by the jury in determining the life expectancy of the injured person. The proper practice is to

ask for the instructions which counsel may consider appropriate and desirable. Seaboard Air Line R. Co. v. Scarborough, 52 Fla. 425, 42 South. 706; Carr v. State, 45 Fla. 11, 34 South. 892.

[9] On the question of damages it is urged that the amount fixed by the jury is "beyond the value of the damages proved by the evidence." We do not find that the amount allowed by the jury in this case, which was \$2,000, is excessive. The plaintiff was 64 years of age, a widow, with five small grandchildren dependent upon her. She did all of the household work, occasionally giving out the washing. After the injury she suffered greatly, her left arm and shoulder and left hip were bruised and wrenched. At the time of the trial, six months afterwards, she could not raise her arm without great pain. As to her household work she could no longer perform it as she did before the injury. She has difficulty in doing the cooking for her family, and assists in a small way with the other work. The doctor treated her "off and on" for months. She did not recover. Dr. Maloney believes she could never recover. The muscles and nerves of her arm were injured, and there will always be a permanent impairment of the functions of her arm, said Dr. J. Y. Porter, Jr. Damages in cases like this must be measured by the loss of time during the cure, and expense incurred in respect to it, the pain and suffering undergone by the person injured, and any permanent injury causing disability or further exertion, in whole or in part, and consequent pecuniary loss. Wilson v. City of Wheeling, 19 W. Va. 323, 42 Am. Rep. 780; Anderson v. City of Wilmington, 6 Pennewill (Del.) 485, 70 Atl. 204.

The judgment of the court below is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(136 La. 739)

No. 21048.

STATE v. McCLOSKEY.

In re McCLOSKEY.

(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by Editorial Staff.)

1. INFANTS \Leftrightarrow 18—JUVENILE COURT—NEGLECTED CHILD—CONSTITUTIONAL PROVISION.
By Const. art. 118, § 8, the juvenile court has jurisdiction of the custody, as between state and parents, of a neglected child, so that the jurisdiction in such case of the juvenile court is simultaneous with that of the court in which suit for separation from bed and board is pending between the parents; the jurisdiction of the latter court being confined to controversies as between the parents over the custody of the child.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 18; Dec. Dig. \Leftrightarrow 18.]

2. PROHIBITION §28—JUVENILE COURT—DETERMINATION OF JURISDICTION.

On application for prohibition against the judge of the juvenile court, who awarded the custody of a child to her mother, a finding of fact of such court as to whether the child was neglected as defined in Const. art. 118, § 8, so as to establish its jurisdiction, must be taken as true by the Supreme Court.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 77; Dec. Dig. §28.]

O'Niell, J., dissenting.

Application by George T. McCloskey for writs of prohibition and certiorari. Order nisi recalled, and application denied.

McCloskey & Benedict, of New Orleans, for relator. Loys Charbonnet, of New Orleans, for respondent.

PROVOSTY, J. The relator in this case, alleging that he is a man of means; that there is pending in the civil district court a suit in separation from bed and board between himself and his wife, in which he has prayed that the custody of their minor child be awarded to him; that in the meantime he has had the said child in his possession, and has been taking proper care of it; that his wife has gone into the juvenile court, and there sworn out an affidavit untruthfully charging said child with being a neglected and abandoned child; that the judge of the said juvenile court, notwithstanding notice given to him of the pendency of the said separation from bed and board suit, and of relator being a man of means, and taking all due and proper care of said child, has ordered said child taken from relator, and, notwithstanding the remonstrance of relator, has turned over said child to relator's said wife upon her furnishing bond in the sum of \$1,000; and alleging, further, that, for two reasons, the said juvenile court has no jurisdiction of said child: First, because the awarding of the custody of said child belongs to the civil district court, as an incident to the separation from bed and board suit; and, second, because said child is neither neglected nor abandoned, but is being taken good care of by its father, a man of means—prayed that this court issue writs of prohibition and certiorari for bringing up all the proceedings in the matter into this court for review; and the said writ of certiorari was accordingly issued, and the judge of the juvenile court was ordered to show cause why the writ of prohibition should not issue.

The two legal questions sought to be presented to this court by the relator in the said application are: First, whether the juvenile court has jurisdiction of the children of a marriage pending a suit for separation from bed and board between the parents in another court; and, second, whether the juvenile court has jurisdiction of a child that is being well taken care of by its parents.

[1] The juvenile court and the court in

which a suit in separation from bed and board is pending between the parents of a child may have simultaneous, though, not concurrent, or conflicting, jurisdiction of the custody of the child; that of the juvenile court to be exercised as between the state, or, so to speak, the child, and the parents of the child; and that of the other court to be exercised as between the two parents. In the instant case, on the assumption of the child Iska McCloskey not being a neglected child within the meaning of that term as defined by the Constitution (article 118, § 3), the juvenile court is utterly without jurisdiction of her custody, and the civil district court has exclusive jurisdiction. On the contrary assumption, the juvenile court has jurisdiction.

[2] With the facts of the case this court has nothing to do, but must assume that the learned judge of the juvenile court exercised jurisdiction because he found upon the facts that the said child of relator was a neglected child within the meaning of that term as expressly, carefully, and explicitly defined by said article of the Constitution.

The order nisi herein is recalled, and the application of relator is denied at his cost.

O'NIELL, J., dissents.

(196 La. 742)

No. 19916.

CHICAGO, ST. L. & N. O. RY. CO. v. TOWN OF AMITE CITY.

(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by the Court.)

ADVERSE POSSESSION §103—PRESCRIPTION—POSSESSION UNDER COLOR OF TITLE—EXTENT.

The rule that possession, under color of title, of a part of a tract of land, is possession of the whole, cannot prevail over the adverse possession of the other party under a better title.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 590-594; Dec. Dig. §103.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Action by the Chicago, St. Louis & New Orleans Railway Company against the Town of Amite City. From judgment for defendant, plaintiff appeals. Reversed, and judgment ordered for plaintiff.

Hunter C. Leake, of New Orleans, and Bolivar El Kemp, of Amite, for appellant. S. S. Reid, of Amite, for appellee.

LAND, J. Plaintiff alleged ownership and actual possession for more than one year of a certain strip of ground 75 feet wide, east of the center line of its north-bound track, by about 1,600 yards in length, and that the authorities of the defendant town were attempting to take possession of said strip for

the purpose of converting it into a public street, and had trespassed on the same by constructing bridges across all the ditches and drains running from petitioner's said track. Plaintiff further alleged that said municipal authorities had further trespassed on said strip by cutting plaintiff's barbed-wire right of way fence and by doing certain grading work on said land.

Plaintiff alleged actual damages in the sum of \$1,000, punitive damages in the sum of \$1,000, and \$500 for attorney's fees.

Plaintiff prayed for judgment against the town of Amite City in the full sum of \$2,500 damages, "and ordering said town to desist from further disturbing plaintiff's possession of said land and quieting petitioner in its possession of same."

The defendant town, for answer, after pleading the general issue, averred its uninterrupted possession and control of the land in dispute, as a public thoroughfare, since the year 1855, when said property was dedicated to public use as a street by the owner, as shown by deed of record and map thereto attached.

Defendant prayed for judgment rejecting plaintiff's demand with costs, and recognizing and quieting the respondent's possession.

There was judgment in favor of the defendant as prayed for, and the plaintiff has appealed.

In June, 1855, John M. Bach, the owner of the site of Amite City, made a figurative plan of said town, and sold to Mrs. John Calhoun squares 38 and 39 by reference to said plan, the original of which was annexed to the deed.

The plan shows the usual subdivision of the town site into squares and streets; one of the latter being designated as Railroad avenue. According to this plan, square 39 fronts on this avenue, in the center of which appear two parallel lines representing a railroad track.

Plaintiff claims that Railroad avenue opposite square No. 39 represents its right of way as granted by the said John M. Bach. The only written evidence of such alleged grant are two certain recognitive acts executed in 1871 and 1873 by the said Bach. The acts recite that the original grant was made about October 6, 1856, and was lost or mislaid, and was never recorded.

This alleged grant was subsequent to the sale from Bach to Mrs. Calhoun, which was seasonably recorded, and consequently cannot affect the dedication of Railroad avenue resulting from said conveyance made with reference to the plan thereto attached.

It appears that since 1855 Amite City has never questioned the right of the railroad company to use the central portion of the avenue, and that said company has never disputed the right of the public to use as a thoroughfare that portion of the avenue west

of its tracks. On the east side of the track the avenue was not opened and improved by the town authorities until July or August, 1908, but it had been used more or less by the public for many years.

The evidence for the defendant tends to show that since 1898 a number of attempts by the agents of the railroad company to prevent or obstruct the public use of the eastern portion of the avenue adjoining the property line have been successfully resisted by residents and municipal officers. Mr. Bostick, whose dwelling faces the avenue, testified that in 1908 the company made another effort to close the avenue by the construction of a cattle guard, and that the mayor made the company's employees desist, and punished one of their number for trespassing on the street. Plaintiff's action is possessory, and titles cannot be considered except to show extent of possession. As both parties claim under color of title, and show possession thereunder, we cannot perceive how plaintiff's later title can expand its actual possession. The rule that possession under color of title of a part of a tract of land is possession of the whole cannot prevail over the adverse possession of the other party under a better title. See *John T. Moore P. Co. v. Morgan's La. & T. R. R. & S. S. Co.*, 126 La. 888, 53 South. 22.

On the issue of quiet and uninterrupted possession beyond the line of actual railroad use, we think that the plaintiff has failed to make out its case. Of course, the judgment below is erroneous in not excepting the track and ground actually used for railroad purposes. This is admitted in defendant's brief, from which we quote as follows:

"The town claims the entire tract, when, as a matter of fact, the actual roadbed was never intended to be included in these proceedings."

According to plaintiff's evidence, the ditch on the east side is approximately 35 feet from the center of the north-bound main track.

It is therefore ordered that the judgment appealed from be reversed, and it is now ordered that there be judgment in favor of the plaintiff, the Chicago, St. Louis & New Orleans Railroad Company, quieting said corporation in the possession of the parcel of land described in the petition, less a strip 40 feet wide by about 1,600 yards in length to be taken off of the eastern portion of said parcel, not including, however, any side or switch tracks of the plaintiff company which may infringe on said strip; and it is further ordered that the defendant town be quieted in the possession of the aforesaid strip, less reservation, as above described; and it is further ordered that the respective demands of the parties in all other respects be rejected, and that each of them pay one-half of the costs of suit in the district court, and that the defendant pay the costs of appeal.

(136 La. 746)

No. 20968.

STATE v. MAUVEZIN.

(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by the Court.)

1. STATUTES \S 109—TITLE AND SUBJECT-MATTER.

The title of Act No. 24 of 1888, being to amend and re-enact section 307 of the Revised Statutes of 1870, is sufficient; and the addition of words descriptive of the purpose of the section is mere surplusage.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. \S 109.]

2. STATUTES \S 107—SUBJECT-MATTER—DULPLICITY—ABORTION.

Section 807 of the Revised Statutes of 1870 denounces both successful and unsuccessful attempts to procure abortion or premature delivery by the administration of drugs, potions, or other things. Act No. 24 of 1888 amends the same section by denouncing the procurement of abortion or premature delivery by any other means. *Held*, that the act does not contain two objects, in the sense of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134; Dec. Dig. \S 107.]

Provosty, J., dissenting.

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

Mrs. John Mauvezin was convicted of procuring and causing an abortion and premature delivery, and appeals. Affirmed.

Clay Elliott and R. C. & S. Reid, all of Amite, for appellant. R. G. Pleasant, Atty. Gen. (Wm. H. McClendon, Dist. Atty., of Amite, and G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. Defendant and appellant was convicted and sentenced for procuring and causing an abortion and premature delivery.

The defendant was charged and prosecuted under the provisions of Act No. 24, p. 18, of 1888, the title and first section of which read as follows:

"No. 24.

"An act to amend and re-enact section 807 of the Revised Statutes of 1870, relative to attempt to procure premature delivery or abortion.

"Section 1. Be it enacted * * * that section 807 of the Revised Statutes of 1870 be amended and re-enacted so as to read as follows: Whoever shall feloniously administer, or cause to be administered, any drug, potion, or any other thing, to any woman for the purpose of procuring a premature delivery, and whoever shall administer, or cause to be administered, to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion or a premature delivery, or whoever by any means whatsoever shall feloniously procure abortion or premature delivery, shall be imprisoned at hard labor for not less than one nor more than ten years."

The words which we have italicized represent the amendment to section 807.

Defendant was charged with feloniously

procuring and causing abortion and premature delivery by the use of a metal instrument.

Defendant moved to quash the information on the ground that Act 24 of 1888 is unconstitutional, because the object of the act is not expressed in its title, and because the act contains two objects.

[1] The title of the act purports to amend and re-enact section 807 of the Revised Statutes of 1870. The words "relative to," etc., refer to the section, and not to the act, and were copied from a marginal note in the edition of the Revised Statutes of 1870. The title is complete without those words of description, and they are mere surplusage.

In *State v. Brown*, 41 La. Ann. 771, 6 South. 638, the court held that "An act to amend and re-enact section 910 of the Revised Statutes of 1870" was a sufficient expression of the object of the act within constitutional requirements, citing *Arnoult v. City of New Orleans*, 11 La. Ann. 56, and *State ex rel. Farrar v. Garrett*, 29 La. Ann. 637.

This doctrine is too well settled to require the citation of other cases.

[2] 2. "Abortion at the common law was one of the leading offenses against population," but now nearly all the indictments are upon statutes. Bishop's Crim. Law, § 509. The same writer further says:

"Where the law makes abortion punishable, a man who attempts it upon a woman, and fails, thereby creates the same alarm, the same disturbance to the peaceful order of society, in every view the same harm to the public, whether the failure was caused by his instrument or drug being imperfect, contrary to his belief, or from other cause. *Id.* § 741.

And in another work Mr. Bishop says:

"A person indicted under a statute for administering a drug, or doing some other like act, with the intent to procure an abortion, may be convicted, not alone when the proofs show an unsuccessful attempt, but equally when they show the attempt made successful; that is, show an abortion actually committed." Bishop on Stat. Crimes, § 748.

Section 807 does not use the word "attempt," but penalizes the felonious administration of any drug, potion, or anything to any woman, for the purpose of procuring abortion or a premature delivery, and prescribes only one penalty.

Hence section 807 makes no distinction between the attempt and the actual procurement of abortion or premature delivery. The section was, however, by its terms restricted to the internal application of drugs, potions, or like things, for the purpose of procuring abortion. Act No. 24 of 1888 sought to enlarge the scope of the section by interpolating the following clause:

"Or whoever by any means whatsoever shall feloniously procure abortion or premature delivery."

The section and amendatory act are on the same subject-matter; that is, abortion and

premature delivery. And there has been no attempt to embrace in the statute crimes of an entirely different nature. The offenses charged in Act 24 of 1888 are germane to the subject of the act; that is, abortion and premature delivery.

In the late case of *State v. Harwick*, 133 La. 545, 63 South. 166, this court, as indicated in the syllabus, held:

"The Legislature may in a statute denounce an act as a crime, and also denounce as a crime in the same statute the attempt to commit the act, without rendering the statute unconstitutional as embracing two objects."

In an attempt, the act falls short of the thing intended. Bishop, Crim. Law, § 728. Section 807 of the Revised Statutes has no such limitation, and applies not only to attempts, but to the actual procurement of abortion or premature delivery. The amendatory act of 1888 denounces the commission of the same offense by any other means.

It suffices that the subject of an act be stated in general terms, and in order to facilitate legislation a very liberal construction should be given to all matters which are pertinent or germane to the subject of the enactment. *Board of Medical Examiners v. Fowler*, 50 La. Ann. 1370, 24 South. 809.

Judgment affirmed.

PROVOSTY, J. (dissenting). The question in this case is not as to whether, for the purpose of amending a section of the Revised Statutes, the recital in the title of an act that the act is one to amend the particular section of the Revised Statutes in question, is not a sufficient compliance with the provision of the Constitution requiring the object of an act to be stated in its title; for it most unquestionably is.

Again, the question in this case is not as to whether the crime of administering or causing to be administered some drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, is not germane with the crime of procuring abortion or premature delivery, and may not be included in the same statute under some appropriate title, for it most unquestionably is.

But the question is whether a title "relative to attempt to procure premature delivery or abortion" expresses an intention to legislate on the subject of the crime itself of procuring abortion or premature delivery.

In my opinion, it does not; and the reason is that the attempt to commit a crime is not in law the same thing as the consummation of the crime. Crimes are so far germane that under the title, "An act relative to crimes," all the crimes known to human nature might be constitutionally legislated upon; and, by virtue of the principle that the greater includes the less, it might perhaps be competent to legislate relatively to the attempt to commit a crime under a title relative to the

commission of the crime; but it seems to me that a title relative to the attempt to commit a crime does not express an intention to legislate touching the consummation of the crime, and that therefore it is not competent to legislate under it touching the completion or commission of the crime.

To illustrate: Section 792, Rev. Stat., denounces a penalty for assault with intent to murder, or, in other words, for attempt to murder. In so far as punishing the mere attempt to commit a crime, as contradistinguished from the consummation of the crime, it is an exact parallel with section 807, which is relative to the attempt to commit abortion, as contradistinguished from the consummation of the crime. Now, would it be competent to legislate touching murder, under a title "An act to amend section 792 relative to attempt to commit murder"? It seems to me, evidently, not. It seems to me that, under such a title, every different mode by which murder could possibly be attempted to be committed might be validly legislated upon, but not the consummation of the crime, or the crime itself of murder.

I therefore respectfully dissent.

No. 20334.

(136 La. 746)

GRAFF v. GRAFF.

(Supreme Court of Louisiana. April 27, 1914. Rehearing Denied May 25, 1914. On Motion to Dismiss, Feb. 8, 1915. Rehearing Denied March 8, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐776 — RIGHT TO WITHDRAW APPEAL.

An appellant will not be permitted to withdraw the appeal without the consent of the appellee who has answered the appeal and asked that the judgment be affirmed, even though, before answering, the appellee moved to dismiss the appeal for want of citation.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3115-3119; Dec. Dig. ⇐776.]

On Motion to Dismiss.

2. APPEAL AND ERROR ⇐435 — MOTION TO DISMISS APPEAL—WAIVER.

A motion to dismiss an appeal for want of citation is waived by an answer to the appeal, praying that the judgment be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2184-2190; Dec. Dig. ⇐435.]

On the Merits.

3. DIVORCE ⇐25—SEPARATION FROM BED AND BOARD—GROUNDS.

Petty quarrels between husband and wife are not sufficient cause for a judgment of separation from bed and board.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 61, 106; Dec. Dig. ⇐25.]

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by John Graff against Marie Graff. From judgment for plaintiff, defendant appeals. Application to withdraw appeal de-

nied, judgment reversed, and rehearing refused.

J. H. Levy and Elias Goldstein, both of Shreveport, for appellant. B. H. Lichtenstein, of Shreveport, for appellee.

On Application to Withdraw the Appeal.

O'NIELL, J. The defendant appealed from a judgment of separation from bed and board rendered against her on confirmation of default.

[1] The appellee filed a motion to dismiss the appeal, on two grounds: First, that he had not been served with a citation of appeal, although the appeal was taken in a term of court subsequent to that in which the judgment was rendered; and, second, that the statement of facts signed by the trial judge is not correct. In support of this latter allegation in his motion to dismiss the appeal, the plaintiff filed two ex parte affidavits. Two days later, the plaintiff filed an answer to the appeal, alleging that:

"Reserving all rights of his motion to dismiss the aforesaid appeal, respondent shows that the judgment rendered in said cause was upon ample and sufficient evidence, and that the judgment of the lower court should be affirmed."

The prayer of this motion is that the judgment be affirmed and that the appellant be condemned to pay the costs of both courts.

Acknowledging that the omission of the citation would be fatal to her appeal unless the answer to the appeal should be held to be a waiver of citation, and fearing that this question might be decided against her at a time when it would be too late to take another appeal, the appellant filed a motion to withdraw her appeal, in order that she might take another appeal with proper citation.

The appellee filed an answer to the appellant's motion to withdraw her appeal, opposing the withdrawal upon the ground that he had answered the appeal and had urged another reason for dismissing it, besides the want of citation of appeal. He therefore insists "that the matter should be allowed to come regularly for trial according to law."

In the brief filed by her counsel, the appellant admits that the only purpose for which she desires to withdraw her appeal is to take another appeal on proper citation. The appellee's original motion to dismiss the appeal for want of citation cannot now be regarded as a consent that the appeal be withdrawn, in view of his subsequent pleadings in this court.

"When the Supreme Court once has jurisdiction of an appeal, whether by transmission of the record or by that of the citation served on the appellee, it cannot, in any case, permit the appellant to withdraw his appeal, without the consent of the appellee, and the cause shall take its course whether the appellant make default or not." C. P. art. 901.

The application to withdraw the appeal is therefore denied.

On Motion to Dismiss.

[2] The motion to dismiss this appeal was waived by the appellee's answer to the ap-

peal, in which he prayed that the judgment be affirmed, and by his answer to the appellant's motion to withdraw the appeal. The motion to dismiss the appeal is therefore overruled.

On the Merits.

[3] The petition, which was served upon the defendant while she was visiting her son in New Orleans, contains only the following allegations:

"Paragraph 1. That he was married to his said wife in the city of Bucharest, state of Roumania, some time during the year of 1882 or 1883; that thereafter they came to live in America, and for the last seven years have lived and maintained their matrimonial domicile in the city of Shreveport.

"Par. 2. Petitioner shows that he has always conducted himself properly, has given his wife no cause or provocation for ill treatment, and has done everything in his power to make her home happy and comfortable.

"Par. 3. Your petitioner shows that his said wife has a violent temper and malicious disposition and has made his life unbearable for a long time; that he has endured the ill treatment imposed upon him for years, always hoping that her disposition would change for the better; but that, instead of its changing for the better, she has become more violent.

"Par. 4. Petitioner shows that his said wife has been guilty towards him for years of the grossest cruel and outrageous treatment, which renders their living together insupportable; that she has, in the presence of strangers, on divers occasions, cursed and abused him, and has, on several occasions, threatened to strike him.

"Par. 5. Your petitioner further shows that, about 10 days ago, his said wife, contrary to his wishes, sold all the household effects and furniture contained in the premises, No. 1800 Laurel street, in the said city, wherein they had their home, and appropriating all the money from the proceeds of the sale of said household goods to her own use, left for the city of New Orleans, where she now resides.

"Par. 6. Petitioner shows that, because of the conduct of his said wife, their living together has been made unsupportable, and he is entitled to a separation from bed and board and in due course a final divorce."

The defendant says that she is unable to read English and did not know that she had been sued until she returned to her home and learned that the judgment had been rendered against her. This, however, is merely her explanation for appealing from a judgment which she did not resist in the district court.

The statement of facts prepared and signed by the trial judge for the purpose of the appeal is as follows:

"I remember very little of the actual testimony in this case, as nothing happened to impress it upon my memory.

"I do remember, however, that plaintiff attempted to prove same upon default about the time it was ripe for same; that he produced one witness who swore that he had heard frequent quarrels between John Graff and his wife, but did not know who started them. I refused to render judgment on such testimony, and the cause was continued for further testimony. Some month or two later, plaintiff took the case up again and produced, I think, two witnesses who swore, to the best of my recollection, that they had heard Mrs. Graff quarreling at her husband on several occasions, and that he just seemed to be taking it. I have no recollection whatever of any evidence being introduced to show that defendant had sold the household goods and left for New Orleans.

"The evidence was not the most satisfactory;

but, in view of the fact that the record showed that defendant had been served personally and made no appearance, the court granted the prayer of the petition."

From this, it appears that the plaintiff failed to prove the only specific allegation of fact in his petition, and is not entitled to a judgment of separation from bed and board.

The doctrine applicable to the facts of this case was expressed in *Pozo v. Connor*, 107 La. 453, 31 South. 766, viz.:

"To warrant, in Louisiana, a judgment of separation from bed and board between married persons, the grounds assigned and proved must be of a very serious character. Light differences between the spouses will not suffice."

The judgment appealed from is annulled and reversed, at the cost of the appellee.

(136 La. 758)

No. 20376.

MUNCHOW v. MUNCHOW.

(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by the Court.)

HUSBAND AND WIFE — 272—COMMUNITY OF ACQUETS AND GAINS—SETTLEMENT.

In the settlement of a community of acquets and gains, the husband is not entitled to have credit for separate funds contributed by him to the community, except to the extent that the property of the community is thereby enhanced in value at the time of its dissolution; and this must be shown with reasonable certainty.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 1003-1007; Dec. Dig. § 272.]

Appeal from Civil District Court, Parish of Orleans; T. C. W. Ellis, Judge.

Action by Mrs. Emile Munchow against her husband. From a judgment rendered on oppositions filed, plaintiff, and her attorney in his own behalf, appeal. Amended in part, affirmed in part, and remanded.

Martin H. Manion and E. Howard McCaleb, both of New Orleans, for appellant. Titcher & Rogers, Chandler C. Luzenberg, and Dart, Kernan & Dart, all of New Orleans, for appellee.

O'NIELL, J. The plaintiff obtained a judgment against the defendant, decreeing a separation from bed and board, and ordering a settlement of the community of acquets and gains which was dissolved by the judgment. The property of the community was sold under the orders of court, and the notary appointed to effect the partition prepared and submitted a project of distribution, to which certain oppositions were filed by the defendant husband, and to which others were filed by the plaintiff. From the judgment rendered on these oppositions, the plaintiff, Mrs. Munchow, and her attorney in his own behalf, have appealed.

The plaintiff complains of the judgment ordering that the defendant husband, be paid \$5,500 out of the community funds. That

much was allowed of his claim of \$6,059.71 which he asserted as a creditor of the community in his opposition to the distribution proposed by the notary. The credits claimed by the husband are as follows:

Amount loaned to the Mutual Loan & Building Company, before the marriage and collected after the marriage	\$1,000 00
Amount similarly loaned to and collected from the firm of Munchow & Son	500 00
Amount similarly loaned to and collected from Otto Walter, builder...	1,000 00
Five shares of Teutonia Bank Stock	500 00
Twenty-one shares of Mutual Building & Loan Stock at \$25	525 00
One-half interest in the business of E. Munchow & Son	2,534 71
	\$6,059 71

The plaintiff and defendant were married on the 30th of April, 1896. He was then the junior member of the firm of E. Munchow & Son, owning one-half interest in the slating or roofing business with his father, Ernest Munchow. An inventory of the business taken in January, 1896, showed assets amounting to \$5,069.42 above liabilities. And, from the testimony of his father that the business was then prospering, the defendant claims that his half interest was worth fully \$2,534.71 at the date of his marriage. It seems that to this should be added a certain deed of trust worth \$1,000, which belonged to the firm.

On the 2d of September, 1901, the partnership of E. Munchow & Son was dissolved by Emile Munchow's purchasing his father's interest in the business. The assets of the business, not itemized, but consisting of stock on hand, bills receivable, cash in bank, horse, wagon, and buggy, then amounted to \$10,125.96. The liabilities amounted to \$156, leaving a value of \$9,969.96. From this was deducted the \$69.96 for bad accounts, leaving a net worth of \$9,900. Ernest Munchow drew out and accepted as his half interest of \$4,950 the following items, which were treated as belonging to the firm, viz.:

Promissory notes due the firm	\$1,700 00
Five shares Teutonia Bank stock	500 00
Cash	1,600 00
Emile Munchow gave his personal note for	1,150 00

Total amount paid Ernest Munchow

\$4,950 00

The defendant thereafter conducted the business of roofing houses and repairing slate roofs, and the business prospered for about five years. Then he began drinking intoxicants to excess, dissipating and wasting his time and money, and neglecting his business. He bought a gas boat and built another for his individual pleasure, and frequently went out on fishing expeditions for several days at a time, taking his employes, whose time he was paying for, taking also other guests, and paying for quantities of intoxicating liquors and all other expenses of the trips. The office

and only business establishment was in the same premises with the residence, and the wife answered the telephone calls, took orders for work, and tried to keep the business from total loss. But the husband continued spending much of his time on fishing expeditions and the balance principally in a maudlin condition at home. At the end of four or five years, the defendant had very little regard for his responsibilities to his wife and their four little children; and his conduct had become so offensive to her that she and the children left the matrimonial domicile, took up their residence with her mother, and she then filed this suit against her husband for a separation from bed and board. He filed simply a general denial, asserted no claim against the community, admitted that his wife had been always faithful and dutiful, and offered no evidence whatever to rebut the abundant proof of his habitual drunkenness, cruelty, and ill treatment of his wife.

On the trial of the oppositions to the proposed partition of the community funds, the defendant made a feeble attempt to prove by the testimony of his father that the plaintiff had conducted her household on an expensive basis, entertaining company, and having perhaps unnecessary servants.

The purpose was, as appears from the argument and reasons for judgment, to show that what the husband had when he married the plaintiff was not afterwards squandered by him in his individual enjoyment and dissipation, but inured to the benefit of the community. The proof is that the servants' hire, including that of the laundress, for the family of six, amounted to only \$24 a month; and there is no evidence of extravagance on the part of the plaintiff, in any other respect.

According to the inventory taken at the dissolution of the community, all that remained of the assets of the business (for one half of which the defendant claims \$2,534.71, and for the other half of which the community paid \$4,950) consisted of office furniture and fixtures valued at \$25.90, old buggy, wagon, mule, harness, ladders, and tools, all valued at \$183.50, stock of roofing material, consisting of slates, tiling, and tin, valued at \$68, and sundry notes and accounts appraised at \$1,000, which were retained by the husband, and which he claims are not all collectible. One of the gas boats was lost or sunk, and all that appears upon the inventory to represent the other is a gas engine valued at \$5 and a skiff valued at \$5.

During the years of prosperity, the community acquired real estate and personal property, from the sale of which, in these proceedings, there was realized a fund of \$10,238.15, which, added to certain items retained by and charged to the spouses respectively, made up a total of \$11,590.59. From this, the notary subtracted costs and charges amounting to \$2,976.53, leaving \$4,407.03 to be paid to each spouse, less the charges for the property purchased by them, respective-

ly, at the auction sale. As the plaintiff is charged with \$1,500 for property purchased by her at the auction sale, there will be very little, if anything, left for her if the defendant's judgment for \$5,500 against the community be paid.

There is no proof that the separate funds of the husband were invested in any of the property belonging to the community at the time of its dissolution, except the inference that the community could not have accumulated \$11,590.59 in the 15 years of its existence, without the aid of what the husband had at the time of the marriage.

The judgment of the district court is said to be founded upon the decisions of this court in Succession of Kidd, 51 La. Ann. 1169, 26 South. 74, and Succession of Kleinert, 125 La. 549, 51 South. 584; and the appellee's counsel also refer us to Succession of Cormier, 62 La. Ann. 881, 27 South. 293.

Succession of Kidd does not lay down a rule with regard to the proof necessary to sustain a claim asserted by one of the spouses against the community. On the contrary, it was said:

"No fixed rule or standard as to extent of the evidence necessary to sustain such a claim can be formulated. We have to take into consideration all the surroundings and circumstances connected with each case to ascertain whether it can be reasonably said that the situation of the community at the time of the husband's death (or at the dissolution of the community) could or would have been found as it was, in the absence of having called in to its assistance and for its benefit outside funds and property."

The judgment recognizing the separate estate of Kidd to be a creditor of the second community was based upon a situation of affairs very different from the facts of this case. The firm in which Kidd had an interest conducted a mercantile business, owning a stock of merchandise, until the second community was dissolved by his death. It was observed by the court that he had been "a prudent, conservative business man," and that he had not "met with any business losses or reverses." The conclusion was that, at the dissolution of the second community, it still possessed the full value and benefit of the business and property which had been contributed to it by the husband's separate estate. And it was observed that the effect of recognizing the right of the heirs of the husband to withdraw the amount of his separate funds, reasonably ascertained to have been utilized for the benefit of the second community, would not leave it in a condition of insolvency, but with a surplus of profits; and that the second community would still come out with a large amount belonging to it. With apparent doubt as to the sufficiency of the proof and legality of the claim, it was said to be equitable to allow the claim of the separate estate of the husband against the second community under the circumstances.

In Succession of Kleinert, the heirs of the

first marriage of the husband were recognized as creditors of the second community for half of the value of a furniture business, the assets of which consisted of a stock of merchandise valued at \$2,250 and \$625 in cash. The court remarked:

"Nothing shows what became of the \$625 cash and of the \$2,522 stock of merchandise, or of the proceeds of the sale of the latter. But it is not shown, or even suggested, that the same was wasted, or misapplied, or lost, or was in any way, shape, or form applied to any separate use of Kleinert."

In Succession of Cormier, the contest was between the children of his first marriage and those of his second marriage; both of his wives being dead. He had had an inventory of the property of the first community made and recorded soon after the death of his first wife, but failed to qualify as natural tutor of his minor children before his second marriage. Therefore there was no dispute or doubt about his owing to his children by his first wife the value of their half of the property of the first community, which he had retained and contributed to the second community. The only question at issue was whether he or the second community should pay the debt due to the children of the first marriage. The inventory of the property of the first community amounted to only \$961.63, and the proceeds of the sale of the property of the second community amounted to \$33,236. The surviving husband testified that the property of the first community inured to the benefit of the second community, and the court concluded that the second community ought to pay for the children's property which it had retained and had the benefit of.

We adhere to the view that there is no fixed rule or standard of proof required to establish that the contribution of the separate funds of the husband has inured to the benefit of the community. But we are constrained to hold that, to sustain such a claim, it must be shown with reasonable certainty that the community still had the benefit of the contribution at the time of its dissolution, and that the separate fund was not wasted by the husband or disposed of for his separate benefit or personal enjoyment.

It does not appear that the firm of E. Munchow & Son owned a stock of merchandise of any considerable value, as in the two cases cited above. The principal value of the business was in the good will and patronage established by the technical knowledge and skill of the members of the firm and their devotion to their business.

Though it may be assumed that this community would not have been as well off as it was at the date of its dissolution if the husband had not owned a half interest in the elating business of E. Munchow & Son at the date of his marriage, it is impossible to say how much better off the community was at the end than it would have been if Mr. Munchow had not been so well off at its begin-

ning. The half interest in the business, owned by the husband at the date of the marriage, is shown to have been worth only about half as much as the community paid for the other half interest five years after the marriage; and there was practically nothing left of it at the dissolution of the community. Under such circumstances, it is impossible to balance accounts mathematically between the husband and the community which existed between him and his wife. To attempt to estimate their financial differences would amount to nothing more than a guess.

The theory advanced in support of this claim seems to be that, at the dissolution of the community, the parties must be restored to the financial situation in which they stood, relatively, when they contracted marriage, and that, from the fact or circumstance that the husband had or received certain funds of his own, it must be inferred that the community got the benefit of it, and that he continues to be a creditor of the community until its dissolution and final settlement. But that doctrine is not borne out by the three decisions cited in support of it, and it is not the law. There has been no departure from the doctrine announced in *Babin v. Nolan*, 6 Rob. 508, viz.:

"Proof that a husband received a certain sum during the existence of the community, in payment of a debt due to him individually, is not sufficient to charge the community with the amount, when there is no evidence that the community was benefited by it, or that it was used in the purchase of community property."

From the syllabus of the decision in *Stewart v. Pickard et al.*, 10 Rob. 18, we quote:

"The price of a slave who belonged to the husband before the marriage, but was sold by him during its existence, cannot be charged to the community, without proof that the price was employed for its benefit."

In *Belair, Tutor, v. Dominguez*, 26 La. Ann. 606, it was said:

"The court below did not err, as contended by the opponents to the tableau of the administratrix, in not charging the community existing between the deceased and his surviving widow with a certain sum of money received by the deceased during marriage from the sale of his separate property, because it is not proved that this money was expended by the deceased for the benefit of said community."

From *Succession of Bollinger*, 30 La. Ann. 193, we quote the syllabus, viz.:

"The community formed by a man's second marriage cannot be held liable for the value of property belonging to a former community, sold by him during his second marriage, unless it be proved that the proceeds of such property were expended for the benefit of the second community."

The cases quoted above were all referred to approvingly in *Succession of Foreman*, 38 La. Ann. 700, where it was held:

"When separate funds or property of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband to the amount of such fund or the value of such property. But the evidence must establish, with reasonable certainty, that the funds were thus used or the property thus employed."

And again, in *Succession of Breaux*, 38 La. Ann. 728, it was said:

"In order to charge the community for separate account of the husband, the proof must show, with reasonable certainty, that his property or money has been used for the benefit of the community."

The case of *Heirs of Gee v. Thompson & Burns*, 41 La. Ann. 354, 6 South. 550, presented the very issue which we are now dealing with. It was held "that the solution of these claims must be made on the status of the community at its dissolution," and that amounts spent by the husband for pleasure trips with his wife were not legal charges against the community. From the syllabus we quote these appropriate expressions:

"To entitle the husband to claim as a creditor of the community, the law demands substantial proof that the amounts were actually invested by him in the community.

"It is not sufficient to prove that during the marriage the husband received large amounts of separate funds, if it appears that he spent a portion for his own pleasure and convenience and those of his wife; that he lost another portion by unfortunate loans, or by investment in securities which he afterwards disposed of."

Although the decision in each case has been and must be controlled by its peculiar facts, and no fixed rule has been or can be laid down as to the sufficiency of evidence to support such a claim, our jurisprudence is consistent in this: That the community does not owe the husband for his separate funds contributed to it, except to the extent that the community is thereby enhanced at its dissolution, and this must be shown with reasonable certainty.

From the evidence in this case, we can as well infer that the separate funds of the husband were wasted by him for his individual enjoyment as conclude that the value of the community property is now augmented by his separate funds. Our conclusion is that his claim should not be allowed.

Taking up the item of \$1,000 with which the notary charged the defendant for the open accounts and bills receivable retained by him, we conclude that the district judge was correct in reducing the charge to the amount actually collected, leaving the uncollected bills to be apportioned between the parties.

As to the appellant's complaint of the reduction of the auctioneer's charge to the amount which he paid the publisher for the advertising, the appellant has not paid nor made herself personally responsible for this debt; hence she has no interest in increasing the charge against the community.

The notary public gave credit to the plaintiff's attorney for \$1,100 as his fee, and charged him with \$800 which had been paid to him by the auctioneer on an order from the plaintiff. The district judge reduced the charge against the community from \$1,100 to \$500, which, in our opinion, is fair compensation. The community is not responsible

for what the plaintiff may have agreed to pay her attorney, but only for the value of the services. The defendant's attorneys were allowed \$400; and that is all they demanded.

The appellant has no interest in complaining of the rejection of the claim of the law firm of Ansley, Graham & Ansley, as the balance of a fee for representing the defendant. Nor has she any interest in complaining of the reduction of the notary's fees for the inventory, etc.

The fee of \$400 allowed the attorneys representing the defendant is not excessive. It was properly charged to the community; and the defendant is entitled to the credit of \$200, which he paid to the attorneys, because he is charged with the community funds retained by him.

For the reasons assigned, the judgment appealed from is amended by striking out the item of \$5,500, for which the defendant was given credit for separate funds alleged to have been contributed by him to the community; in all other respects the judgment is affirmed; and the case is remanded to the civil district court for execution of the judgment as amended. The cost of this appeal is to be borne by the community.

(136 La. 764)

No. 20088.

JACKSON v. WATERS-PIERCE OIL CO.
(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by Editorial Staff.)

CORPORATIONS—§668 — FOREIGN CORPORATIONS—SERVICE OF PROCESS.

Under Act No. 54 of 1904, providing that a foreign corporation, which has not appointed an agent in this state for the service of process, may be reached by service upon the Secretary of State, superseding Act No. 149 of 1890, providing that service of process on a foreign corporation might be had by service on its agents, service upon defendant corporation by serving copies of process upon its state manager was not sufficient.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Action by Harrison Jackson against the Waters-Pierce Oil Co. Judgment for defendant, and plaintiff appeals. Affirmed.

Paul J. Barbe and Robert R. Stone, both of Lake Charles, for appellant. McCoy & Moss, of Lake Charles, and Robt. L. Knox, of New Orleans, for appellee.

PROVOSTY, J. The defendant is a Missouri corporation, there domiciled. It does business in this state through a manager, for the entire state, located at Shreveport, and through local agents appointed by the state manager, at various points, among these,

Lake Charles, where this suit arose. Its business in this state consists in "selling petroleum and its products in the finished state, handling no crude or raw material."

The citation, duly addressed to the defendant, was served as shown by the following sheriff's return:

"I served said copies on the within named defendant, Waters-Pierce Oil Company, represented by C. D. Dickson, manager, in the city of Shreveport, Caddo parish, Louisiana."

The question is as to the validity of this service.

The defendant has not filed with the Secretary of State a declaration naming an agent upon whom service of process may be made in suits against it, as is required of foreign corporations by Act 149, p. 188, of 1890, Act 54, p. 138, of 1904, and Act 284, p. 423, of 1908, and plaintiff contends that, where a foreign corporation has thus failed to name an agent for receiving service of process, service is authorized, by said Act 149 of 1890, to be made upon its business representative in the state.

Defendant, on the other hand, contends that said Act 149 of 1890 has been superseded by Act 54 of 1904 and, we think, correctly.

The titles of the two acts announce an intention to cover precisely and exactly the same ground, namely, to carry into effect article 236 of the Constitution of 1879, reproduced in the Constitution of 1898 as article 264; and the phraseology of the earlier act has been reproduced in the later to such an extent that there is no room whatever for doubt that the one was intended to be a reproduction of the other with such amendments as were desired to be made; so that the case comes clearly under the rule announced in *State v. Henderson*, 120 La. 535, 45 South. 430, and repeated in *State v. Chicago, R. I. & P. Ry. Co.*, 133 La. 304, 62 South. 934, and *State v. Dudley*, 123 La. 436, 49 South. 12, that:

"Whilst it is well settled that repeals by implication are not favored, it is equally well settled that, in determining whether one law conflicts with another, it is necessary to consider the purposes of both, and if it appears that the purpose of the law last enacted is to cover the whole subject-matter dealt with, and to modify or supersede those previously enacted, then the modification or suppression results, and must be declared."

Defendant further contends that this later act prescribes the exclusive mode of service, in the absence of the designation of an agent, namely, upon the Secretary of State; whereas, plaintiff contends that a service which would be good upon a domestic corporation is good upon a foreign corporation, regardless of whether the corporation has or not complied with the laws requiring it to designate an agent for receiving service of process. And in support of this plaintiff cites *Curtis v. Jordan*, 115 La. 918, 40 South. 334, 5 L. R. A. (N. S.) 298, 5 Ann. Cas. 950. Defendant, on

the other hand, contends that the mode prescribed by the said later statute is exclusive.

A nice question is here raised which we spare ourselves the trouble of solving as, conceding plaintiff to be correct, the service in this case would not be good as against a domestic corporation. So held in *Welsh v. N. O. Great Northern*, 128 La. 738, 55 South. 338, where the return of the sheriff was precisely the same as in this case.

Judgment affirmed.

(136 La. 767)

Nos. 20643 and 20552.

LAYMAN v. SUCCESSION OF WOULFE
(THOMPSON, Intervener).

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

1. APPEAL AND ERROR ⇐460—SUSPENSIVE APPEAL—BOND.

A suspensive appeal cannot be maintained on a bond where the amount thereof was not fixed by the judge, except in cases of judgments for sums of money where the amount is fixed by law.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2217-2226, 2245, 2246; Dec. Dig. ⇐460.]

2. PARTIES ⇐47—INTERVENTION—RIGHT TO COMPLAIN.

Interveners cannot complain of informalities or defects in the suit or proceeding between the original parties, nor to the form of action.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. § 74; Dec. Dig. ⇐47.]

Appeal from Civil District Court, Parish of Orleans; Porter Parker, Judge.

Proceedings by L. M. Layman against the Succession of M. P. Woulfe, wherein Harry A. Thompson intervened. From a judgment dismissing the injunction procured and a judgment dismissing a suspensive appeal, intervener appeals. Affirmed.

James McConnell, Jr., of New Orleans, for appellant. Titcher & Rogers, of New Orleans, for appellee. Dinkelspiel, Hart & Davey, of New Orleans, for appellee Louis Knop, Civil Sheriff.

LAND, J. Plaintiff sued out executory process on two notes executed by Maurice J. Woulfe and secured by vendor's privilege and special mortgage as shown by act of sale purporting to have been passed before a notary public and two witnesses.

One Harry A. Thompson filed an intervention in said executory proceedings, coupled with an injunction against the sale of the property, based on allegations substantially as follows:

That Intervener was the holder and owner of two certain promissory notes identical in date, amount, and tenor with the two notes sued on by the plaintiff, and identified by the paraph of the same notary with the same act of sale.

That said act of purchase and mortgage

was not an authentic act, importing confession of judgment, because neither the vendee and mortgagor, Maurice P. Woulfe, nor James Jameson, one of the two alleged subscribing witnesses, ever appeared before E. P. Cousin, notary, nor subscribed their names in his presence;" said act being therefore unauthentic, and availing only as a private writing."

That the mortgage notes held by the intervenor are secured by mortgage and vendor's lien upon said property through the said private writing, although said act has not the force of an authentic act.

That the plaintiff, alleging himself to be the owner of the two mortgage notes described in said act, obtained an order of executory process, under which the sheriff had seized the mortgaged property, and advertised the same for sale.

That said proceedings, and seizure and intended sale, are illegal and unauthorized by law, because said act is not in authentic form and does not import a confession of judgment.

Intervenor prayed for judgment perpetuating the injunction and for costs and all general and equitable relief.

Plaintiff excepted to the petition of intervention on the ground that it disclosed no valid or legal cause of action.

Plaintiff, reserving the benefit of his exception, answered that the notes held by the intervenor, together with the notary's signature and paraph thereon, were false and forged. Plaintiff prayed for judgment dissolving the injunction with damages, and dismissing the demand of the intervenor at his costs.

No evidence was adduced, and the case seems to have been submitted on the face of the pleadings.

There was judgment dissolving the writ of injunction, reserving the rights of all parties.

[1] Record No. 20648 appertains to the dismissal of intervenor's suspensive appeal in the court below. The appeal was properly dismissed, because the amount of the bond for a supersedeas was not fixed by the judge, and the law fixes the amount only where the judgment is for a sum of money. Code of Practice, arts. 574, 575; Succession of Lynch, 124 La. 127, 49 South. 1002.

Plaintiff annexed the notes sued on to his petition. Intervenor does not allege that said notes were forged, but, as the alleged holder of duplicate notes secured by the same mortgage, sought to arrest the seizure and sale of the property on the sole ground that the act of mortgage was not, as it purports to be, passed before a notary and two witnesses. The representatives of the succession of the deceased vendor and mortgagor, defendants herein, have made no objection to the proceeding, via executiva.

It has been held that interventions are not allowed in proceedings via executiva; and that third persons must assert their rights in direct actions. *Chambliss v. Atchison*, 2 La. Ann. 488. This case was cited and applied to other summary proceedings in *Bank of Louisiana v. Delery*, 2 La. Ann. 649, Succession of McCarty, 5 La. Ann. 435, and *State ex rel. Bienvenu v. Wrothnowski*, 17 La. Ann. 159; and was differentiated in the case of *Brugier v. Miller*, 114 La. 423, 424, 38 South. 404, where it was properly held that an opposition claiming ownership of the thing seized, or an opposition claiming a privilege on the proceeds of the thing seized, is allowable in executory proceedings under the text of article 396 of the Code of Practice. But in the case at bar the intervenor does not claim ownership of the property seized, and his assertion of a privilege on the proceeds of the property would not have entitled him to an injunction.

[2] It is settled beyond dispute that an intervenor must take the suit as he finds it, and cannot complain of the form of action, or of informalities or defects in the proceedings between the original parties. See Code of Practice, art. 389, Garland's Notes (D). One of the cases cited is that of a defective affidavit on which a writ of sequestration had issued. *Hawkins & Roberts v. Beer*, 37 La. Ann. 55.

Both judgments appealed from are affirmed.

(126 La. 770)

No. 21025.

CITY OF SHREVEPORT v. KNOWLES.

In re KNOWLES.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW — 394 — EVIDENCE OBTAINED—ILLEGAL MANNER.

Evidence is not rendered inadmissible by having been secured in an illegal manner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 875, 876; Dec. Dig. — 394.]

2. INTOXICATING LIQUORS — 11 — ORDINANCES—EFFECT OF STATUTE—"BLIND TIGER"—"NUISANCE."

Act No. 146, of 1914, defines a "blind tiger" to be any place in those subdivisions of the state, including the city of Shreveport, where prohibition obtains, where liquor is kept for sale, exchange, or habitual giving away in connection with any business conducted at such place, declares it a "nuisance," and repeals all laws in conflict; there being no other such laws except local ordinances. An ordinance of the city of Shreveport defines a blind tiger, declaring it a nuisance, makes its keeping a punishable offense, and authorizes the search of suspected premises. Held, that the intention of the statute was to override local ordinances on the same subject so far as inconsistent, that a place where liquor was kept for sale in connection with some other business conducted at the same place was a blind tiger both under the statute and the ordinance, but that a conviction under the ordinance upon a charge of keeping a blind tiger in violation of the ordi-

nance would be set aside where it did not appear but that accused was convicted, even though liquor was not kept by him in connection with some other business conducted at the same place, leaving the charge to stand as to any violation of the ordinance as controlled and superseded by the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 13; Dec. Dig. § 11.

For other definitions, see *Words and Phrases*, First and Second Series, *Blind Tiger*; *Nuisance*.]

Monroe, C. J., dissenting in part.

Certiorari to First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

I. Knowles was convicted of keeping a blind tiger, and he brings certiorari. Judgment set aside, and cause remanded.

Cal. D. Hicks, of Shreveport, for relator. George G. Dimick, Asst. City Atty., of Shreveport, for City of Shreveport.

PROVOSTY, J. [1, 2] Ordinance No. 5 of the city of Shreveport defines a "blind tiger," declares it to be a nuisance, and imposes a penalty for keeping one. The accused was prosecuted under said ordinance. It seems that for obtaining evidence against him his premises were invaded. He says this was illegal and entailed illegality upon the evidence thereby secured, making said evidence inadmissible. Evidence is not rendered inadmissible by having been secured in an illegal manner. *State v. Aspara*, 113 La. 941, 37 South. 883.

By comparing said ordinance, as referred to in *City of Shreveport v. Maroun*, 134 La. 494, 64 South. 388, with Act 146, p. 260, of 1914, as reproduced in the not yet officially reported case of *State v. Quinn* (No. 20,953) 67 South. 206, it will be found that the two cover the same ground. Both declare a blind tiger to be a nuisance, prescribe what shall constitute one, make the keeping of one a punishable offense, and authorize the search of suspected premises, and prescribe the manner thereof. The ordinance differs from the statute in that an essential feature of a blind tiger under the statute is that the liquors must be kept for sale, etc., in connection with some other business conducted at the same place (see *State v. Quinn*, just cited), whereas, under the ordinance, that feature is not essential; and the accused contends that the statute, being the higher and later law and covering the same ground, repealed and superseded the ordinance, it being inconsistent with it.

The statute from its very nature and by its express terms has for its object and purpose to prescribe what shall constitute a blind tiger in those parts of the state where, as in the city of Shreveport, prohibition obtains; and necessarily, in doing so, it overrides local ordinances on the same subject; otherwise it would fall of its purpose, or could be overridden by local ordinances.

The learned city attorney invokes the doc-

trine that the same act may be an offense both under a city ordinance and a statute, and expose the culprit to punishment under each, or, in other words, to double punishment; but the question is not as to whether the keeping of a blind tiger may not be punishable both under the said ordinance and the said Act 146 of 1914, but as to whether after a statute has prescribed what shall, in the city of Shreveport and other prohibition territory, constitute a blind tiger, the city of Shreveport is at liberty to prescribe some thing else as constituting a blind tiger.

Next, the learned city attorney invokes the doctrine that a special law is not repealed by a general law, the more particularly where the special law is a municipal charter, or is an ordinance validly enacted thereunder. *Welch v. Gossens*, 51 La. Ann. 852, 25 South. 472; *Garrett v. Mayor*, 47 La. Ann. 618, 17 South. 238. But the question as to whether a general statute repeals a pre-existing special statute is in every case a question simply of intention. 36 Cyc. 1089. And in the present case the intention was to prescribe what should constitute the keeping of a blind tiger, and to override the local ordinance on the same subject. This is manifest from the subject-matter itself, and also from the repealing clause, which repeals all laws in conflict; there being no other such laws than these local ordinances.

The statute repeals the ordinance only in so far as the two are inconsistent. They are not so in so far as the ordinance declares a blind tiger to be a nuisance, and imposes a penalty for keeping one. They would be inconsistent if an act could not be punished both by a statute and by an ordinance, or if the act made punishable by the statute were not also made so by the ordinance. But such is not the case. A place where liquors are kept for sale in connection with some other business conducted at the same place is a blind tiger under the statute, and is also a blind tiger under the ordinance, since, under the ordinance, a place where liquors are kept for sale is a blind tiger regardless of whether the liquors are or not so kept in connection with some other business conducted at the same place. Under these circumstances, while we must set aside the judgment for the reason that for all that appears the accused may have been condemned even though the liquors were not kept by him in connection with some other business conducted at the same place, yet we cannot dismiss the charge altogether, for the affidavit simply charges in general terms that the accused kept a blind tiger in violation of the ordinance, and for all that appears he may have kept the liquors in connection with some other business conducted at the same place, and therefore come within the terms of the ordinance as controlled and superseded by the statute. Notwithstanding the said statute, there still remains in the

city of Shreveport an ordinance denouncing a penalty for keeping a blind tiger; that ordinance has been superseded in so far as it defines what is a blind tiger; but it has not been repealed in so far as it denounces a penalty for keeping a blind tiger.

The judgment appealed from is therefore set aside, and the case is remanded to be proceeded with according to law.

MONROE, C. J., concurs in the reversal of the conviction, and dissents in so far as the case is remanded, being of opinion that the defendant should be discharged.

(138 La. 774)

No. 21094.

THOMPSON v. McCausland.

In re THOMPSON.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

1. DISMISSAL AND NONSUIT \Leftrightarrow 42—RIGHT TO DISMISS—DEMAND IN RECONVENTION.

It has been held by this court, and the later authorities are conclusive on the subject, that a plaintiff may discontinue his suit at any time previous to judgment being rendered, "but that he cannot by so doing put the defendant out of court with respect to his demand in reconvention."

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Cent. Dig. §§ 75-83; Dec. Dig. \Leftrightarrow 42.]

2. MANDAMUS \Leftrightarrow 43—PROHIBITION \Leftrightarrow 5—MOTION TO DISCONTINUE—DENIAL.

When, in such case, the motion to discontinue contains an express reservation of defendant's right to proceed upon his reconventional demand, the matter is one in which the law leaves nothing to the discretion of the judge, even though the plaintiff be a nonresident, and, when he has denied the motion, mandamus and prohibition will lie.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 88, 89; Dec. Dig. \Leftrightarrow 43; Prohibition, Cent. Dig. §§ 20-30; Dec. Dig. \Leftrightarrow 5.]

Action by John W. Thompson against William McCausland. Judgment for defendant, and plaintiff applies for certiorari and mandamus. Alternative writ of mandamus made peremptory and respondent judge directed to set aside an order and prohibited from further executing same.

T. Jones Cross, of Baton Rouge, for relator John W. Thompson. Charles A. Holcombe, of Baton Rouge, for defendant William McCausland.

MONROE, C. J. Plaintiff (relator herein) sued defendant, in the district court for the parish of East Baton Rouge, for \$95. Defendant answered, denying liability and setting up a claim, in reconvention, for \$1,950. The case was tried and submitted; and, whilst it was under advisement, plaintiff moved to dismiss his demand, as in case of nonsuit, without prejudice to the right of defendant to prosecute his reconventional

demand, which motion was denied. He then moved to abandon and discontinue his demand, with the same reservation in favor of defendant, which motion was also denied, and he thereupon notified the court and the opposing counsel that he would make the application to this court, which we are now considering, for the writs of certiorari, mandamus, and prohibition; but the judge a quo proceeded, nevertheless, to render judgment, rejecting plaintiff's demand and condemning him, on the reconventional demand, to pay defendant \$1,950, with interest and costs. The Code of Practice reads:

"Art. 491. The plaintiff may, in every stage of the suit previous to judgment being rendered, discontinue the suit on paying the costs."

Construing the article thus quoted with reference to the right, accorded a defendant, to file a reconventional demand, it has been held, and we think the later authorities are conclusive upon the subject, that plaintiff may discontinue his suit at any time before judgment, but that he cannot, by so doing, put the defendant out of court, with respect to his demand in reconvention. *Coxe v. Downs*, 9 Rob. 133; *Smalley v. Lawrence*, 9 Rob. 213; *Donnell v. Parrott*, 10 La. Ann. 704; *Davis et al. v. Young*, 35 La. Ann. 740.

In *Meyers & Co. v. Birotte*, 41 La. Ann. 745, 6 South. 607, it was held (quoting the syllabus):

"The plaintiff may discontinue his suit at any stage previous to judgment, and that right on the part of an attaching or seizing creditor is not affected by the fact that a third person has intervened for the purpose of claiming ownership of the property attached. The dismissal of the suit operates a release of the property claimed by the intervenor, and, if he wishes to be quieted in his title, he must have recourse to a direct action."

It is hardly necessary to say that an intervenor stands upon a different footing from a defendant who becomes plaintiff in reconvention; or that the rulings, to the effect that a plaintiff is not entitled, of right, after a trial, to a judgment of nonsuit, do not bear upon the question here at issue, since the plaintiff, now before the court, asked leave to "abandon and discontinue his demand against the defendant, William McCausland, without prejudice to the right of the said McCausland to continue to prosecute, in this suit, any and all rights or claims that he may have under and by virtue of his reconventional demand against plaintiff." And the order, prepared for the signature of the judge, reads, in part:

"It being understood that this dismissal is without prejudice to any rights of defendant herein and that all rights of defendant to prosecute, in this suit, his reconventional demand against plaintiff, are reserved."

We are unable to discover, upon the case thus presented, that plaintiff's right to discontinue is affected by the fact that he is nonresident, as nonresidents and residents are, alike, bound by their judicial admissions;

and we conclude that the matter was one concerning which the law left nothing to the discretion of the judge. *State ex rel. Administrator v. Judge*, 48 La. Ann. 455, 19 South, 256.

It is therefore ordered that the alternative writ of mandamus herein issued be now made peremptory; that the respondent judge be directed to set aside his order denying plaintiff's motion, of January 20, 1915; that he be allowed to abandon and discontinue his suit; and that he be prohibited from further proceeding in execution of said order.

(136 La. 777)

No. 21019.

RICHARD D'AIGLE CO., Limited, v. WESTERN INS. CO. OF PITTSBURG.

In re WESTERN INS. CO. OF PITTSBURG.
(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

1. INSURANCE — 553 — FIRE POLICY — LIABILITY OF INSURER — FALSE INVENTORY.

A policy of fire insurance containing the provision that, "this entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after the loss," becomes void by the making of a false inventory going to show that the stock of goods destroyed by fire was more than twice its real value. And the insurer is not responsible to the insured for damages and injury to said stock of goods by fire, although he did not predicate his proof of loss upon the fraudulent inventory.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.]

2. INSURANCE — 553 — FIRE POLICY — FALSE INVENTORY — EFFECT TO BAR RECOVERY.

It is immaterial that a false inventory may have been not made for the purpose of deceiving the insurer, and that it was made for the purpose of making false representations to other parties. The question relates to the value of the goods destroyed for which the insured is making claim and it is material. The attempted fraud is a breach of the condition of the policy and is a bar to recovery.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1362-1366; Dec. Dig. § 553.]

Certiorari to Court of Appeal, Parish of Calcasieu.

Action by the Richard D'Aigle Company, Limited, against the Western Insurance Company of Pittsburg. A judgment for defendant was reversed by the Court of Appeal, and defendant applies for certiorari or writ of review. Reversed, and judgment of District Court made judgment of Court of Appeal.

Thomas C. Plauche, of Lake Charles, for plaintiff. John C. Hollingsworth, of New Orleans, for defendant.

SOMMERVILLE, J. Plaintiff's claim is on a New York standard fire insurance policy. It is resisted by the company on two conditions contained in the policy, namely:

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated therein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss"

—and for the violation of the iron safe clause contained therein.

A judgment in favor of the defendant in the district court was reversed by the Court of Appeal, and the judgment of the latter court is before us for review.

The defendant company alleges that plaintiff made a fraudulent inventory in the latter part of the year 1912, a short time prior to the fire which destroyed the stock of goods belonging to plaintiff and insured by defendant, and that this inventory, together with one taken earlier in the same year, was submitted to the officers of the company after the fire.

[1] The policy required that at least one inventory should be made annually, and plaintiff made two inventories during the year. These inventories, together with others taken in previous years, were kept in an inventory book, and all of these inventories were submitted after the fire to the officers of the defendant company at one time. But, in making its proof of loss, plaintiff based its claim upon the inventory taken in the early part of the year, which was not shown to have been fraudulently made, and it seeks to evade the consequences of the provision of the policy quoted above which says that:

"In case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," shall avoid the policy.

The condition is clear and explicit, and it is reasonable. Plaintiff did attempt to perpetrate a fraud when it entered a fraudulent inventory upon its inventory book, and when it submitted this fraudulent inventory to the defendant company. It falsely misrepresented that it had a stock of goods of some \$23,000 on hand, when in reality it had a stock valued at about \$11,000.

In the case of *Jones & Pickett, Ltd., v. Michigan Fire & Marine Ins. Co.*, 132 La. 847, 61 South. 846, where the insured showed that certain foreclosure proceedings against the property insured had been withdrawn and the claim was settled before the fire occurred, and that there was no existing seizure at the time of the fire, and that the risk had not been increased by such abandoned seizure, it was held that the condition providing that the policy should be avoided in the event of a seizure was a binding condition upon the parties and that the policy had been avoided by the violation of the condition, and that it (the policy) had not been revived when the seizure was released before the fire occurred.

In that case the decision in *Imperial Fire Ins. Co. v. Coss County*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231, was quoted from as follows:

"Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guarantee the insured against loss or damage upon the terms and conditions agreed upon and upon no other, and when called upon to pay, in case of loss, the insurer therefore may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and, in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform, the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms and conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

[2] The contention of plaintiff that the fraudulent inventory made in September was not made for the purpose of deceiving the defendant, and that it had not made out its proof of loss from such false inventory, is immaterial. It submitted the two inventories made in 1912, together with inventories made in previous years, to defendant without any explanation whatever. The wide discrepancy between the two inventories caused the defendant to suspect fraud, and to refuse to pay the amount fixed in the policy. It may have been that the second, and fraudulent inventory, made in 1912, was made to deceive others when additional insurance was sought and obtained by plaintiff, or it may have been made for some other purpose.

In the case of *Claffin v. Insurance Co.*, 110 U. S. 81, 3 Sup. Ct. 507, 28 L. Ed. 76, it was decided, as set forth in the syllabus:

"Although it appeared that the statements were not made for the purpose of deceiving the insurer, but for the purpose of covering up some false statements previously made to other parties,

"Held, that the motive which prompted them was immaterial, since the questions related to the ownership and value of the goods, and were material, and that the attempted fraud was a breach of the condition of the policy and a bar to recovery."

The case is with the defendant on the question of fraud, and it should have been decided in its favor. It becomes unnecessary to

consider the iron safe clause which was also violated, by failing to keep all of the books of the plaintiff company in an iron safe while the place of business was closed; or by failing to have kept them in some place not exposed to any fire which would destroy the building of the insured.

While the books of plaintiff which were not kept in an iron safe were not books in daily use for making entries therein, they were in use for reference by the bookkeeper and others, and they should have been kept in accordance with the agreement in the policy. *Hiller v. Ins. Co.*, 125 La. 938, 52 South. 104, 32 L. R. A. (N. S.) 453.

It is therefore ordered, adjudged, and decreed that the judgment of the Court of Appeal, First Circuit, Parish of Calcasieu, be annulled, avoided, and reversed, and the judgment of the district court be made the judgment of the Court of Appeal in this case.

No. 21065.

(136 La. 781)

STATE v. DANTONIO.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW §84—JURISDICTION OF CITY COURTS—VALIDITY OF STATUTE.

That provision of an act of the General Assembly which attempts to confer on city courts "exclusive" jurisdiction in certain criminal cases is violative of article 109 of the Constitution, which gives unlimited and original jurisdiction in all criminal cases to the district courts throughout the state. The jurisdiction must be concurrent.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 115-124; Dec. Dig. §84.]

Appeal from Twenty-Sixth Judicial District Court, Parish of Washington; J. B. Lancaster, Judge.

Joe Dantonio was convicted of selling intoxicating liquors without a license, and appeals. Affirmed.

Fred J. Heintz, of Covington, for appellant. R. G. Pleasant, Atty. Gen., and J. Vol Brock, Dist. Atty., of Franklinton (G. A. Gondran, of New Orleans, of counsel), for the State.

SOMMERVILLE, J. Defendant appeals from a conviction of and sentence for selling spirituous and intoxicating liquors without having previously obtained a license to do so.

A plea to the jurisdiction of the district court was based upon section 45 of Act No. 14 of 1914, p. 31, which gives to the city court of Bogalusa "civil jurisdiction now vested in justices of the peace, exclusive criminal jurisdiction to try offenses not punishable by imprisonment at hard labor under the laws of the state," etc.

The plea was overruled by the district judge, on the ground that the Legislature was without authority to confer "exclusive

criminal jurisdiction to try offenses not punishable by imprisonment at hard labor under the laws of this state" in the city court of Bogalusa.

Article 126 of the Constitution of 1913 gives to justices of the peace "exclusive original jurisdiction in all civil matters, where the amount in dispute does not exceed fifty dollars, exclusive of interest, and original jurisdiction concurrent with the district court when the amount in dispute shall exceed fifty dollars, exclusive of interest, and shall not exceed one hundred dollars, exclusive of interest," and over some other civil matters. The same article further provides:

"The General Assembly may by general or special laws invest justices of the peace in general or in any particular parish or parishes with criminal jurisdiction over misdemeanors to be tried with a jury composed of not more than five nor less than three persons, in such manner as may be provided by law, with the right of appeal to the district court in all cases, not appealable to the Supreme Court, as hereinbefore provided for."

And article 96 provides that:

"The General Assembly shall have the power to abolish justice of the peace courts in wards containing cities of more than five thousand inhabitants, and to create in their stead courts with such civil jurisdiction as is now vested in justices of the peace, and with criminal jurisdiction which shall not extend beyond the trial of offenses not punishable by imprisonment at hard labor under the laws of this state, and of violations of municipal and parochial ordinances, and the holding of preliminary examinations in cases not capital."

But article 96 does not give to the General Assembly the right to create courts in the place of the justice of the peace courts with "exclusive" criminal jurisdiction. On the contrary, article 109 of the Constitution gives to district courts throughout the state, except in the parish of Orleans, "unlimited and exclusive original jurisdiction in all criminal cases except such as may be vested in other courts authorized by this Constitution," etc.

The jurisdiction in criminal matters given by article 109 of the Constitution to district courts cannot be taken away from such courts by the Legislature. The article permits the Legislature to confer concurrent jurisdiction with district courts upon other courts authorized by the Constitution. The latter are provided for in article 96, before referred to, which gives to the General Assembly the right to create courts in place of justice of the peace courts with limited civil and criminal jurisdiction. But, when this is done, and the justice of the peace courts have been abolished, the criminal jurisdiction conferred upon the newly created inferior courts must be exercised concurrently with the district courts.

The court, in *State ex rel. Muller*, Dist. Atty., v. Judge, 105 La. 315, 29 South. 806, issued a mandamus to compel the district judge to retain jurisdiction in a crim-

inal cause where a city court of the city of New Iberia had been given limited criminal jurisdiction by the General Assembly. It is true in that case the General Assembly had not attempted to confer "exclusive" jurisdiction upon the city court of the city of New Iberia. In view of the constitutional provision giving to the district courts unlimited and exclusive original jurisdiction in criminal cases, and the other provision giving to the General Assembly the right to create inferior courts with criminal jurisdiction over certain cases, the principles announced by the court, in the *Muller* Case are applicable to this case.

The plea to the jurisdiction was properly overruled.

Judgment affirmed.

(136 La. 784)

No. 20627.

POLICE JURY OF JACKSON PARISH, LA.,
v. TREMONT & G. RY. CO.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

HIGHWAYS ⇐70, 153 — RAILROADS ⇐93 —
CROSSINGS—"ALTER"—"CHANGE"—"HINDER,
IMPEDE, OR OBSTRUCT."

A railroad company has an implied right to build across a highway, since otherwise the right granted by article 271 of the Constitution "to construct and operate a railroad between any points within this state" would have to be abandoned.

It is one thing to "alter" or "change" a public road, within the meaning of Rev. St. § 3380, and another thing to "hinder, impede or obstruct" the use of such road, within the meaning of Rev. St. § 691, as amended by Act No. 204 of 1902 and Act No. 157 of 1910. The one section refers to the substitution of one road for another; the other section to the obstruction of an existing road, without necessarily providing another.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 234, 235, 238, 299, 417, 419; Dec. Dig. ⇐70, 153; Railroads, Cent. Dig. §§ 260-265; Dec. Dig. ⇐93.

For other definitions, see Words and Phrases, First and Second Series, Alter; Change.]

Appeal from Fifth Judicial District Court, Parish of Jackson; Cas Moss, Judge.

Action by the Police Jury of Jackson Parish, La., against the Tremont & Gulf Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Julius T. Long, of Winnfield, for appellant. Stubbs, Russell, Theus & Wolff, of Monroe, and Grisham & Oglesby, of Winnfield, for appellee.

MONROE, O. J. The petition herein filed alleges, in substance: That defendant is a railroad corporation established under the laws of this state, and that, about January 1, 1908, it began the construction of a portion of its railroad which crosses a certain public road in Jackson parish, and that:

"The ground where said railroad crosses said public road was, on said day, torn and dug up in such a condition that the citizens of the said parish of Jackson who traveled said public road have never since been able to travel it at said point; * * * that, after starting the construction of the * * * railroad, at the point where it crosses said public road, defendant immediately constructed a deep cut through the hill on which the said public road was located at said point, and that now * * * the said cut * * * is 20 feet deep where it crosses the place where the said public road is located legally; * * * that for several miles the said "public road runs on a high ridgeway, in approaching said point where the cut was made by said railway company from either direction on said public road; that, at the time said cut was commenced, the said public road at said point and for miles in either direction * * * was high, dry, and safe for travel; that defendant changed and turned said public road at said point so as to make it 300 yards longer or farther for people to travel than it used to be, or ought to be now; that it is 125 yards from the mouth of said cut and place where said company has changed said road to where its proper place is and where it used to run; that, where the changed position of said public road leaves the old and legally established line, it descends from either point; * * * that the descent and ascent around said cut * * * is very steep, and the ground over which it runs is usually wet and without foundation sufficient to support travel of wagons and horses; * * * that the place where said public road ran before it was thus changed was on a dividing ridge; * * * that the said road could not be changed around to the other side of said cut or hill and make any improvement as to distance, foundation, or kind of soil; that the said road, as now changed, has caused the persons who travel said road much inconvenience"

—and that the present crossing is dangerous, by reason of the fact that those who approach it are unable to see the trains passing through the cut until they get very near to the railroad; that said public road had been established more than 20 years before the railroad was built, and that the citizens and others who use it desire that it shall be re-established as before; that, in making the change as alleged, defendant acted without authority from the police jury; and that petitioner is therefore entitled, under section 3380 of the Revised Statutes, to recover \$100 for each month during which the change has continued, with interest.

The petition further alleges that defendant should be required to replace the road in its former position and make it as convenient and safe for travel as before the change, and, if it should choose to bridge the cut, should be required to build a certain described bridge, and keep it in repair.

Wherefore petitioner prays for judgment condemning defendant to pay \$7,400, with interest, and to restore the road in question to its former position, and, should it elect to bridge the cut, that it be required to build a bridge such as is described, and keep it in a safe condition. Defendant filed an exception of "no cause of action," the exception was maintained as to the demand for a money judgment, and plaintiff, alone, has appealed.

As we interpret the allegations of the petition, the meaning intended to be conveyed is that, in originally constructing its railroad across the public road, defendant, by reason of the disturbance of the earth, rendered the public road impassable, and thereafter aggravated the obstruction by opening a cut, which, at the time of the filing of the petition, had grown to be 20 feet deep, and that in the meanwhile those who travel the public road found themselves obliged to make the detour which is described; in other words, that, finding an obstruction in the road upon which they were accustomed to travel, they chose their own route around the obstruction.

Section 3380 of the Revised Statutes appears, originally, to have formed part of an act of 1818 relating to public roads, and it declares that:

"No person shall turn, alter, or change any public road, unless it be by order of the police jury, under penalty of \$100 for each month the said road is altered or turned out of its old course; to be recovered, one-half to the use of the person suing for the same."

Since the passage of the act thus quoted railroads have come into use, and since its incorporation in the Revised Statutes the people of Louisiana have adopted several Constitutions, and more or less of legislation, with which, for the purposes of the question here presented, the act must needs be construed.

Article 271 of the Constitution of 1896 confers upon "any railroad corporation, * * * the right to construct and operate a railroad between any points within the state," and Act No. 204 of 1902, p. 395, amending and reenacting section 691 of the Revised Statutes, declares that:

"In all cases where railroads, * * * shall cross any highway, the corporation shall so construct the work as not to hinder, impede or obstruct its safe and convenient use," etc.

And Act No. 157 of 1910, p. 236, is to the same effect.

The right to build a railway across a highway, though not expressly granted, results from a necessary implication, since otherwise the grant contained in the Constitution of the right to construct and operate a railroad between any points within the state, would have to be abandoned. *Railroad Co. v. Railroad Co.*, 48 La. Ann. 856, 19 South. 863. It may happen, as it appears to have happened in this case, that, in exercising the right to cross a highway, a railroad company will obstruct the highway, and that the public will, temporarily, or perhaps permanently, find their own way around the obstruction; and it may be (though we express no opinion on that subject) that the railroad company, in such case, would be liable, civilly or criminally; but we are of opinion that such obstruction would not constitute an altering or changing, within the meaning of Rev. St. § 3380, which, as we interpret it, refers to the substitution of one road for another, whereas the hindering, impeding, or obstructing to

which section 691 refers is the rendering of an existing road impassable or difficult, without necessarily providing another.

The judgment appealed from is therefore affirmed.

(136 La. 788)

No. 20957.

MILLER v. BOPP.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

1. ANIMALS §50—POLICE JURY—POWER TO ENACT NO-FENCE LAW.

The police jury of Webster parish has the power to enact a "no-fence" law for a particular ward of the parish. To what extent the roving of domestic animals shall be permitted, restrained, or suppressed is left by the statute to the discretion of the police jury.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 148-157; Dec. Dig. §50.]

2. ANIMALS §56—RUNNING AT LARGE—PENALTIES—JURISDICTION OF SUPREME COURT.

Ordinances directing the impounding of domestic animals found running at large, prescribing charges for their taking up and keeping, and authorizing sales at public outcry to pay such charges, impose a "penalty" in the sense of article 85 of the Constitution, which vests jurisdiction in the Supreme Court in all cases where the constitutionality or legality of any fine, penalty, or forfeiture imposed by a municipal corporation shall be in contestation.

[Ed. Note.—For other cases, see *Animals*, Cent. Dig. §§ 181-189; Dec. Dig. §56.]

Monroe, C. J., and Provosty and O'Niell, JJ., dissenting in part.

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"PENALTY"—"FORFEITURE"—"PENAL STATUTE."

"Penalty" or "forfeiture" does not necessarily imply a fixed sum, but anything imposed as a punishment. A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for a breach of its provisions. Penalty is a punishment prescribed by law for its violation. The term is mostly applied to a pecuniary punishment, but it is not exclusively so. It is the suffering, in person or property, which is annexed by law to the commission of a crime, an offense, or a trespass as a punishment (quoting Words and Phrases, Penalty; Penal Law).

Appeal from Second Judicial District Court, Parish of Webster; John N. Sandlin, Judge.

Action by A. A. Miller against F. L. Bopp. From judgment for defendant, plaintiff appeals. Affirmed.

Wimberly, Reeves & Dormon, of Shreveport, for appellant. Lynn K. Watkins, of Minden, for appellee.

LAND, J. Under a police jury ordinance prohibiting the running at large of "all stock, cattle, cows, horses, mules, hogs, goats, sheep and geese" within the limits of ward 4 of the parish of Webster, the defendant took up 22 head of hogs, found running at large and trespassing on his premises, and demanded of the plaintiff, owner of the animals, payment of charges for keeping them as fixed by the

ordinance. Plaintiff refused to pay said charges, and thereupon the defendant gave public notice that he would sell said hogs in the manner provided by the ordinance aforesaid to pay charges and penalties; the balance, if any, to be paid to the parish treasurer for account of the owner.

Plaintiff, as owner, enjoined the sale of the animals, and sued the defendant for damages, on the ground that the police jury had no authority to pass such an ordinance for a particular ward; that the ordinance discriminated against the plaintiff, because live stock were permitted to rove at large in other wards, and, if said ordinance were permitted to stand, it would deprive the petitioner of his property without due process of law.

The answer was, in effect, that the ordinance was approved by a large majority of the voters of the ward, and was in all respects legal and constitutional.

There was judgment in favor of the defendant rejecting plaintiff's demands and dissolving his injunction, with costs. Plaintiff has appealed.

The ordinance in question authorized any and all persons in ward 4 of Webster parish to take up and confine in a proper manner all animals of the kind above described found roving or running at large in said ward, and to make certain charges per head for taking up and giving notice to the owner, and for care and keeping such animals. The ordinance further authorized the person impounding the animals to hold the same until the charges were paid in full, and, on the failure or refusal of the owner to pay the said charges, to sell the animals to the highest bidder at public auction, after posting for ten clear days.

The record shows that the defendant notified the plaintiff of the impounding of the hogs, and that the latter refused to pay the charges imposed under the ordinance, and enjoined the sale of the animals. Defendant bonded the injunction and, after the prescribed notice, sold the hogs at public outcry for \$60, out of which he retained \$32 for charges, and deposited the balance of \$28 with the parish treasurer to the credit of the plaintiff.

[2] During the argument the question of the jurisdiction of this court was suggested, and we are bound to consider it on our own motion.

This court has jurisdiction in all cases where the constitutionality or legality of any fine, penalty, or forfeiture imposed by a municipal corporation is in contestation. Const. art. 85.

[3] The question for solution is whether the police jury ordinance in question imposes a penalty or forfeiture.

"Penalty" or "forfeiture" does not necessarily imply a fixed sum, but anything imposed as a punishment." Words and Phrases, vol. 6, 5273.

"A statute properly designated as penal is one which inflicts a forfeiture of money or goods by way of penalty for a breach of its provisions." *Id.*

"Penalty is the punishment inflicted by law for its violation. The term is mostly applied to a pecuniary punishment, but it is not exclusively so." *Id.* 5274.

"The suffering, in person or property, which is annexed by law to the commission of a crime, an offense, or a trespass as a punishment." *Id.*

We therefore have jurisdiction of this appeal, but it is limited to the question of the legality or constitutionality of the ordinance in question. Mayor, etc., of the Town of Homer v. Brown, 117 La. 425, 41 South. 711.

[1] The illegality alleged in the petition is that the police jury—

"have no authority to pass such an ordinance for a particular ward; that their powers are general; that said ordinance discriminates against plaintiff and is greatly to his injury."

The ordinance in question was adopted under section 2743 of the Revised Statutes of 1870, as amended and re-enacted by Act No. 202 of 1902, which, as far as pertinent to the issue before us, reads as follows:

"The police juries shall have power to make all such regulations as they may deem expedient: * * * Fifth. To pass all ordinances and regulations which they shall deem necessary in relation to the marking the sale destruction of cattle in general and especially of wild cattle which are not marked; and also of horses and mules; and to take any measure concerning the police of cattle in general in all the cases not provided for by law; to fix the time in which cattle may be suffered to rove in the parishes of this state, where that custom prevails, so that such roving may not be detrimental to crops; to determine what animals shall not be suffered to rove, and in what cases they may lawfully be killed."

The above was copied from paragraph 5 of section 2743 of the Revised Statutes of 1870. The first part of this paragraph, down to and including the words "by law," was taken from section 3 of the act approved February 2, 1825 (Acts 1825, p. 64), which indicates that wild cattle were then common in this state. The remainder of the paragraph was new legislation intended to restrict, and even suppress, the roving of animals to the detriment of agriculture.

Paragraph 4 of Act No. 202 of 1902 reads as follows:

"As to the form and height of inclosures or fences, whenever they may think proper to require the proprietors to inclose any ground."

Ever since the adoption of the Revised Statutes of 1870, police juries have enacted ordinances, from time to time, prohibiting the roving of live stock in certain wards or sections of the parishes, and the validity of such regulations was never questioned until the institution of this suit. Plaintiff's contention that the ordinance now under consideration is illegal, because it does not apply to the whole parish, is, we think, without merit.

The statute vests in police juries the power to make all such regulations as they may deem expedient "concerning the police of cattle in general"; to restrict the roving of cattle, where that custom prevails, so that such roving may not be detrimental to crops; to determine what animals shall not be suffered to rove; and to require the proprietors to inclose any ground with fences of certain form and height. The main object of the restriction or suppression of the roving of domestic animals being for the protection of crops, it is manifest that the statute was never intended to apply to sections composed of marsh, swamp, or other lands, fit only for pasturage or the growing of trees. The contention of the plaintiff, if maintained by this court, would simply render paragraph 5 of section 2743, as re-enacted, inoperative in nearly every parish of this state. The Legislature has wisely left to police juries the discretion to determine, in view of local conditions, to what extent domestic animals shall be permitted to run at large.

Judgment affirmed.

MONROE, C. J. I concur upon the question of jurisdiction, but dissent upon the other questions decided.

PROVOSTY and O'NIELL, JJ., dissent on the question of jurisdiction, but concur on the merits.

(191 Ala. 53)

ALABAMA POWER CO. v. KEYSTONE LIME CO. (No. 623.)(Supreme Court of Alabama. Nov. 7, 1914.
On Application for Rehearing,
Jan. 11, 1915.)**1. EMINENT DOMAIN — 131, 138 — COMPENSATION — RESULTING DAMAGES.**

Where land is taken under the right of eminent domain, the owner is entitled to actual value of the land taken and to the direct and certain damages resulting to his other land.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 353, 370; Dec. Dig. ¶¶ 131, 138.]

2. EMINENT DOMAIN — 100 — COMPENSATION — RESULTING DAMAGES.

Where a right of way for the erection and maintenance of towers, poles, and wires for the transmission of electricity is condemned, the owner may recover compensation for actual depreciation in the value of his remaining land, caused by the presence of the right of way; but mere fears of people from the presence of the right of way cannot be made a basis on which to predicate such depreciation or affect the amount of the recovery.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 294, 295; Dec. Dig. ¶¶ 100.]

3. EMINENT DOMAIN — 145 — DAMAGES — BENEFITS.

Where, in condemnation proceedings, the owner of the land taken demands recovery for injuries to his remaining land, the jury must set off the value of any benefit that may accrue to the remaining land against any resulting damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 378-389; Dec. Dig. ¶¶ 145.]

On Application for Rehearing.

4. EMINENT DOMAIN — 147 — ACQUISITION OF LAND — DAMAGES.

Where a power company condemned a right of way for the erection and maintenance of instrumentalities for the transmission of electricity, acquired only the surface, and any mineral interests remained in the owner, the owner could only recover the value of the surface taken, unaffected by the value of mineral interests.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 394-396; Dec. Dig. ¶¶ 147.]

Appeal from Shelby County Court; E. S. Lyman, Judge.

Proceedings by the Alabama Power Company against the Keystone Lime Company to condemn a right of way for the erection and maintenance of towers, poles, or wire lines for the transmission of electricity. From a judgment awarding damages, petitioner appeals. Reversed and remanded.

Knox, Acker, Dixon & Sims, of Talladega, and Thomas W. Martin, of Birmingham, for appellant. Riddle, Ellis & Riddle, of Columbiana, for appellee.

DE GRAFFENRIED, J. By this proceeding the appellant sought to condemn a strip of land 100 feet in width across the lands of appellee as a right of way upon which to erect and maintain towers, poles, or wire lines for the transmission of electricity. After the court

made the order condemning the above strip, and before the trial in which the damages were assessed by the jury, the appellant, as under our Constitution and statutes it had the right to do, placed its towers, poles, and conductors on the strip, and is now using it for the purposes for which it was condemned. This appeal is taken, not from the judgment of condemnation, but from the judgment pronounced upon the verdict of the jury assessing the appellant's damages.

During the trial by jury of the issue as to the amount of the appellee's damages, the evidence showed what the appellant has done and is doing in the use of the strip of land, and what use the strip may be, under the rights which appellant acquired by its judgment of condemnation, put to in the future. The conductors of appellant are strung on steel towers. These towers are 75 feet high and each weighs about 4,500 pounds. Upon these towers are cross-arms which support the conductors, and the lowest cross-arm on any tower is 47 feet from the ground. From each cross-arm hangs a string of insulators, and the lowest conductor of electricity is thus, at the tower, at least 42 feet from the ground. The towers are placed from each other at such distance that the nearest point at which a conductor approaches the ground is 25 feet. The conductors are copper cables, and there are six conductors now in use. The conductors are strung with a pull of about 1,400 pounds, and a conductor will itself break at a pull of 6,000 pounds.

"The towers are so placed that the lowest conductor or cable will at no place be nearer than 25 feet of the ground, and the height of the lowest cable will vary from 25 to 43 feet above the ground. The cables are strung on three cross-arms, one cable being strung on the end of each cross-arm, thereby placing three cables on each side of the towers. The highest cable is 67 feet above the ground. The towers are composed of steel, the tower being completely covered with a coat of zinc so that it will not rust. The towers are fastened to anchors which extend into the ground 7½ feet and at the base of the anchors, is a grillage about 2½ feet square, pieces of iron that extend out at right angles which are about 2½ feet square at the base. * * * The towers were composed of four posts, which were in form angular, which posts are anchored in the ground, and which extended to the top of the steel work. These four posts are braced together with steel strips or bars. The base of each tower covers a space 15 feet square. The tops of the towers are strung to what are called ground wires or cables, each three-eighths of an inch in diameter and made of high-grade galvanized steel, and each of which is so strong that it would lift about 20 bales of cotton without breaking. These steel cables are placed on the towers 3 feet above the first cross-arm, which is the very highest point of the towers, and they extend from one tower to another above the copper conductor, thereby tying the whole row of towers together. The towers as constructed are designed to stand a velocity of wind of 70 miles an hour, and the breaking of three conductors in addition thereto. Each conductor will support a weight of 6,000 pounds without breaking. The maximum weight under any condition that will be placed on each conductor will be

3,000 pounds, so they will stand twice as much as will be placed on them; that, for a wind 70 miles an hour to affect these towers, three of the cables would also have to be broken. A wind blowing 70 miles would, no doubt, not blow over these towers unless three of the cables were broken. Wind at 70 miles an hour is about 20 miles higher than any wind that has been recorded in the last six years, either at the weather station at Montgomery or Birmingham. A person could go to a distance of $3\frac{1}{4}$ feet of these cables when they are charged with electricity without danger; so, the lowest being 25 feet above the ground, it would be more than 20 feet beyond the danger line of any person or animal. If one of the cables should break and fall to the ground, the electrical current will immediately be shut off at the station by what is called circuit breakers, which is automatically done, and which occurs immediately upon the cable touching the ground. If the broken cable should touch another wire, the current would instantly be shut off; that is, automatically. * * * The steel ground wires placed on top of the towers act as a shield to the copper conductors, so that lightning will strike the ground wires and be immediately conducted into the ground through the steel towers. There is no increased danger from being near the tower lines during a thunderstorm. The tower lines and electrical currents on the cable have no detrimental effect on crops or trees or anything growing on the land over which the cables stand—do not injure them in any way."

The above quotations mark a part of a witness' testimony, and from his testimony and the photographs accompanying the transcript we gather that, so far as the strip of land is concerned, where it runs through woodlands, the trees have been cleared from it, and that steel towers with cables upon them have been erected along the middle of the condemned strip; the distance between the towers being 750 feet. Photographs accompanying the transcript indicate that, where such towers are placed in cultivated fields, no great impediment is thereby created, even at the points where the towers are anchored to the ground, to the cultivation of the right of way, and that no impediment whatever is created by the towers to the cultivation of the right of way at points between the anchoring points of the towers. There resides, however, in appellant, at all times, whenever its reasonable necessities may require it to do so, the right to go up or down the right of way for the purpose of repairing any breakage in its right of way, or for other reasonable purposes, and, of course, if its business should require it, appellant may, in the future, place other towers upon the right of way.

In its practical use of this land for the purposes for which it has been condemned, appellant has up to the present time made no changes upon the surface of the earth, except to cut the trees from the surface of the right of way and to place some towers 750 feet apart and some telephone posts upon it. The towers are attached to steel anchors, which have been sunk or driven 6 or 7 feet into the earth, and this appears to be all that has been done to the land up to the present time. In the future some other tow-

ers may be placed on the right of way, but the uses to which the right of way may be put are not, however, exclusive in appellant. Appellee may use the right of way for any purpose which does not conflict with the paramount rights of appellant. For instance, subject to the above rights of appellant, appellee has the right to cultivate the land, to go across it, and generally, as already said, to use it in any way which does not affect the paramount rights of appellant. Appellant has no right—and there is, in the nature of things, no reason for it—to fence either side of the right of way.

[1] 1. There is evidence tending to show that the lands indicated in the strip are in the mineral district. The condemnation proceedings do not touch the appellant's ownership of the minerals on the strip, if there are minerals there, nor do they preclude the appellee from taking the minerals therefrom, provided this is done in such a way as not to obstruct the use by appellant of so much of the surface as it may now need or may need in the future for the proper maintenance of its appliances for conducting electricity. When a railroad company condemns a right of way, it has the exclusive right to the use of the entire surface of the right of way, so long as the right of way remains in use for railroad purposes. The railroad company may place as many tracks on its right of way as it sees proper, may fence it, and in fact possesses the right to the exclusive use of the surface. The ultimate fee which resides in the owner of the land after such a condemnation is therefore of but little practical value. When, therefore, such a condemnation is had, the damages of the owner of the land, in so far as the right of way is concerned, are the actual value of the land, no more and no less. His entire damages in such a case are the actual value of the land actually condemned and the damages, if any, which have resulted to his other lands, out of which the right of way is carved, by reason of the existence of the right of way through his land. The damages resulting to the owner of the lands not condemned—the lands out of which the right of way is carved—are the difference in its actual fair value before and after the condemnation. In estimating the amount of such resultant damages, the jury should consider only such injuries as will naturally result from the appropriation of the right of way for the permanent uses for which it was condemned, and "only such injuries as are ascertainable at the time of the construction of the improvement should be considered." *Young v. Harrison*, 17 Ga. 30; *Chicago, etc., R. R. Co. v. Hunter*, 128 Ind. 213, 27 N. E. 477; 15 Cyc. 715, subd. B, and authorities collated in notes 74 and 75. The resultant damages must be the direct and certain—not remote and speculative—damages which will accrue to the remaining lands by reason of the presence of the right

of way through such lands, and the uses to which such right of way is to be put.

2. In this case, then, in so far as the 100-foot strip is concerned, the appellee is entitled to recover of the appellant the value of the easement which has been sequestered to the use of the appellant. The right of way, it appears, takes up about 14 acres of the appellee's land. The question then is: What was the fair, actual value of that 14 acres before its sequestration for appellant's uses, and how much is its fair actual value to appellee, for the purposes to which appellee may lawfully put it, since its appropriation to the uses of appellant? The difference between the two values will fix the amount which should be awarded appellee on account of the land condemned for such right of way. The difference between the actual fair value of the land actually condemned and its fair actual value for the uses to which appellee may lawfully put it since the condemnation is the true amount of the loss which has been occasioned appellee by reason of this condemnation proceeding in so far as the right of way, considered alone, is concerned. *Mobile & Ohio Railroad Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 South. 408; *A. & F. R. R. Co. v. Burkett*, 42 Ala. 83; *Odum v. Rutledge & Julian R. R. Co.*, 94 Ala. 488, 10 South. 222.

"The exercise of the power being necessary for the public good, and all property, being held subject to its exercise when and as the public good requires it, it would be unjust to the public that it should be required to pay the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good." *Lewis on Eminent Domain* (2d Ed.) vol. 2, p. 397, § 462.

[2, 3] In so far as the lands of appellee which are not condemned are concerned, the only question is: How much have those lands been depreciated—if any—by the location of the right of way of appellant over said lands, considered in connection with the uses to which appellant has put and will in the future put the right of way as above indicated? Is the tract of appellee, with the right of way running through it and subject to the above-named uses of appellant, of any less actual value for the uses to which said lands are adapted—viz., for quarrying lime, making bricks, farming, and probably for pasturage—than it was before appellant began to use the right of way? Is the tract of land—leaving out of consideration the value of the 100-foot strip—of appellee of any less actual value since the towers and telephone poles have been placed upon the 100-foot strip, with the cables upon the towers and telephone wires upon the poles, than it was before the towers and poles were erected upon the strip and the cables and telephone wires placed as they are now hung above the earth? Does the fact that appellant, in addition to the maintenance of the towers and cables which it now has on said land, may, if it becomes necessary, erect other towers

and maintain other cables upon the said 14 acres, and that it may, in future, use the surface of said 14 acres in such other ways as may be necessary for furnishing electric currents to the public, decrease the actual value of the remainder of the tract? If so, then appellee is also entitled to recover of appellant the value of such actual depreciation.

From the evidence in this case, read in connection with the photographs which have come into our hands, we gather that on account of the distance of the towers as they now stand from each other, their height, the elevation of the lowest points of the cables from the earth, the strength and size of the cables, the long life of the towers and cables, and the fact that the cables are so connected with appliances that, if one should break, such cable will instantly lose its electrical character and become harmless, the presence of the towers now upon appellee's land places no greater servitude upon the right of way and is attendant with no greater injury to the remainder of appellee's land than would accompany a similar right of way sequestered for and used by an ordinary telegraph company. The cables of appellant are, it is true, so heavily charged with electricity that, if a human being comes in contact with or within 2 or 3 feet of them while they are charged with electricity, death will be the result. These cables are, however, attached to steel towers, and are 25 feet above the ground at their lowest points on the right of way. They are, therefore, too far removed from the earth to be attended with danger to human beings so long as they use the surface of the ground in the ordinary and customary way, viz., by cultivating it, walking or riding upon it, or by hauling loads in wagons or other vehicles upon it. We not only think that the evidence discloses the above situation, but we think that human experience indicates it. Electricity not properly controlled is one of the most dangerous agencies known to man; properly controlled, it is not only of great practical value, but its use, under proper control, is attendant with as few dangers to life as any other agency which human ingenuity has been able to place at our disposal. It would seem, therefore, that the mere fact that the appellant has strung across appellee's land, as above indicated, cables which are heavily charged with electricity at the lowest point of 25 feet from the surface of the earth, and which cables, if breakage occurs, will automatically become instantly innocuous, can have no bearing upon the question as to the loss to which appellee has suffered in the adjacent lands through which the right of way runs by reason of the condemnation of the strip of land. The mere fact that people have fears that injury may possibly occur at some time to some person by reason of the cables cannot be considered by the triers of the facts.

While public service corporations are permitted to exercise the right of eminent domain, and thus acquire against even an unwilling owner valuable rights in his land, it is the public interest, and not the private right of the public service corporation or its stockholders, which confers upon such corporation the right of eminent domain. The public is as deeply interested in the proper supply of wholesome water, in the proper conduct of electricity from the sources of supply to the points of distribution to the public, and, in short, in all the modern methods of meeting the demands of the people for transportation, light, heat, communication, etc., as it is in the matter of courthouses, public roads, public parks, etc. While, through condemnation proceedings, rights are sometimes acquired which are exclusively public, and at other times such rights are acquired by a corporation whose energies are directed to meeting public demands, in every instance it is the public right, and not the private interest, which gives rise to the extraordinary right of eminent domain. The right of eminent domain resides exclusively in and is a necessary attribute of the state, and the state, in permitting its exercise, either does so—as, for instance, in condemning lands for courthouses, jails, public roads, parks, etc.—directly and exclusively for the public, or indirectly for the public by requiring property condemned to another's use to be actually used for the public benefit. For this reason the rule seems to be well settled that:

In all condemnation proceedings, "the exercise of the power being necessary for the public good, and all property being held subject to its exercise when and as the public good requires it, it would be unjust to the public that it should be required to pay to the owner more than a fair indemnity for the loss he sustains by the appropriation of his property for the general good. On the other hand, it would be equally unjust to the owner if he should receive less than a fair indemnity for such loss. To arrive at this fair indemnity, the interests of the public and of the owner, and all the circumstances of the particular appropriation, should be taken into consideration." *Lewis on Eminent Domain* (2d Ed.) § 462.

While, therefore, it is the intent of the law that all the actual damages which may naturally and proximately result to the remainder of a man's tract of land by reason of the condemnation of a right of way for a public purpose across it shall be paid to him, the law will not permit mere speculative elements of damages, based upon an ill-defined fear that at some unknown and indefinite time in the future some misfortune may come to some man or beast by reason of such improvement, to enter into the consideration of those who, under the law, are required to fix the amount of the damages. The rights of the party condemning are confined to the lands taken, and for any damage which in the future may be done by the condemning party to persons or property on adjoining lands—as by "blasting, by occupation or en-

croachment, by depositing debris upon it, or by using it as a roadway"—a suit may be brought and a recovery may be had whenever the tortious act, from which such damages arise, is committed. *Lewis on Eminent Domain* (2d Ed.) vol. 2, §§ 573, 574.

In our cities and towns electric wires charged with sufficient electricity to kill a human being are placed up and down the streets upon wooden poles at elevations less than 20 feet above the earth's surface, and are found, when properly kept and insulated, to be sufficiently guarded to meet without appreciable danger to the public all of the demands of public travel, whether by pedestrians or by vehicles, upon such streets. The evidence in this case discloses that the steel towers of appellant are much more firmly grounded than are the usual wooden poles upon which are strung the wires of the ordinary company which supplies electrical power to the cities and towns of the state. It also shows that appellant's cables are much larger than the wires in ordinary use, and that, in addition to being more firmly attached to their towers than the ordinary wires, they are so connected with the source of their electrical supply as that, if one breaks, it at once loses its electrical current and becomes a dead wire. In other words, the evidence in this case shows, without dispute, that the appellant, in installing its fixtures upon the 100-foot strip, has met all reasonable and known precautions to avoid injury to any one who may be at work, in any way, upon the earth's surface on the right of way.

The trial court, therefore, in our opinion, committed reversible error in orally charging the jury as follows:

"If there was a general fear in the community of the operation of that line, so that it affected the value of the land, you would consider that; but the mere fact possibly in the future somebody might be hurt by that line, it might break or any sort of accident happen, or even if it was not properly constructed, if there were faults in the construction of it, or there was a possibility of damaging some person by the fault of construction or by the negligent operation, or anything of that sort, you do not take that into consideration, except as I have told you, if it affects the value of the remaining portion of the land, because the law requires that line to be constructed in a proper manner and in a manner that would be reasonably safe to all persons who are called or have to be around, and if it is not done, and injury or damage results to any person from the negligence of the operator, either in the construction or maintenance of it, that is a separate question which would be determined by another suit. In other words, you cannot look to any speculative damage in this case, anything that might possibly, by some mishap or otherwise, arise in the future; but all damage to which the respondent here is entitled has already accrued, and accrued to it at the time this land was taken by the petitioner. Consequently it is not for you to go out into the future and speculate on what else may accrue in the future. All his rights and damages, and damages to which he is entitled, have accrued now. Of course, as I told you, if the fear of the operation of this line is prevalent in the community, and it affects the

value of the remaining tract of land, then it is proper for you to allow such weight as you think it is entitled to, and to assess or determine the amount of diminution in value of the property on that account."

It may be, as the evidence tends to show, that there has never been in the neighborhood of this property a line similar to that of appellant, and that, as the people in that neighborhood know that the cables are heavily charged with electricity, they are afraid to go in the neighborhood of it. Having no actual knowledge of the practical operation and effect of such lines, they may, as some of the testimony tends to show, be afraid of the property on which the lines are situated. A large percentage of the agencies which now conserve human effort are, when negligently controlled, dangerous to human life, and many things now daily used upon our streets and upon our public highways were, when they were first introduced, objects of terror to those who knew nothing about them. When the automobile was first introduced, especially in our towns, villages, and country neighborhoods, the driver of the automobile was regarded at least with disfavor, because he was known to be in possession of a dangerous instrument. Now, however, while still dangerous when negligently driven, automobiles are in common use upon all of our highways, are regarded as one of the usual vehicles in which to travel, and their owners are probably in large measure responsible for more and better public roads. If it be true that some people who have not grown accustomed to lines similar to that of appellant are afraid of this improvement, and that therefore they are not now willing to buy appellee's lands, the law can furnish to appellee no remedy therefor, and cannot regard depreciation created by such a cause as resting upon any substantial basis. The law can and will see that appellee is justly compensated for the rights which appellant has acquired in the condemned strip, and if appellee shows on the next trial by evidence of a substantial quality that there has been actual resultant damages to the remaining land by reason of the appellant's right of way through appellee's land, the law will award him compensation for the resultant loss. In allowing compensation, however, it cannot allow any compensation on account of any claimed depreciation of such remaining land which is due to the mere fears of some of the people, which are founded in reality upon their lack of knowledge of the real effect of the line, and which human experience shows is not justified by the facts. We have discussed this subject at length, because the subject is now and will continue to be of great importance to the people of the state.

[3] 4. It is, of course, the rule that when, in condemnation proceedings, the owner of the land asks for a recovery for injuries resulting to his remaining land by reason of the public improvement, the jury shall offset

the value of any benefit that may accrue to the remaining land by reason of the particular public improvement against such damages as may be shown to have resulted to the remaining land by reason of the improvement. The rule upon this subject is fully set out in *Town of Eutaw v. Botnick*, 150 Ala. 429, 48 South. 739, in which case the reasons for the rule are shown, and which need not be here repeated.

5. Some of the rulings of the trial court upon the evidence are assigned as error. These questions relate to the admissibility of certain opinion evidence as to the value of the remaining land before and after the condemnation of the right of way. The above discussion will probably rid this case upon the next trial of some of the issues which were presented upon the last trial and the rules announced in Code 1907, § 3960; and the cases of *A. G. S. R. R. Co. v. Moody*, 92 Ala. 283, 9 South. 238, *Sou. Ry. Co. v. Morris*, 148 Ala. 631, 42 South. 17, *Ward v. Reynolds*, 32 Ala. 384, *Moss v. State*, 40 South. 341,¹ and *Long Distance Telephone Co. v. Schmidt*, 157 Ala. 391, 47 South. 731, will furnish a sufficient guide to the trial judge upon the next trial on the question as to the qualifications which are necessary for a witness to be able to give his opinion as to the value of the remaining land before and after the condemnation of the right of way.

Undoubtedly the appellee is entitled to recover the value of the easement in the 100-foot strip which has been condemned across its land. It is also undoubtedly entitled to recover the value of the actual depreciation, if any, which has been caused to its remaining lands by reason of the presence of the right of way upon them; but the mere fears of the people of this improvement can in no way be made the basis upon which to predicate such a depreciation, or in any way be permitted to affect the amount of the appellee's recovery.

Reversed and remanded.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

On Application for Rehearing.

DE GRAFFENRIED, J. [4] In the above opinion we called attention to the fact that, in this state, it has, with judicial sanction, been the custom, upon a condemnation proceeding instituted by a railroad company, to allow the owner of the land condemned to the use of the railroad company for the right of way to recover the value of the land condemned for use as a right of way. The reason for this judicial custom obtaining here is given in the above opinion, and is well stated in *Southern Pacific Railroad Co. v. San Francisco Savings Union*, 146 Cal. 290, 79

¹ Reported in full in the *Southern Reporter*; reported as a memorandum decision without opinion in 146 Ala. 636.

Pac. 961, 70 L. R. A. 221, 106 Am. St. Rep. 36, 2 Ann. Cas. 962. Upon considering this case upon this application for rehearing, our attention is called to the case of Long Distance Telephone & Telegraph Co. v. Schmidt et al., 157 Ala. 391, 47 South. 731. In that case it was held that, where lands are condemned for a right of way, the measure of damages recoverable by the landowner for the lands taken for the right of way is the value of the lands so taken for the right of way when taken. While the conclusion of the court in said case of Long Distance Telephone & Telegraph Co. v. Schmidt et al., supra, may be somewhat in conflict with the conclusions reached in Alabama & Florida Railroad Co. v. Burkett, 42 Ala. 91, Odum v. Rutledge & Julian Railroad Co., 94 Ala. 494, 10 South. 222, and Mobile & Ohio Railroad Co. v. Postal Telegraph Cable Co., 120 Ala. 21, 24 South. 408, nevertheless, to preserve the harmony, in so far as we can, of our own decisions on the subject in hand, we have determined to follow and reaffirm the opinion of this court in said case of Long Distance Telephone & Telegraph Co. v. Schmidt et al., supra, in so far as the amount which should be awarded to appellee for the lands which were condemned to appellant for its right of way are concerned.

As the Alabama Power Company acquires, by this condemnation proceeding, no mineral rights in the condemned strip, the jury, in estimating the value of the condemned strip, should allow the Keystone Lime Company no compensation for the mineral interests in the land so condemned; but as the power company has acquired the right to use the entire surface of the land condemned, under the authority of Long Distance Telephone & Telegraph Co. v. Schmidt et al., supra, the jury should allow the lime company the value of the strip so condemned, less the value of the mineral interest therein.

In the respect pointed out, and only in that respect, the above opinion is modified.

The application for rehearing is denied.

MCCLELLAN, SAYRE, and GARDNER, JJ., concur.

(191 Ala. 54)

ALABAMA POWER CO. v. ADAMS et al.
(No. 624.)

(Supreme Court of Alabama. Nov. 7, 1914.
Rehearing Denied Dec. 17, 1914.)

1. CONTEMPT ⚡66—REVIEW ON APPEAL.

That the trial court incorporated its decision in contempt proceedings against petitioner in eminent domain proceedings in the judgment in the eminent domain proceedings does not justify the court, on appeal from the judgment, in reviewing the contempt proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. ⚡66.]

2. CONTEMPT ⚡66—TAXATION OF COSTS--REMEDY.

Where, in condemnation proceedings, the owner during the trial instituted contempt proceedings against petitioner, and the court, on denying motion to punish for contempt, taxed the costs against the owner, the remedy of the owner was by certiorari, mandamus, or other extraordinary writ, pursued in a proceeding separate from the condemnation proceedings.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 213-215, 223-237; Dec. Dig. ⚡66.]

3. EMINENT DOMAIN ⚡228—APPOINTMENT OF COMMISSIONERS—STATUTORY PROVISIONS.

Under Code 1907, §§ 3861, 3866, 3869-3871, providing that, where there are several tracts of land within one county, of which parts are proposed to be taken, the applicant may join them in separate paragraphs in the same application, and where there are several distinct tracts owned by different persons embraced in the same application, the owners of each may have a separate hearing as to the right to condemn, and providing for commissioners to assess separately the damages and compensation to which the several owners are entitled, the better practice requires the appointment of but one commission to assess compensation where separate tracts of the same owner are sought to be taken, for confusion may otherwise ensue as to consequential injury to land not taken.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 582; Dec. Dig. ⚡228.]

4. ACTION ⚡57—CONSOLIDATION.

Where an applicant, condemning a right of way over separate tracts of land of the same owner, described the tracts in separate paragraphs, and separate commissioners were appointed in the probate court, the action of the circuit court in consolidating the issues avoided any injury resulting from the appointment of separate commissioners.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 632-675; Dec. Dig. ⚡57.]

Appeal from Shelby County Court; E. S. Lyman, Judge.

Proceedings by the Alabama Power Company against J. B. Adams and others to condemn land. From a judgment, petitioner appeals. Reversed and remanded.

Knox, Acker, Dixon & Sims, of Talladega, and Thomas W. Martin, of Birmingham, for appellant. Riddle, Ellis & Riddle, of Columbiana, for appellees.

SAYRE, J. [1, 2] The contempt proceeding against appellant put on foot during the trial of this cause in the court below raised an issue entirely outside of the pending cause and has no proper place in this record. The fact that the trial court incorporated its judgment in the contempt proceeding into its judgment in the proceeding for condemnation under the right of eminent domain cannot suffice to establish the right to a review of the former judgment on the record of this appeal. Whether the court was or was not without power to tax defendant with the costs of the proceeding after denying the motion to punish for contempt—a question we do not purpose to consider at this time—de-

fendant's remedy was by certiorari, mandamus, or some like extraordinary writ, and should have been pursued in a separate proceeding. *Easton v. State*, 39 Ala. 551, 87 Am. Dec. 49.

[3, 4] Appellee owned a large tract of land contained in one continuous, though very irregular, boundary, over and through which appellant's transmission line has been located by virtue of the condemnation proceeding in this case. At two points, other ownerships push in across the transmission line, so that so much of it as is located upon appellee's land is divided into three disjointed sections. Appellant's petition for condemnation hence alleged appellee's ownership and described his land in three separate paragraphs. It appears that two commissions were issued for the assessment of appellee's damages, one to assess the damages to be caused by appellant's line over two of the aforementioned sections, the other to assess the damages to be caused by the other section. The commissioners reported at different times and their reports were confirmed. Separate appeals were taken from each order or decree of confirmation to the circuit court, where the question of damages was to be tried *de novo*, and on appellee's motion the two appeals were consolidated and the cause, which had thus been broken up, was tried as one.

It is provided that where there are several tracts of land lying within one county, of which parts are proposed to be taken or in which an interest or easement is proposed to be acquired, the applicant may join them all in separate paragraphs in the same application. Code, § 3861. Section 3866 reads as follows:

"If there are several distinct tracts of land owned by different persons embraced in the application, the owners of each tract may have a separate hearing as to the right to condemn their lands, and the court may, if it finds that the application should be granted as to some and not as to others of the owners, make and enter its decree accordingly."

It is further provided that a commission shall issue and that the commissioners "shall assess separately the damages and compensation to which the several owners of each of the several tracts of land are entitled." Code, §§ 3869-3871. It does not appear that the probate court may not arrange for an assessment of damages to different tracts by different commissions, and it is rather clear that the dispatch of business, the convenience of parties, and their more substantial interests may be served by such an arrangement for the assessment of damages. In the case at hand, however, it would have been better that only one commission be appointed to assess compensation to appellee, for confusion in such case in respect of the evidence of consequential injury to the land not to be taken may ensue, where such damages are claimed, and no doubt the court would have so ordered, had it been given to understand that

appellee's land lay in one body. But, however this may be, there could have been no harm in consolidating the issues anew in the circuit court, where the case was to be tried *de novo*.

Other questions argued have been considered and disposed of in *Alabama Power Co. v. Keystone Lime Co.*, 67 South. 833, where we held that the record showed reversible error. So in this case.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(191 Ala. 356)

Ex parte GOLDBERG & LEWIS. (No. 667.) (Supreme Court of Alabama. Dec. 17, 1914.)

1. PRINCIPAL AND SURETY \S 23—CONDITIONAL SIGNATURE—"HOLDER IN DUE COURSE"—"NEGOTIATE"—"HOLDER."

Under Negotiable Instruments Act (Code 1907, § 4985), declaring that an instrument is negotiated when it is transferred so as to constitute the transferee a holder, and section 5007, defining a "holder in due course" of a negotiable note so as to require that it shall have been negotiated to him without notice of any infirmity, and section 5013, declaring that in the hands of any holder who is not a holder in due course a negotiable instrument is subject to the same defenses as if nonnegotiable, and section 5138, defining a "holder" to mean a payee of a note in possession thereof, and section 5143, providing that in any case not provided for by the law the rule of the law merchant shall govern, a payee of a negotiable note taking the note for value in good faith in the regular course of business without notice may recover thereon against a surety signing in reliance on the false statement of the maker that the signature of another ostensible surety is genuine and on the violated condition that other named persons are to sign as cosureties before delivery to the payee; the definition of a "holder in due course" being construed as applicable to a holder provided he is a negotiatee, but not excluding all who are not holders by negotiation, though the word "negotiate" means only the transfer from one holder to another after the instrument has been issued.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 45-54; Dec. Dig. \S 23.]

For other definitions, see Words and Phrases, First and Second Series, Holder in Due Course; Negotiate; Holder.]

2. BILLS AND NOTES \S 63—DELIVERY—IMMEDIATE PARTIES.

Negotiable Instruments Act (Code 1907, § 4973), providing that as between immediate parties and as to a remote party other than a holder in due course a delivery of a note to be effectual must be made either by or under the authority of the maker, and in such case the delivery may be shown to have been conditional or for a special purpose only, refers only to a conditional or special delivery to the payee of which he is advised at the time and not to a delivery to an agent for transmission to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 95-103; Dec. Dig. \S 63.]

Certiorari to Court of Appeals.

Petition for certiorari by Goldberg & Lewis to the Court of Appeals to review a judgment (10 Ala. App. 485, 65 South. 454) affirm-

ing a judgment in an action by them against J. H. Stone and another. Judgment of Court of Appeals reversed and remanded.

Browne, Leeper & Koenig, of Columbiana, and Knox, Acker, Dixon & Sims, of Talladega, for appellant. Riddle, Ellis & Riddle, of Columbiana, for appellee.

SOMERVILLE, J. [1] The only question presented by the record is whether the payee of a negotiable note can recover thereon against a surety, who signed the note in reliance upon the false statement of the principal signer that the signature of another ostensible surety upon the note was genuine, and upon the violated condition that other named persons were to sign the note as co-sureties before its delivery to the payee; the payee having taken the note for value in good faith in the regular course of business, without notice of the fraud or breach of agreement.

In its original opinion the Court of Appeals held that, on common-law principles, either of the matters stated was available to the defendant to defeat a recovery. On the application for rehearing, however, it was held, without receding from the former opinion, that these defenses were available to this defendant under the provisions of the Negotiable Instruments Act (Code, §§ 4958-5149), regardless of the previous state of the law as shown by our decisions (*Stone v. Goldberg & Lewis*, 6 Ala. App. 249, 60 South. 744).

In the leading English case of *Watson v. Russell*, 3 B. & S. (Q. B.), it was said by Lord Cockburn, C. J.:

"I consider the law to be now quite settled that if a person puts his name to a paper, which either is, or by being filled up or indorsed may be converted into, a negotiable security, and allows such paper to get into the hands of another person, who transfers the same to a holder, for consideration and without notice, such party is liable to such bona fide holder, however fraudulent, or even felonious, as against him, the transfer of the security may have been."

The "transfer" in that case was simply the delivery of the note to the payee, and the principle of protection was applied to the payee as a bona fide holder for value.

This principle is equally well settled in the United States, and has been most frequently applied by the courts in the enforcement of the liability of a surety to the payee of commercial paper, whether his relation to the paper was prima facie that of surety, co-maker, or irregular indorser before delivery. The American cases are collected in notes to *Benton*, etc., *Bank v. Boddicker*, 105 Iowa, 548, 75 N. W. 632, 45 L. R. A. 321, 67 Am. St. Rep. 310; *Vander Ploeg v. Van Zuuk*, 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275; and in the opinions of the court in *Boston*, etc., *Co. v. Steuer*, 183 Mass. 140, 66 N. E. 646, 97 Am. St. Rep. 426, and *Mechanics' Bank v. Chardavoyne*, 69 N. J. Law, 256, 55 Atl. 1080, 101 Am. St. Rep. 701. In his note to *Bedell*

v. Herring, 77 Cal. 572, 20 Pac. 129, 11 Am. St. Rep. 307, 310, Mr. Freeman says:

"It is not necessary, in order to entitle a holder to the protection of the rule, that he be a subsequent transferee from or through an original party to the instrument. The payee himself may be protected. Thus, if a person is induced to sign a note as surety by the fraudulent representations of the principal maker, he will, notwithstanding, be liable to the payee, if it does not appear that the payee knew of the fraud. (Citing the authorities.)"

To this effect the authorities are uniform, and the rule seems to be grounded equally upon the maxims of the common law and of the *lex mercatoria*.

This court is fully committed to the rule that protects an innocent payee for value against any defense by an accommodation indorser, based upon transactions between such indorser and his principal.

In *Marks v. First Nat. Bank*, 79 Ala. 550, 58 Am. Rep. 620, it was said, per *Somerville, J.*:

"The main question in this case, reduced to its last analysis, is simply whether, in the case of accommodation negotiable paper, the fraud of the maker, in procuring the signature of an accommodation indorser, is a good defense to a suit brought against such indorser by the payee, who knows the nature of the paper, but is ignorant of the fraud. We are of opinion, upon fundamental principles of law governing the subject of commercial paper, that the defense cannot be sustained."

In *First Nat. Bank v. Dawson*, 78 Ala. 67, the defendant had indorsed a note for the maker's accommodation, upon the violated condition that the maker "was not to negotiate or use it until he procured two other solvent cosureties, or indorsers, to be jointly bound with him (Dawson) as common sureties for Fellows (the maker)." The plaintiff bank was the payee of the note. *Stone, C. J.*, said:

"It is not, and cannot be, controverted that if the bank acquired this commercial paper in due course of trade, for a valuable consideration, and without notice of the limitation put upon Fellows' use of it, this defense would be unavailing."

The case was tried and determined upon the issue of due notice to the bank of the limitation.

For the purposes of this case, and with respect to the application of the principle under consideration, it could make no possible difference whether the technical relation of the defendant to the principal debtor and to the paper was that of indorser and guarantor, or comaker and surety.

From these cases it clearly appears that this court regards a payee, under the conditions stated, as a bona fide purchaser in due course of trade, as to the ostensible obligations of all other parties who have lent their credit to the paper by signing it in any recognized mode before its delivery to the payee. And, further, that the protection of such a payee against such a plea by a surety is based upon "fundamental principles of law, governing the subject of commercial paper."

From the foregoing it will be readily seen that the cases of *Guild v. Thomas*, 54 Ala. 414, 25 Am. Rep. 703, *White, etc., Co. v. Saxton*, 121 Ala. 399, 25 South. 784, and others, which relate to bond contracts, and *Sharp v. Allgood*, 100 Ala. 183, 14 South. 16, which relates to a nonnegotiable note, usurious on its face, are not here in point. *Smith v. Kirkland*, 81 Ala. 345, 1 South. 276.

The decisive inquiry is, therefore, whether the provisions of the Negotiable Instruments Act have expressly or impliedly abrogated the principle in question.

Looking to the opinions emanating from other jurisdictions where a code of commercial law uniform with our own has been adopted, we note a striking absence of harmony. The provisions of the Code which are supposedly pertinent are as follows:

Sec. 5138. Holder means the payee or indorsee of a bill or note, who is in possession of it, or the bearer thereof.

Sec. 5007. A holder in due course is a holder who has taken the instrument under the following conditions: (1) That the instrument is complete and regular upon its face. (2) That he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact. (3) That he took it in good faith and for value. (4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.

Sec. 4985. An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof; if payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery.

Sec. 5013. In the hands of any holder who is not a holder in due course a negotiable instrument is subject to the same defenses as if it were non-negotiable. * * *

In *Lewis v. Clay* (1897) 67 L. J. (Q. B.) 224, 227, there is a dictum by Lord Russell, C. J., that under the English Bill of Exchange Act "a 'holder in due course' is a person to whom, after its completion by and as between the immediate parties, the bill or note has been negotiated"; and to the effect, also, that the delivery between the original parties is not a negotiation. The inference, of course, is that under the act a payee could not be a holder in due course.

In *Herdman v. Wheeler* (1902) 1 K. B. 361, the defendant signed a blank promissory note and delivered it to A. to be filled in with a certain sum, and to be payable to A. A. fraudulently inserted a larger amount and made the plaintiff the payee. Held, that the delivery of the note by A. to the plaintiff was not a negotiation of the note within the meaning of the proviso to section 20, subd. 2, of the B. of E. Act, 1882, so as to entitle the plaintiff to recover. The proviso referred to is that such an instrument (i. e., one signed in blank and delivered to another for completion) becomes enforceable if negotiated after completion to a holder in due course. *Channell, J.*, speaking for the court, said (after referring to *Lewis v. Clay*):

"It is quite clear therefore that the expression of opinion of the Lord Chief Justice that a payee was never a holder in due course was a dictum only, and, moreover, as his remarks on the other part of the case appear quite unanswerable, the case could not well have been appealed, and in fact was not appealed; so that his dictum could not well be questioned in that case. It appears to us that the late Lord Chief Justice overlooked the definition of holder in section 2, which is, 'Holder means the payee or indorsee of a bill or note who is in possession of it, or the bearer thereof.' Therefore, in section 29 [Ala. Code, § 5007], it is necessary to read holder as including payee as well as indorsee, and to read it 'a holder in due course is a payee or indorsee who,' etc. That being so, the only words in section 29 which can be said to indicate that a payee cannot be a holder in due course are those in subdivision 'b': 'And that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.' But if the word 'payee' had been expressed in the earlier part of the section, it would be clear that this means 'if negotiated to him he had at the time no notice, etc.' On the whole, therefore, we are not prepared to hold that a payee of a note can never be a holder in due course; but it is, as it seems to us, just as unnecessary for us to decide that question as it was for the late Lord Chief Justice to do so on the case before him."

The foregoing excerpt will at once mark the limits of the decision, and indicate the disfavor of the court for the sweeping dictum of Lord Russell in *Lewis v. Clay*.

Under conditions substantially the same as in *Herdman v. Wheeler*, the right of a payee of a note, who took for value in good faith and without notice, to recover against the defrauded maker, was again considered in *Lloyd's Bank v. Cooke* (1907) 1 K. B. 794, and it was held that he could recover on the principle of common-law estoppel, the integrity of which was not affected, even as to commercial paper, by the B. of E. Act. All three of the judges concurred in the validity of this view; *Cozens-Hardy, L. J.*, expressed a wish "to keep an open mind as to the correctness of the decision in *Herdman v. Wheeler*," and *Fletcher Moulton, L. J.*, in an elaborately argued opinion, entirely repudiated the ground of that decision, viz., that "negotiate," as used in the act, means a transfer only from one holder to another. He said, very justly and forcibly:

"The contention of the counsel for the defendant amounts therefore to saying that the act has made this important change, viz., that it has taken away the right of a payee to recover under such circumstances, leaving only the right of an indorsee in this respect unchanged. I cannot accept that view. I see no indication in the act of any intention to make such a radical change in the law, a change which does not commend itself to one's sense of justice, and which, if intended, would surely have been made formally and explicitly, and not left to be gathered by mere implication. And, apart from the absence of any indication that such a serious change in the law is intended to be made, there are many things in the act which lead me to the opposite conclusion."

He then undertakes to show that "negotiated," as used in the section defining a "holder" in due course (section 29, subd. 1, Eng. B. of E. Act; Ala. Code, § 5007) is broad enough—

as it is defined in section 31, subd. 1 (Ala. Code, § 5138)—to include a transfer, i. e., a delivery with the intention of passing title, from the maker to the payee.

It is thus apparent, notwithstanding these strong expressions from individual judges, that the status of a payee under the Bills of Exchange Act, in the particular under discussion, is not yet definitely settled in England. It is to be noted, however, that in a later English case (*Glenie v. Bruce Smith* [1908] 1 K. B. 263) it is held, without dissent, that under section 80 of the B. of E. Act (Ala. Code, § 5014) the payee of a bill may be, and prima facie is, a holder in due course, though the application was to a case different from this.

In Canada the views of Channell, J., in *Herdman v. Wheeler*, supra, seem to be strongly approved:

"That the plaintiff, though he is the immediate payee of the notes, and did not acquire them by indorsement or transfer from a party other than the maker, is a holder in due course, seems to follow from reading the interpretation section (2 (g)), into section 56, and reading both with section 58 (2). This, though not actually decided, is evidently the opinion of the Court in *Herdman v. Wheeler* (1902) 1 K. B. 361, at page 371, which, on the whole, I see no sufficient reason for not following." Per Osler, J. A., in *McDonough v. Cook*, 19 Ont. L. R. 267.

In the same case, in a separate opinion, *Maclaren, J. A.*, said:

"To my mind the reasoning in *Herdman v. Wheeler*, * * * referring to definition of 'holder' in section 2 (g) as including payee, in *Lloyd's Bank v. Cooke*, supra, at page 806, and in *Glenie v. Bruce Smith* [1908] 1 K. B. 263, at pages 268, 269, is conclusive as to the possibility of a payee becoming a holder in due course."

See, also, *Lilly v. Farrow* (1908) Q. R. 17 K. B. 554, where the Quebec Court of Appeals held that the payee may become a holder in due course.

To the same effect, apparently, is the case of *Knechtel Fur. Co. v. Ideal*, 19 Manitoba Rep. 652.

In the United States the question seems to have been presented in only two of the reported cases.

In the case of a negotiable note signed in blank by the several makers, and then wrongfully filled out by one of them, and delivered to the payee for value and without notice, the Supreme Court of Iowa has held the note to be unenforceable as to the other makers, under the Iowa N. I. Law, on the theory that it was not negotiated to the payee, citing and following *Herdman v. Wheeler*, supra; *Vander Ploeg v. Van Zuuk* (1907) 135 Iowa, 350, 112 N. W. 807, 13 L. R. A. (N. S.) 490, 124 Am. St. Rep. 275. But the court also went further and held, not only that the note was not "negotiated" within the meaning of the section governing blank instruments (Ala. Code, § 4971), but also that, without negotiation by transfer from one holder to another, one cannot become a "holder in due course"—thus indorsing the broad dictum of Lord Russell in *Lewis v. Clay*.

Where a wife drew a check in favor of a creditor severally of herself and her husband, and delivered it to her husband to deliver to the payee in payment of her debt, and he delivered it in payment of his debt, and it was so taken by the payee in good faith, the Supreme Court of Massachusetts has held that the payee could recover against the drawer. Says the court:

"The fact that the plaintiff is the payee of a negotiable security does not prevent him from becoming a bona fide purchaser of it at common law, with all the rights incident to a purchaser for value thereof without notice. (Citing, among other cases, *Watson v. Russell*, 3 B. & S. 34, 5 B. & S. 968; *Munroe v. Bordier*, 8 Com. B. 862; and *Armstrong v. Am. Ex. Bank*, 133 U. S. 433 [10 Sup. Ct. 450, 33 L. Ed. 747].) * * * The plaintiff is a holder in due course of the \$200 check within Revised Laws, c. 73, § 69. This section is taken from section 29 of the English Bills of Exchange Act of 1882 (Ala. Code, § 5007), and *Watson v. Russell* is cited in *Chalmers on Bills of Exchange* (5th Ed.) 89, as an example of a person who is a holder in due course within that section."

We have been unable to discover any other American or English case in which the question has been discussed.

An interesting commentary on the cases above reviewed—especially *Lloyd's Bank v. Cooke* (1907) 1 K. B. 794—will be found in the editor's note to *Vander Ploeg v. Van Zuuk*, 13 L. R. A. (N. S.) 490.

The great importance of the question under consideration will, perhaps, justify the somewhat extended review of principles and authorities which we have here presented. Any one who reads the cases cited will be impressed by the scope which the subject offers for purely verbal dialectics, and, if confined to that narrow view of the subject, might find much difficulty in choosing between the merits of the opposing arguments.

Commercial paper is the common currency of mankind. Without its unhampered use, whether international or domestic, the business of the modern world could scarcely move at all.

The law merchant is essentially the creation of the business world, whose practices have hardened into principles, and these principles have been shaped and polished for centuries by the lapidaries of the law—all to one supreme end, viz., the protection of a bona fide holder for value who has acquired a negotiable instrument in the due course of trade or business. Only such protection can give confidence, and only confidence can give free currency to any medium of exchange. This is the capstone of the structure known as "Commercial Law." Its codification into a uniform Negotiable Instruments Law has been accomplished, not for the purpose of altering any of its essential principles, and certainly not for the purpose of destroying or weakening its cardinal principle, but for the purpose of harmonizing certain minor differences existing in the various jurisdictions.

Keeping all this in mind, we cannot, upon a very full consideration of the language and provisions of the Commercial Code, assent to the view that it has withdrawn from a payee the status of a holder in due course in those cases where he was so regarded and protected prior to its enactment. And we think and hold that subdivision 4 of section 5007, defining a holder in due course, must be construed as applicable to a holder if he be a negotiatee, and not as excluding from the general class all who are not holders by negotiation. It is clear that, if subdivision 4 of section 5007 does not by necessary implication exclude a payee in every case from the status of "holder in due course," there is nothing else in the Code which even suggests that result.

And even if we could not construe subdivision 4 as above indicated, we think it would still be perfectly consonant with reason, and with the general language and purpose of the law, to hold that the definition of a "holder in due course," as expressed in the entire section (5007), was framed with regard only to the usual and ordinary case of negotiatees; and that the occasionally exceptional status of a payee as such is simply a *casus omissus*, contemplated and provided for by section 5143: "In any case not provided for in this chapter, the rules of the law merchant shall govern."

It might be conceded that "negotiate," as used throughout the act, means always only the transfer from one holder to another, after the instrument has been "issued," as held in *Herdman v. Wheeler and Vander Ploeg v. Van Zuuk*, supra—which, however, we do not now attempt to decide—without affecting our judgment in this case.

What we do decide is that the payee of a completed negotiable note to whom it is given for value, without notice, and in the ordinary way of business, by one of several makers, to whom it has been intrusted by another maker for that purpose—albeit by fraud or upon condition, as in this case—is, as to the obligation of such other party, a bona fide holder in due course of trade, and is, as for such fraud or breach of authority between the obligors, entitled to enforce the obligation.

This obviously does not infringe the universal rule that, as between immediate parties, the consideration of the instrument and the capacity of the parties may be inquired into; for it only means that one who ostensibly and voluntarily assumes the obligation to pay the note—and this is in part what the payee buys—cannot repudiate his obligation to do so by reason of any secret matters between himself and the person who procured his undertaking.

[2] It may be well to note, in this connection, that section 4973 of the Code, providing that "as between immediate parties, and

as regards a remote party other than a holder in due course, the delivery, in order to be effectual, must be made either by or under the authority of the party making, drawing, accepting, or indorsing, as the case may be; and in such case the delivery may be shown to have been conditional or for a special purpose only," has reference only to a conditional or special delivery to the payee or holder, of which he is advised at the time, and not to a delivery by an obligor to an agent or intermediary for transmission to the payee.

For the reasons set forth, the judgment of the Court of Appeals will be reversed, and the cause will be remanded for disposition accordingly.

Reversed and remanded. All the Justices concur, except DE GRAFFENRIED, J., not sitting.

GOLDBERG & LEWIS v. STONE. (No. 256.)

(Court of Appeals of Alabama. Jan. 12, 1915.)

Appeal from Shelby County Court; E. S. Lyman, Judge.

Action between Goldberg & Lewis and J. H. Stone. Judgment (10 Ala. App. 485, 65 South. 454) reversed in conformity to judgment of Supreme Court (67 South. 839).

Browne, Leeper & Koenig, of Columbiana, for appellant. Riddle & Ellis, of Columbiana, for appellee.

PELHAM, P. J. The ruling of the trial court on the plaintiff's demurrers to the defendant's special pleas, as well as other rulings shown by the record and assigned as error, are in conflict with the holding of the Supreme Court in the opinion of that court in *Ex parte Goldberg & Lewis*, 67 South. 839, decided at a special term of the court on November 7, 1914, and, in conformity with the holding announced in that case, the judgment appealed from is reversed, and the cause remanded.

Reversed and remanded.

(13 Ala. App. 624)

ANNISTON ELECTRIC & GAS CO. v. STATE. (No. 318.)

(Court of Appeals of Alabama. Feb. 4, 1915.)

STREET RAILROADS \Leftrightarrow 69—LICENSES.

Under Code 1907, § 2361, requiring street railroad companies to pay to the state a license tax of \$50 in cities of more than 10,000 inhabitants and \$15 in cities and towns of less than 5,000 inhabitants, a street railway with its office and place of business in a city of more than 10,000, whose lines extended into the streets of two adjacent towns of less than 5,000, was required to pay one license tax of \$50 and an additional \$15 for each of the smaller towns into which its lines extended.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 157-165; Dec. Dig. \Leftrightarrow 69.]

Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge.

Proceeding by the State of Alabama against the Anniston Electric & Gas Company. Judgment for the State, and the defendant appeals. Affirmed.

Knox, Acker, Dixon & Sterne, of Anniston, for appellant. W. L. Martin, Atty. Gen., for the State.

THOMAS, J. Section 2361 of the Code of 1907 provides:

"Licenses are required of all persons engaged in or carrying on any business, or doing any act in this section specified, for which shall be paid for the use of the state the following taxes, to wit: * * * (35) Each electric light or power company, street railroad company, water works company or corporation, gas company or corporation, operated by a person or company or corporation for public uses, other than a municipality, shall pay to the state the following license taxes: In cities or towns of twenty thousand inhabitants or more—two hundred dollars; in cities or towns of more than ten thousand inhabitants and less than twenty thousand inhabitants—fifty dollars; in cities or towns of more than five thousand inhabitants and less than ten thousand inhabitants—twenty-five dollars; in cities and towns of less than five thousand inhabitants—fifteen dollars."

The city of Anniston is a city of more than 10,000 but less than 20,000 inhabitants. Adjoining it on one side is the town of Oxford, with a population of less than 5,000; and adjoining it on another side is the town of Hobson City, with a population also of less than 5,000.

The appellant is a public service corporation, with its office and place of business in the city of Anniston, where it operates a system of street railway for public uses. Some of its lines, over which it operates cars, extend, however, from the city of Anniston (the head of the system) out into, along, and through some of the streets of the adjacent towns of Oxford and Hobson City. And the sole question presented by this appeal is whether, under the statute quoted, the appellant, as it contends, must pay, as a license tax to the state for operating its said system of street railway, only \$50, being the amount fixed by the statute, as seen, for operating such a railway in a city the size of Anniston, where appellant's office, place of business, and the head and center of the system is located; or whether, as the state contends, it must pay, in addition to such \$50, \$15 for operating in each of the towns of Oxford and Hobson City—towns, as stated, of less than 5,000 inhabitants—into and through some of the streets of which appellant's said lines of street railway extend from Anniston.

It is our opinion that the contention of the state is correct, and that that contention, as stated above, expresses the proper interpretation of the statute, whose evident design was to proportion and regulate the amount of the license tax required by it for doing business in this state, according to the extent that the privilege taxed had been enjoyed in this state, which extent is, by the terms of the statute, we think, to be ascertained and measured by the number of inhabitants in each of the cities and towns in which the business is operated or carried on; it being contemplated that each municipality of the

state so entered by such company or corporation in the carrying on of such business would enhance, in proportion to its population, such company's or corporation's opportunities for increasing such business and the consequent revenues therefrom. Hence, that the privilege taxed of doing that business in this state would become more valuable as each new unit of territory was entered in carrying it on and would furnish justification for the increase required in the license tax for the doing of such business in the state.

The fact that appellant's lines of street railway do not extend over all the streets of the adjacent towns of Oxford and Hobson City, but over only a portion of them, and then only as a continuous line from Anniston, is immaterial; since appellant, under our understanding of the meaning of the statute, has no right to enjoy to any extent whatever the privilege of operating its street railway in either of these towns without first paying the additional license tax required; and since when it does pay such additional tax it has the right to enjoy such privilege to the full extent, or less, as it may choose.

The fact therefore that it has chosen, for reasons of its own, not to enjoy the privilege to the full extent allowed, and the fact that its office, place of business, and the head of its system is in Anniston, furnish no reason, to our minds, why it should be exempted from the operation of the provisions of the statute, which, as we interpret it, requires, as stated, an increase in the tax for each separate municipality entered in the carrying on of that business.

We hold, consequently, that the lower court committed no error in sustaining the state's demurrers to the defendant's special pleas setting up those facts in defense of this suit brought by the state against appellant for the recovery for each of the years from 1909 to 1913, inclusive, of the \$15 license tax for operating its street railway in each of the towns of Oxford and Hobson City; appellant having for each of the years mentioned paid to the state the \$50 for operating its railway in the city of Anniston.

Appellant, in support of its contention that the court did err, cites us to the case of *Southern Railway Co. v. Mitchell*, 139 Ala. 629, 37 South. 85, where, in construing a statute providing for the payment of a license tax "for each toll bridge" and requiring that if the bridge was "in or within two miles of the corporate limits of any town or city" of 5,000 inhabitants or more the tax should be \$75, but that if the bridge was "in or within two miles of a town or city" of 2,000 inhabitants and less than 5,000, the tax should be only \$50, it was held that, where such bridge was within two miles of a town of 5,000 inhabitants on one side and within two miles of a town of 2,000 on the other side, the owner of the bridge could not satisfy the requirements of the statute by pay-

ing a tax of \$50, but would have to pay a tax of \$75, because the condition to the liability of the maximum tax fixed by the statute existed and such liability was not destroyed by the fact that the condition for the minimum tax also existed. In other words, it was held in effect that where a condition existed which, under the provisions of the statute, would support either tax there fixed (either the maximum or the minimum), the owner of the bridge must pay the maximum. The court adds, which appellant quotes in brief, as follows:

"Nor is it of any consequence that the bridge is partly in each of two counties. The state collects but one license tax and issues but one license; and it is not concerned whether this tax is paid in Lauderdale or in Colbert county [in each of which the bridge partly is], nor whether the license is issued through the probate judge of the one or the other county."

So, under the statute here in question, it is equally true that the state collects but one license tax and issues but one license, but the sole question is: What is the amount of that license tax? Is it merely \$50, the sum fixed for operating in a city the size of Anniston, or \$80, the total of the several sums fixed for operating in three cities or towns of the size of Anniston, Oxford, and Hobson City, respectively? In the case cited, the statute under consideration fixed the amount of the license on the basis of the proximity to towns and cities of the bridge, through and over which the business taxed was to be done, in the knowledge that a bridge is essentially a localized thing that could not be extended into other territory, and that the measure of the tax for operating it could only be fairly regulated by the size of the largest nearby town, the travel to and from which over the bridge would bring the largest revenue from operating it—large or small in proportion as the town or city was large or small. Consequently, our Supreme Court held, in construing that statute, that, where the bridge was within the same distance of a large and a small town, the standard by which the amount of the tax was determined in the statute was the larger, and not the smaller, town. There, not only the language of the statute under consideration and the conditions to which it was applied are different from that and those here, but also the nature of the privilege or business taxed is different, in that the business of operating a toll bridge is, as stated, permanently localized, because a bridge is not susceptible of extension by its owner in search of new revenues, while a street railway has the potentiality of almost indefinite extension.

We are clear therefore that the state license tax required by the statute under consideration for operating street railways in this state is, where such railway is operated in more than one city or town, to be ascertained by adding together the several sums

fixed by the statute for operating in each of said towns. This is in line with the general policy, though there may be exceptions, adopted by the Legislature with respect to practically all other classes and kinds of business licensed to be carried on in the state; for instance, a license to sell liquor, cigars, cigarettes, etc., confines the licensee to selling at one place of business.

In the case of *Jebeles Brothers v. State*, 117 Ala. 174, 23 South. 676, the court had under consideration a statute which provided that every person, firm, or corporation selling cigarettes should pay a license tax therefor as follows: Outside of incorporated towns and cities, \$5; in incorporated towns and cities of 2,000 inhabitants or less, \$10; in cities and towns of over 2,000 inhabitants and not over 5,000, \$15, etc. And it was held that a license taken out to sell cigarettes in the city of Anniston did not authorize the selling at two separate and distinct places in said city. So we hold that a license to operate a street railway in Anniston does not authorize its operation in Oxford and Hobson City.

The test of the sufficiency of one license is "unity of management, ownership, and locality." *Hochstadler v. State*, 73 Ala. 24; *Johnson v. State*, 152 Ala. 61, 44 South. 555. While unity of management and ownership of the street railway here in question exists, unity of locality does not, since such railway is operated in three separate and distinct units of territory as fixed by the statute.

It follows that the judgment appealed from must be affirmed.

Affirmed.

(12 Ala. App. 614)

ROE v. CITY OF TUSCALOOSA. (No. 776.)

(Court of Appeals of Alabama. Dec. 17, 1914.)

1. CRIMINAL LAW §753—TRIAL—DIRECTION OF VERDICT.

In a prosecution for violation of a city ordinance, where the evidence afforded an inference that the defendant was guilty, the refusal of the court to give an affirmative charge for him was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. §753.]

2. CRIMINAL LAW §753—DIRECTION OF VERDICT—RESTING CASE.

In a prosecution for violation of a city ordinance, where defendant refused to rest his case at close of plaintiff's evidence, no duty rested on the court to give an affirmative charge for him because the ordinance on which the conviction was sought, that could not be judicially noticed, had not been introduced in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. §753.]

3. CRIMINAL LAW §1169—INTRODUCTION OF ORDINANCE AFTER PROOF OF VIOLATION.

In a prosecution for violation of a city ordinance, any error committed by the court in refusing to exclude testimony as to the commission of the offense before the introduction

in evidence of the ordinance itself was cured by its subsequent introduction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. ☞1169.]

4. CRIMINAL LAW ☞1153 — DISCRETION OF COURT—PROOF OF ORDINANCE AFTER PROOF OF VIOLATION.

In a prosecution for violation of a city ordinance, it was within the sound discretion of the trial court to permit the introduction in evidence of the ordinance itself, after proof had been made of its breach, and such action of the trial court was not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3061-3066; Dec. Dig. ☞1153.]

Appeal from Tuscaloosa County Court; H. B. Foster, Judge.

Andrew Roe was convicted of violating a city ordinance, and he appeals. Affirmed.

The appellant was convicted under a complaint charging him with a violation of a city ordinance prohibiting the manufacture, sale, offering for sale, keeping or having in possession for sale, bartering, exchanging, or giving away or transporting, over or along a public street in the city of Tuscaloosa, or otherwise disposing of, prohibited liquors or beverages. The evidence was undisputed that the defendant sent a note by a negro girl by the name of Lula May Walton to a person in Bessemer named "George," who was connected with a saloon, and that this person put two suit cases filled with whisky on a train to be watched by the negro girl, and that she watched the grips until they got to Tuscaloosa; that before the train arrived at Tuscaloosa, the defendant was at the station standing on the platform, and when the train stopped at the Alabama Great Southern station, which was within the city limits, and about 200 yards from the Mobile & Ohio crossing, he boarded the train; that he did not purchase a ticket, but had in his possession a regular monthly ticket from Tuscaloosa to Crabtree, a station a short distance below Tuscaloosa; that after boarding the train, he gave the conductor one of the coupons from his tickets, good from Tuscaloosa to Crabtree, but instead of going on to his destination, he got off at the Mobile & Ohio crossing, about 200 yards from the Alabama Great Southern station; that here another negro by the name of Snodgrass met the train, defendant took the two grips off the train and handed one of them to Snodgrass, taking the other in his hand; that both of these suit cases contained whisky, the one handed to Snodgrass 23 pint bottles of "Deep Spring Whisky," and the other contained 95 half-pint bottles of "Shaw's Malt Whisky." The defendant and Snodgrass were arrested with these two suit cases filled with the whisky in their possession. On the morning after the defendant and Snodgrass were arrested with this whisky in their possession,

defendant stated to the chief of police that the whisky the police officers took from him and Snodgrass when they were arrested belonged to the defendant.

Defendant testified in his own behalf that he bought this whisky for his own use and paid \$23 for it, and that he did not have it to sell or give away, or for any unlawful purpose. The evidence was further undisputed that the defendant was not a married man; that when he was arrested, he was working for the Crabtree Lumber Company; that he drank whisky, but did not get drunk, and there was evidence tending to show the defendant's good character.

Clarkson & Morrisette, of Tuscaloosa, for appellant. Brown & Ward, of Tuscaloosa, for appellee.

BROWN, J. [1] The complaint under which the defendant was tried charged several distinct offenses in the alternative, and the evidence was sufficient at least to afford an inference that the defendant had whisky in his possession for an unlawful purpose, as charged in the complaint, and in violation of the city ordinance. *Wynn v. State*, 65 South. 687; *Allison v. State*, 1 Ala. App. 206, 55 South. 453. There was therefore no error in refusing the affirmative charge requested by the defendant after the close of all the evidence.

[2, 3] If the defendant had rested his case on the testimony offered by the appellee in chief, he would clearly have been entitled to the affirmative charge, because up to that time the ordinance under which the prosecution was instituted had not been offered in evidence. The ordinance not being a matter of which the court could take judicial notice, its introduction was necessary to sustain the prosecution, but until the defendant rested his case, no duty rested on the trial court to consider the affirmative charge requested by him. In other words, the defendant could not insist on the affirmative charge and yet reserve the right to introduce proof in rebuttal of that offered by the prosecution, in the event the charge was refused. Under these circumstances, there was no error in the action of the court in refusing to consider the giving of the affirmative charge requested by the defendant at this stage of the case. If there was error in the refusal of the court to exclude the testimony, this error was clearly cured by the subsequent introduction of the ordinance before the case was submitted to the jury.

[4] It was within the sound discretion of the court to allow the plaintiff to introduce the city ordinance after the evidence was closed and some of the arguments had been made, and this court will not review this action of the trial court.

There was no error in the action of the

court in overruling the appellant's objection to the testimony of the witness Lula May Walton. *Bone v. State*, 8 Ala. App. 59, 62 South. 455.

We find no error in the record, and the judgment of the county court is affirmed. Affirmed.

(12 Ala. App. 260)

BUSH v. STATE. (No. 269.)

(Court of Appeals of Alabama. Jan. 21, 1915.)

1. INDICTMENT AND INFORMATION — PROSECUTION—COMPLAINT—AMENDMENT OF AFFIDAVIT.

Where the original affidavit, on which a prosecution was commenced for the illegal disposition of intoxicating liquors, was in the form prescribed by Laws 1909 (Sp. Sess.) p. 90, § 29½, and charged in the alternative that the defendant "did sell, keep for sale, offer for sale or otherwise dispose of spirituous * * * liquors contrary to law," an amendment of such original complaint by averring in the language of the statute that the defendant transported or delivered for another prohibited liquors or beverages, etc., merely made the original charge more specific, which was broad enough to cover the offense denounced by section 24, providing that it shall be unlawful for any person to transport or deliver for another such prohibited liquors or beverages received at one point in the state, etc., and so did not infringe any right of the defendant.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 524; Dec. Dig. —182.]

2. CRIMINAL LAW — PROSECUTION — AMENDMENT OF COMPLAINT—FURTHER PLEA — NECESSITY.

In a prosecution under Laws 1909 (Sp. Sess.) p. 63, for illegally transporting liquor, where it affirmatively appeared that the defendant interposed a plea of not guilty before the amendment of the original affidavit, and that the defendant had full benefit of the plea as to both counts, it is not necessary for the defendant to plead again to the second count before trial, since under rule 45 of the Supreme Court (61 South. 1x), no ground for reversal is shown where it appears, on examination of the entire case, that defendant had the full benefit of his plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. —1186.]

3. INTOXICATING LIQUORS — PROSECUTION — ALTERNATIVE COMPLAINTS — SUFFICIENCY OF EVIDENCE.

In a prosecution for disposing of intoxicating liquor in violation of Laws 1909 (Sp. Sess.), p. 63, evidence held to justify submission to the jury of charge that defendant had illegally transported liquor for another.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 324-330; Dec. Dig. —238.]

4. CRIMINAL LAW — PROSECUTION—CONFESSION—SUFFICIENCY OF EVIDENCE.

In a prosecution for the violation of Laws 1909 (Sp. Sess.) p. 91, § 31, evidence held sufficient to justify the admission of the defendant's confession that the liquor had not belonged to him.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. —535.]

5. CRIMINAL LAW — TRIAL—AFFIRMATIVE CHARGE.

Where there is sufficient evidence of defendant's guilt to go to the jury, an affirmative charge for him is properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1727-1739; Dec. Dig. —753.]

6. CRIMINAL LAW — EVIDENCE — DEFENDANT AS WITNESS—CREDIBILITY.

In weighing defendant's testimony on prosecution for crime, the jury can consider the fact that he is not a disinterested witness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1255, 1256; Dec. Dig. —554.]

7. CRIMINAL LAW — GUILT—MEASURE OF PROOF.

A charge that if from the evidence it was probable that defendant was innocent, the jury should find him not guilty, though it had on the evidence, no reasonable doubt of his guilt, was erroneous, since the only requirement is that defendant's guilt be shown beyond all reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. —561.]

Appeal from Shelby County Court; E. S. Lyman, Judge.

Tom Bush was convicted of violating the prohibition law, and he appeals. Affirmed.

The original affidavit charged that Bush did sell, keep for sale, offer for sale, or otherwise dispose of, spirituous, vinous, or malt liquors, etc. The count added is that Tom Bush shipped, transported, or delivered for another prohibited liquors or beverages, received at one point, place, or locality in this state to be transported, shipped, or delivered to another person, firm or corporation at another point, place, or locality in this state. The original affidavit was made and filed November 15, 1913, and the second or amended count was filed March 26, 1914. The judgment entry recites:

"Now, on this 26th day of March, 1914, comes the state of Alabama * * * and also came the defendant, * * * and the defendant, being arraigned in open court for answer to the affidavit, pleads and says he is not guilty in the manner and form as charged therein. Thereupon the state, by leave of the court first had and obtained, adds a second count to the affidavit against the objection of defendant. The defendant files demurrers to the amended count, which having been heard and understood by the court, it is considered, ordered, and adjudged by the court that the same be and they are hereby overruled, and thereupon both the state and defendant announce ready for trial."

The following is charge D refused defendant:

"If from the evidence in this case there is a probability that defendant is innocent, the jury should find him not guilty, although the jury has no reasonable doubt from the evidence that defendant is guilty."

Riddle & Ellis and Acuff & Pitts, all of Columbiana, for appellant. W. L. Martin, Atty. Gen., for the State.

BROWN, J. [1] The original affidavit on which the prosecution was commenced was in the form prescribed by the statute (Gen.

Acts, Sp. Sess. 1909, p. 90, § 29½), charging in the alternative that the defendant "did sell, keep for sale, offer for sale, or *otherwise dispose of* spirituous, vinous, or malt liquors, contrary to law," etc. This charge was broad enough to cover the offense denounced by section 24 of the act, making it unlawful for one person to ship, transport, or deliver for another "prohibited liquors" as defined in this statute, when received at one point in this state to be shipped, transported, or delivered to another point in this state. The terms "*otherwise disposed of*," when used in the connection set forth in the affidavit, the act provides "shall include and be deemed to include barter, exchange, giving away, furnishing, or *any manner of disposition by which said liquors and beverages may pass unlawfully from one person to another*." Gen. Acts Sp. Sess. 1909, p. 91, § 31.

The legal effect of the amendment was merely to add another count, making the charge more specific by averring, in the language of the statute, that the defendant "transported or delivered for another *prohibited liquors* or beverages, received at one point in this state to be shipped or transported to or delivered to another person," etc. The court in allowing this amendment impinged no right of the defendant. *Campbell v. State*, 150 Ala. 70, 43 South. 743; *Brannon v. State*, 67 South. 634.

The term "prohibited liquors or beverages" is defined by the Legislature as including "all liquors, liquids and beverages prohibited by the law of the state to be manufactured, sold or otherwise disposed of, or any device or substitute for any of them, and shall also be so understood in any warrant, process, affidavit, complaint," etc. Acts supra, § 31. The legal import of the averments made in the second count of the complaint is that the defendant transported or delivered for another liquors or beverages in violation of the statute, and imposed upon the state the burden of proving the charge as laid. The demurrer to the second count of the complaint was not well taken, and was properly overruled. *Brannon v. State*, supra; *Traylor v. State*, 100 Ala. 142, 14 South. 634; *Jordan v. State*, 5 Ala. App. 229, 59 South. 710.

[2] While the recitals in the judgment entry indicate that the defendant interposed his plea of not guilty before the amendment of the complaint by adding the second count was allowed, it affirmatively appears that the plea was interposed, and that the defendant had full benefit of the plea as to both counts of the complaint. The plea of not guilty as

interposed applied to both counts of the complaint, and it was not necessary for the defendant to plead again before the trial was entered upon. *Howard v. State*, 185 Ala. 18, 50 South. 954. Under rule 45 of the Supreme Court practice (61 South. 1x), it appearing on examination of the entire case that defendant had full benefit of his plea, no ground for reversal is shown. *Harwell v. State*, 68 South. 500.

[3, 4] The original complaint charged several offenses in the alternative (*Allison v. State*, 1 Ala. App. 207, 55 South. 453), embracing, as we have shown, the offense charged in the affidavit added by amendment, and the defendant was tried on the complaint as amended. The corpus delicti of one of the offenses charged in the first count was the unlawful keeping of liquors for sale. *Allison v. State*, supra. The evidence offered by the state, independent of the confession of the defendant, showed that the defendant was arrested in November, 1913, at Hopkville, in Shelby county, and when arrested he had in his possession a grip or suit case filled with pint bottles containing whisky, there being in the suit case 14 or 15 of such bottles, and at the time of the arrest and before the suit case was opened he stated to the officers that there was only one quart of whisky in the case. This evidence was sufficient to justify the submission of the case to the jury (*Roe v. City of Tuscaloosa*, 67 South. 845; *Foshee v. State*, 9 Ala. App. 76, 63 South. 753), and was sufficient to justify the admission of the defendant's confession, as shown by one of the state's witnesses, that the liquor did not belong to the defendant. *Allison v. State*, supra; *Pappenburg v. State*, 10 Ala. App. 224, 65 South. 418.

[5] The question of defendant's guilt or innocence, under all the evidence, was one for the jury, and the affirmative charge was properly refused. *Roe v. City of Tuscaloosa*, supra.

[6] The instruction to the jury in the court's oral charge, to the effect that in weighing the defendant's testimony they could consider the fact that the defendant was interested, was not improper, and affords defendant no ground of complaint.

[7] Charge D is manifestly bad. The law only requires that the defendant's guilt be shown beyond all reasonable doubt.

The court did not err in overruling the defendant's motion non obstante veredicto. *Brannon v. State*, supra.

There is no error in the record, and the judgment is affirmed.

Affirmed.

(109 Miss. 74)

BELLEW v. WILLIAMS. (No. 16652.)
(Supreme Court of Mississippi. March 22, 1915.)

CONTRACTS — 138 — ILLEGALITY — EFFECT — PARTIES IN PARI DELICTO.

Parties whose logging contract provided a measurement in violation of Code 1906, § 5072, providing a standard rule of measurement for sawlogs and square timber, and declaring the use of any other measurement unlawful, and the use of a rule giving a lesser measurement a misdemeanor, and who executed the contract so that complainant received all due him thereunder, though less than he would have received under the statutory measurement, were in pari delicto, and the court would not relieve either, but would leave both in their respective conditions.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. —138.]

Appeal from Chancery Court, Hancock County; T. A. Wood, Chancellor.

Bill by R. B. Bellew against R. J. Williams. Decree for defendant, and complainant appeals. Affirmed.

T. M. Evans, of Gulfport, and J. A. Teat and L. Brame, both of Jackson, for appellant. Gex & Waller, of Bay St. Louis, for appellee.

REED, J. Appellant brought suit in chancery to recover from appellee damages alleged to have been sustained by the unlawful measurement of logs hauled by appellant for appellee under a contract.

In the bill of complaint it is alleged that the difference between the amount which appellant should have been paid for logs if the measurements had been made as required by law and in the amount which he received through the measurements in accordance with the terms of the contract totaled the sum of \$7,000. He prayed for triple damages—\$21,000.

In the logging contract between appellant and appellee it was provided that all logs should be scaled by Doyle's rule; and then is set forth certain provisions to be followed in measuring logs of given length. It is claimed that this is in violation of the statute providing a standard of measurement of saw logs and square timber, in that it is different from the standard rule prescribed in the table which the statute requires to be used.

The statute referred to is in the chapter on "Weights and Measures" in the Code of 1906, and is section 5072, reading as follows:

"The table known as 'Scribner's Lumber and Log-Book by Doyle's Rule' is the standard rule of measurement by which sawlogs and square timber shall be measured. The use of any other rule of measurement is unlawful; and any person who shall use any other rule which gives a less number of feet in a given log, shall be guilty of a misdemeanor, and punished accordingly, and be liable to any person injured for triple damages."

We note in the same chapter another section, 5066, which reads:

"All contracts for work or labor done, or anything to be sold and delivered, will be construed to have been made according to the standards, unless the parties stipulate to the contrary."

A demurrer was filed to the bill of complaint, and was overruled. Appellee thereupon filed an answer. The case was heard by the chancellor on the pleadings and agreed statement of facts. It is admitted that the logs were measured correctly in accordance with the contract, and that appellant had received all owing to him under his logging agreement. The contract has been fully executed.

The chancellor, in finally deciding the case, returned to a consideration of the demurrer, and held that he erred in overruling the same, and that it should have been sustained by reason of the third ground thereof, and stated that the same point was raised in the answer. The third ground reads as follows:

"If the contract was in violation of the law of the state of Mississippi, then, the parties being in pari delicto, the complainant cannot recover under the said contract as he is attempting to do."

The chancellor then held that the parties were in pari delicto, and dismissed complainant's bill.

Conceding for this consideration, but not deciding, that the contract made between appellant and appellee was in violation of the statute providing a standard rule of measurement, we then decide that, as both parties participated in the violation of the law, they are in pari delicto, and the court will therefore not interfere for the relief of either party, but will leave both in their respective conditions. *McWilliams v. Phillips*, 51 Miss. 196; *Lemonius v. Mayer*, 71 Miss. 523, 14 South. 33; *Woodson v. Hopkins*, 85 Miss. 186, 37 South. 1000, 38 South. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275.

Affirmed.

(109 Miss. 66)

GENTRY v. GULF & S. I. R. CO.
(No. 16605.)

(Supreme Court of Mississippi. March 22, 1915.)

1. DAMAGES — 206 — PHYSICAL EXAMINATION — POWER OF COURT.

The court may not require plaintiff, suing for personal injuries, to submit to a physical examination by physicians appointed by it.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 531; Dec. Dig. —206.]

2. TRIAL — 237 — INSTRUCTIONS — BURDEN OF PROOF.

An instruction, in an action for injuries by the derailment of a train, that if the jury are in doubt as to whether plaintiff was injured in the derailment, and this doubt cannot be removed by a clear preponderance of the evidence, the verdict must be for defendant, erroneously imposed on plaintiff the burden of removing all doubt by a clear preponderance of the evidence, while plaintiff, to recover, need only establish his case by a preponderance of the evidence.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 542, 548-551; Dec. Dig. —237.]

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Action by J. W. Gentry against the Gulf & Ship Island Railroad Company. From a judgment for defendant rendered on a trial, after granting a new trial after judgment for plaintiff, he appeals. Judgment in second trial reversed, and cause remanded, but verdict in first trial not reinstated.

Hilton & Hilton, of Mendenhall, and Hirsh, Dent & Landau, of Vicksburg, for appellant. Wells, May & Sanders, of Jackson, for appellee.

COOK, J. This action was begun in the circuit court by appellant, seeking to recover damages for injuries inflicted on him by the negligence of the appellee railroad company. At the first trial of the case appellant was awarded judgment for \$1,500. A motion for a new trial, among other things, set up newly discovered evidence. Without here considering any other ground for a new trial, we think the trial court properly set aside the verdict of the jury and granted defendant a new trial, because the newly discovered evidence was very pertinent, and may have controlled the verdict in the second trial. The action of the court in granting a new trial being proper, it follows that the motion of appellant to reinstate the former verdict will be overruled.

[1] We will now consider the second trial, which resulted in a verdict for defendant. Upon application of defendant the court appointed two physicians to examine plaintiff. Plaintiff was compelled to submit to a physical examination by the court's physicians. When these physicians were on the stand, testifying for defendant and against plaintiff, it was made known to the jury that they were chosen representatives of the judge of the court. This was done over the objection of plaintiff. It is quite clear to our minds that the quality of the testimony given by these experts was thus much magnified and unduly impressed on the minds of the jury. And this is one of the reasons why courts are denied the power to appoint expert witnesses and compel persons to submit their bodies to their inspection.

We cannot admit that physicians, or other experts, appointed by a court at the request of a party to a lawsuit, are more reliable and more disinterested than are others of like attainments and professional standing, simply because the others have given expert testimony at the request of a party to the suit. There is nothing in the education and training of a judge that peculiarly qualifies him to discriminate in the selection of medical experts, and yet there is little room to doubt that the ordinary juror would give undue weight to the judge's nominee. In a recent case this court has held that the trial judge is without power to appoint physicians and require parties to a suit to submit their

bodies to the inspection of the physicians designated by the court. *Y. & M. V. R. R. Co. v. Robinson*, 65 South. 241. It was error for the court to assume this power in this case.

[2] Several of the instructions given at defendant's request should not have been given. As a sample, we quote the fifth instruction, viz.:

"The court instructs the jury, for the defendant, that if they are in doubt as to whether plaintiff was injured or not in the derailment of the train, and this doubt cannot be removed by a clear preponderance of the evidence in the case, the verdict of the jury should be, 'We, the jury, find for the defendant.'"

This instruction imposes on a plaintiff a greater burden than the law imposes on the state in a criminal trial. In a criminal trial the state must prove its case beyond all reasonable doubt. By this instruction the plaintiff must remove all doubt from the minds of the jury—and that is not all; the plaintiff must remove all doubt—"by a clear preponderance of the evidence." The plaintiff must establish his right to recover by a preponderance of the evidence. Whenever the jury is satisfied that the plaintiff has proven his case, the plaintiff is entitled to recover. The law imposes on the plaintiff no burden to remove all doubts from the minds of the jury.

This instruction is misleading, and calculated to do much harm. Lawsuits must be tried under reasonable rules and regulations. It is reasonable to require the party who asks relief to satisfy the jury that he is entitled to it. It is unreasonable to require the plaintiff to remove all doubts which may find lodgment in the brain of some skeptical juror. This instruction, and others in this record, cast on the plaintiff this burden.

We refuse to reinstate the former verdict; but the judgment of the court in the last trial is reversed, and the cause remanded.

(100 Miss. 79)

MARTIN v. STATE. (No. 17862.)

(Supreme Court of Mississippi. March 22, 1915.)

CRIMINAL LAW §873—TRIAL—SEALED VERDICT—DISPERSAL OF JURY.

Where the trial was concluded Saturday afternoon, and the jury were told that if they reached a verdict to deliver it to the clerk in a sealed envelope and to disperse until Monday, which they did, when, upon reconvening of the court, each upon oath stated that the sealed envelope contained a verdict at which each of them had arrived before separation, the verdict was properly received and entered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2084; Dec Dig. § 873.]

Appeal from Circuit Court, Yalobusha County; L. M. Burch, Special Judge.

Earl Martin was convicted of crime, and he appeals. Affirmed.

I. T. Blount, of Water Valley, for appellant. Ross A. Collins, Atty. Gen., for the State.

SMITH, C. J. This is an appeal from a conviction of burglary. We find no reversible error in the record, and deem it necessary to notice specifically only one of the matters complained of.

The trial was concluded Saturday afternoon; and when the case was given in charge to the jury, they were instructed by the court, counsel both for the state and defendant agreeing thereto, that in event they reached a verdict they might deliver it to the clerk in a sealed envelope, and then disperse until Monday morning. The court thereupon adjourned until Monday morning. A verdict of guilty was arrived at by the jury about 5 o'clock Saturday afternoon, handed to the clerk in a sealed envelope, and they thereupon dispersed. When the court reconvened Monday morning, all the jurors were present; and, upon the jury's being polled each of them, "severally and upon their oath," stated that the sealed envelope delivered by them to the clerk contained the verdict at which each of them had arrived before their separation, each answering separately that it was his verdict. The court thereupon received and entered the verdict, and committed no error in so doing. *Friar v. State*, 3 How. 422.

Affirmed.

(109 Miss. 82)

LUCAS v. STATE. (No. 17960.)

(Supreme Court of Mississippi. March 22, 1915.)

1. HOMICIDE \Leftrightarrow 112 — DEFENSES — SELF-DEFENSE.

It is not every act of aggression producing a difficulty in the course of which it becomes necessary to kill another that will preclude the slayer from availing himself of the right of self-defense, and hence where accused claimed that when he demanded an explanation from deceased, thus bringing about the difficulty, he was unarmed and had no intention of taking deceased's life, an instruction, denying self-defense if he brought about the difficulty, is incorrect.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 145-150; Dec. Dig. \Leftrightarrow 112.]

2. CRIMINAL LAW \Leftrightarrow 811—TRIAL—INSTRUCTIONS.

In a prosecution for homicide, an instruction should not advise the jury that threats by accused against deceased might be construed with the other testimony in arriving at the verdict.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1787, 1969-1972; Dec. Dig. \Leftrightarrow 811.]

3. HOMICIDE \Leftrightarrow 340 — APPEAL — HARMLESS ERROR.

Such instruction, taken alone, does not require a reversal.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 715-717, 720; Dec. Dig. \Leftrightarrow 340.]

4. HOMICIDE \Leftrightarrow 190—EVIDENCE—ADMISSIBILITY.

Evidence, in effect, showing that deceased was trying to procure a pistol with which he intended to shoot accused, is improperly excluded.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 399-413; Dec. Dig. \Leftrightarrow 190.]

Appeal from Circuit Court, Yalobusha County; Fred Montgomery, Special Judge.

Ed Lucas was convicted of murder, and he appeals. Reversed and remanded.

This is an appeal from a conviction of murder and a life sentence to the penitentiary. The opinion states the facts.

The instructions referred to are as follows:

No. 4: "To make out a case of self-defense four essential conditions are necessary: First. The party assaulted or seriously threatened must not have brought about the difficulty. Second. He must believe at the time and under the circumstances that the danger of death, or serious bodily harm at the hand of his assailant is such as to render it necessary to take his assailant's life, or to save his own life, or to prevent serious bodily harm. Third. The circumstances must be such as to warrant such belief in the mind of an ordinarily prudent person. Fourth. There must exist a real and apparent necessity to take life."

No. 6: "The court instructs the jury for the state that, even though they may believe from the evidence that the deceased made threats against the life of the defendant, such threats were not sufficient of themselves to justify him in making a felonious assault upon the deceased, and unless the jury believes from the evidence that at the time the fatal shot was fired the deceased was so conducting himself as to satisfy a reasonably prudent man that he was then about to take the life of the defendant, or to do him some great bodily harm, and that such action was not provoked by the then action and conduct of the defendant, the jury should find the defendant guilty, notwithstanding you may believe the deceased had made threats against the life of the defendant. And the jurors are further instructed that if they believe from the evidence beyond a reasonable doubt that the defendant had made threats against the life of the deceased, such threats may be considered in connection with the other testimony in arriving at your verdict."

Creekmore & Stone, of Water Valley, for appellant. Ross A. Collins, Atty. Gen., for the State.

SMITH, C. J. This is an appeal from a conviction of murder. Only two witnesses testified to the facts of the homicide, one of them being the defendant himself. The homicide occurred on Sunday morning.

According to the testimony of Cordella Mitchell, the witness who testified in behalf of the state, she, her father, mother, and the deceased were on the gallery of the witness' home when the defendant drove up in a buggy, accompanied by the witness' sister Lula; that as they approached, the deceased asked who they were, and on being told said, "It is a good time now to get the son of a bitch"; that when the defendant and Lula reached a point in the road opposite the house they stopped, got out of the buggy, and approached the house, the defendant having with him a rifle; that when the defendant reached the gallery a conversation occurred between him and the deceased which, according to the witness, was as follows:

"The first word I heard was, 'I heard what you were going to do with me,' and John he

said, "Do what?" and he said that he heard that he was going to kill him the next time he set eyes on him, and John said that he didn't say that, and came in the house, and Ed called him to come outdoors, and John whirled around, and I ran in the other room."

A few moments after the witness "ran in the other room" she heard a shot; and, on returning to the yard a few moments thereafter, the deceased was lying on the ground, on his back, in a dying condition, and the defendant had gotten into his buggy. A large pocketknife, partly open, was lying on the ground near the deceased's right hand. According to the defendant's testimony, he did not see the deceased when he started into the house, and did not have with him his rifle, but left it in his buggy; that several persons had told him that the deceased had threatened to kill him, and that when he reached the gallery he said to him, meaning the deceased, "that I understood him to say that he was going to kill me"; that the deceased denied having said it, and that then the defendant told him, the deceased, "if you are going to kill me, to get away from there." What then transpired can best be told in the defendant's own language:

"I started back then, and he came on behind me. He comes down the gallery and I goes to the side of it. Q. What was he doing; what was his attitude? A. He came running behind me, and I went on to my buggy, and I ran on up to the buggy, and when I gets to the buggy I reached over and got my gun. Q. What was he doing at that time? A. He was coming after me with his knife. He had it in his hand. I threw the gun up then when he was coming on me and told him to stop, and he leans over this way and kept on coming, and I shot. Q. What happened when you shot? A. I got back in the buggy, and he wheeled when I shot. Q. Did he run? A. No, sir; he fell. Q. When you shot what was his position towards you; the position of his hands and the knife? A. He had his knife after me, and he was about half bent over this way."

There was some evidence introduced on behalf of the state tending to show that from the nature of the wound, the ball must have entered the deceased's body from the rear, and some evidence introduced on behalf of the defense which tended to show that it must have entered the body from the front. There was also some evidence of statements made by the defendant, which may be said to have thrown some light upon his conduct, not material to be here set out. Several witnesses also testified that both the defendant and the deceased had threatened to kill each other. The deceased owned a pistol which he had pawned to a man named Smith. The defendant sought to prove by Smith that on Friday before he was killed the deceased applied to him for his pistol, but that, not having the money with which to redeem it he, Smith, declined to let him have it; that the deceased then said he would get another, and that the witness then said to him, "Yes, you can get one, and you will fool around and get yourself killed," to which the deceased replied, "There will be a dead negro when

I do." The deceased had told another witness that Smith would not let him have his pistol and that he knew the reason why, saying: "It was to keep me from killing Ed Lucas; that he wanted to kill him before now, and he said he didn't give a damn whether Mr. Smith gave him the pistol or not."

[1] The granting of the state's fourth and sixth instructions, which the reporter will set out in full, is assigned for error. The objection to the fourth instruction is that the court thereby charged the jury that one of the essential conditions in order to make out a case of self-defense is that "the party assaulted, or seriously threatened, must not have brought about the difficulty"; and to the sixth, that the court charged the jury that, in order for the defendant to plead self-defense, the conduct of the deceased must not have been "provoked by the then action and conduct of the defendant." It is not the law that, in order "to make out a case of self-defense, * * * the party assaulted or seriously threatened must not have brought about the difficulty." A party assaulted is not estopped from pleading the right of self-defense, even though he may have "brought about the difficulty," unless it was "brought about" by him unlawfully; and, moreover:

"It is not every act of aggression or provocation which produces a difficulty, and in the course of which a necessity to kill another arises, that will preclude the slayer from availing himself of the right of self-defense; but it depends upon the character and quality of the act, and in some jurisdictions also upon the intent with which the difficulty was brought on." 21 Cyc. 806.

If the defendant "brought about" this difficulty at a time when he was unarmed, and with no intention of inflicting death or great bodily harm upon the deceased in the course thereof, and according to his testimony such may have been the fact, he is not estopped from pleading the right of self-defense according to the rule laid down in *Prine's Case*, 73 Miss. 838, 19 South. 711, and followed in *Lofton's Case*, 79 Miss. 732, 31 South. 420, and *Rogers' Case*, 82 Miss. 479, 34 South. 320. These instructions, therefore, should not have been given.

[2, 3] A further objection to the sixth instruction is that the court should not have thereby called attention specifically to the threats said to have been made by the defendant against the life of the deceased, and advised the jury "that such threats may be considered in connection with the other testimony in arriving at your verdict." This objection to the instruction is well taken, but the error is not of such character as to of itself alone call for a reversal. *Cheatham v. State*, 67 Miss. 335, 7 South. 204, 19 Am. St. Rep. 310.

[4] The testimony of the witness Smith should not have been excluded. The fact that the deceased was trying to procure a pistol from him with which, as he in effect

stated to another, he intended to kill deceased was material in determining whether he or the defendant was the aggressor in the difficulty in which he lost his life.

Reversed and remanded.

(109 Miss. 91)

STATE v. MITCHELL. (No. 17964.)
(Supreme Court of Mississippi. March 22, 1915.)

FALSE PRETENSES §27—LANDLORD'S LIEN—SALE OF PROPERTY—INDICTMENT.

Under Code 1906, § 1168, providing that any one selling property on which he knows that there is a lien, without informing the buyer of the lien, shall be guilty of obtaining the proceeds under false pretenses, an indictment charging that defendant unlawfully sold one bale of cotton on which there was an existing landlord's lien, without informing the buyer of such lien, and thereby obtained the sum of \$72, was sufficient; and it was not necessary to allege a fraudulent or felonious intent, as the absence of such intent would not be a defense.

[Ed. Note.—For other cases, see False Pretenses, Cent. Dig. § 32; Dec. Dig. §27.]

Appeal from Circuit Court, Winston County; F. E. Everett, Judge.

Robert Mitchell was indicted for selling cotton subject to a landlord's lien, and from a ruling sustaining a demurrer to the indictment the State appeals. Reversed and remanded for new trial.

Ross A. Collins, Atty. Gen., for the State.

COOK, J. This is an appeal by the state from the judgment of the trial court sustaining defendant's demurrer to the indictment. The indictment, omitting formal parts, reads this way, viz.:

"That Robert Mitchell, in said county, on the 12th day of January A. D. 1914, unlawfully, willfully, and feloniously did sell to J. F. Ferguson one bale of cotton on which Dan Williams held a valid and existing landlord's lien for rent of land on which said cotton was raised, and for supplies furnished said Robert Mitchell during the year 1913, without then and there, or at any time prior thereto, informing him, the said J. F. Ferguson, of the existence of said lien, and of the exact state of the title of said bale of cotton as affected thereby, he, the said Robert Mitchell, then and there well knowing of the existence of said lien, and did then and there, in the manner and form aforesaid, obtain of and from him, the said J. F. Ferguson, the sum of \$72, good and lawful money of the United States, of the property of the said J. F. Ferguson, of the value of \$72, under false pretense, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Mississippi."

The grounds of the demurrer are as follows:

"(1) Because said indictment charges no offense; (2) because said indictment does not show that the money was procured from Ferguson by means of any false pretense; (3) because the indictment does not show that the defendant intended to cheat or defraud the said Ferguson; (4) because said indictment does not show that any act of the defendant in the procurement of any money was feloniously and unlawfully obtained, nor does the indictment show that such

procurement was with an intent to cheat or defraud the said Ferguson."

This indictment was drawn under section 1168, Code 1906, which section is in these words, viz.:

"If any person shall sell, barter, or exchange or mortgage, or give deed of trust on, any property, real or personal, which he had before sold, bartered, or exchanged, or obligated himself to sell, barter, or exchange, or which he had mortgaged, or in any manner incumbered, or on which he knows there is a lien of any kind, by contract or by law, without informing the person to whom he so sells, barter, exchanges, or bargains, or mortgages or gives deed of trust on it, of the exact state of the property as affected by said acts or of the lien or incumbrance thereon, he shall be guilty of obtaining under false pretenses whatever he received from the person dealing with him, and shall, on conviction, be punished therefor, as for obtaining goods under false pretenses."

The statute makes the selling of property on which there is a lien of any kind, "without informing" the buyer of the lien, a crime. The sale of property under a lien, coupled with a failure to disclose the fact to the seller, constitutes the statutory crime. The absence of any intent to defraud would not avail as a defense, and it is therefore unnecessary to allege a fraudulent or felonious intent.

The mere selling of property on which there is a lien is not criminal—it is the omission to inform the buyer of the state of the title which completes the offense.

We think the demurrer should have been overruled.

Reversed and remanded for trial on its merits.

(109 Miss. 94)

BERBETTE v. STATE. (No. 17756.)
(Supreme Court of Mississippi. March 22, 1915.)

JURY §92—DISQUALIFICATION OF JUROR BY INTEREST—SERVANT OF CORPORATION ROBBED.

In a prosecution for stealing one dollar's worth of electric light current by means of a "jumper," defendant's challenge for cause to a juror, because he was an employé of the electric light company, was improperly denied.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 420-422; Dec. Dig. §92.]

Appeal from Circuit Court, Hinds County; J. A. Teat, Special Judge.

M. Berbette was convicted of crime, and he appeals. Reversed and remanded.

W. J. Croom, of Jackson, for appellant.
Ross A. Collins, Atty. Gen., for the State.

REED, J. Appellant was tried and convicted on an indictment charging him with taking, stealing, and carrying away electricity of the value of \$1, the property of the Jackson Light & Traction Company, a corporation.

The evidence shows that the taking and carrying away of the property in this case

was by the means of a device known in the electrical business as a "jumper." These are said to be two pieces of wire, connected with the feed wires conveying the current into the meter on the receiving or supply side, and again connected with such wires on the other or transmitting side of the meter, so that the current will not pass through the meter. We understand from the testimony that through the arrangement of these jumper wires the electric current was thereby detoured around the meter and not registered, to the loss of the Jackson Light & Traction Company. The company's general manager and other of its employes appeared as witnesses for the prosecution.

In the selection of the jury, one of the jurors was challenged by appellant on the ground that he was an employé of the Jackson Light & Traction Company, the owner of the electricity which appellant is charged with taking. The juror testified that he was employed as a motorman on the street cars of the company. The trial court overruled the challenge. Appellant exhausted all the peremptory challenges allowed him by law.

It is the purpose of the law to provide as jurors men who are fair and impartial and free from bias or prejudice. It has been held that one who is in the employ of a party to a suit is incompetent as a juror. The existence of any business relation between the one offered as a juror and one of the parties in interest which might be calculated to influence his verdict is sufficient to render such person incompetent to serve as a juror. This rule applies where there exists between parties the relation of master and servant, or employer and employé. 17 Amer. & Eng. Ency. of Law (2d Ed.) p. 1127; 24 Cyc. 276. In the case of Hubbard v. Rutledge, 57 Miss. 7, it was decided that a clerk of a defendant was incompetent as a juror. In *L. N. O. & T. R. R. Co. v. Mask*, 64 Miss. 738, 2 South. 360, it was held that an employé of a railroad company, party defendant, was incompetent to sit as a juror in that case, and should have been rejected upon a challenge for cause. In delivering the opinion of the court Judge Arnold said:

"The juror Hartgroves, being in the employment of appellant, was subject to challenge for that cause. He was not 'omni exceptione major.' He would have been disqualified at common law, and we have no statute removing such disqualification. It does not matter that he had the self-confidence to swear that he could try the cause impartially. It was not for him to determine his competency on that point. When the fact was developed that he was in the employment of appellant, the law adjudged him incompetent. The law does not lead jurors into the temptations of a position where they may secure advantage to themselves by doing wrong, nor permit the possibility of the wavering balance being shaken by self-interest."

In *Central R. R. Co. v. Mitchell*, 63 Ga. 173, an employé of the railroad company was held to be incompetent as a juror in the trial of that case wherein the company

was a party. We quote from the opinion delivered in that case by Judge Jackson:

"We think that the employé of the company was properly rejected as a juror. To sit on the case he must be 'omni exceptione major.' The servant of the company is not. It is almost impossible, however incorruptible one may be, not to bend before the weight of interest; and the power of employer over employé is that of him who clothes and feeds over him who is fed and clothed. Hence the common law excluded all servants, and our statutes have nowhere altered the rule, and it should not be altered. A close relative is a less dangerous juror, if not a dependent kinsman, than one who is dependent on his employer."

One of the reasons given to sustain the challenge for cause of a juror in the case of *Minich v. People*, 8 Colo. 440, 9 Pac. 4, was that he had business relations with a person jointly indicted with the defendant, but not on trial, owing to a severance allowed by the court. In the case of *State v. Coella*, 3 Wash. 99, 28 Pac. 28, it was held that the former employer of a decedent was disqualified as a juror in the trial for decedent's murder. In the opinion in that case, delivered by Judge Scott, it was said that the juror would have been disqualified in a civil action between the murdered man and the defendant under a statute of the state, because of the relation of master and servant and (quoting from the opinion):

"While, of course, the deceased could not be a party to the prosecution, yet for the purpose of impaneling a jury he should be considered as an adverse party to the defendant. If the feelings supposed to be engendered by this relationship, or the influence that it might exert, are ground for disqualification in a civil cause, it goes without saying that the reasons apply with much more force in a case like this."

In the case at bar the Jackson Light & Traction Company owned the electric current alleged to have been stolen. The company, therefore, would be an adversary of appellant, in any question relative to the unlawful taking of the electricity. In a civil action for the recovery of the value of the property, the company would be a party opposed to appellant. In a prosecution charging appellant with criminal liability for the wrongful taking of the electricity, the company, as the person owning the property taken and thereby suffering loss, is certainly a party in interest. The challenged juror was therefore an employé of a party in interest in the case.

We see no reason why the rule, which has been established in this state by the decisions of this court (*Hubbard v. Rutledge*, supra; *Railroad Co. v. Mask*, supra), to the effect that an employé of a party in a civil action is not a competent juror, should not apply to criminal prosecutions such as the case at bar. The reasons for the rule in civil actions apply with equal or greater force in criminal cases. We therefore apply the rule to this case. The challenge of the juror should have been sustained.

Reversed and remanded.

YAZOO & M. V. R. CO. v. JONES.
(No. 17588.)

(Supreme Court of Mississippi. March 30, 1915.)

Appeal from Circuit Court, Bolivar County; W. D. Cutrer, Special Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Vamperdelle Jones. From the judgment, the Railroad Company appeals. Appeal dismissed by consent.

Mayes & Mayes, of Jackson, for appellant.

PER CURIAM. Appeal dismissed by consent.

MOUND BAYOU OIL MILL & MFG. CO. v. LINDSEY. (No. 16941.)

(Supreme Court of Mississippi. March 30, 1915.)

Appeal from Circuit Court, Bolivar County; T. E. Watkins, Judge.

Action between the Mound Bayou Oil Mill & Manufacturing Company and Charlie Lindsey. From the judgment, the company appeals. Appeal dismissed.

See, also, 63 South. 298.

Boddie & Farish, of Greenville, for appellee.

PER CURIAM. Appeal dismissed.

BURRAGE v. STATE. (No. 17805.)

(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Circuit Court, Winston County; F. E. Everett, Judge.

Alonzo Burrage was convicted of crime, and appeals. Affirmed.

J. B. Gully and Richardson & Richardson, all of Louisville, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

REED v. STATE. (No. 17570.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Rankin County; C. L. Dobbs, Judge.

Bertha Reed was convicted of selling intoxicating liquors, and appeals. Affirmed.

W. J. Croom, of Jackson, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

WESTERN UNION TELEGRAPH CO. et al. v. LINKS. (No. 16951.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Attala County; J. A. Teat, Judge.

Action between the Western Union Telegraph Company and others and A. Links. From the judgment, the parties first mentioned appeal. Appeal dismissed by consent.

PER CURIAM. Appeal dismissed by consent.

BOSTICK v. TONEY. (No. 18116.)

(Supreme Court of Mississippi. March 15, 1915.)

Appeal from Circuit Court, Jones County; J. M. Arnold, Judge.

Action between J. H. Bostick and L. Toney. From the judgment, Bostick appeals. Appeal dismissed.

W. J. Pack, of Laurel, for the motion.

PER CURIAM. Motion to dismiss appeal sustained.

FINKBINE LUMBER CO. v. HARPER.
(No. 16600.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Harrison County; T. H. Barrett, Judge.

Action by the Finkbine Lumber Company against J. W. Harper. From the judgment, the Lumber Company appeals. Affirmed.

Ford, White & Ford, of Gulfport, for appellant. Mize & Mize, of Gulfport, and Whitfield & Whitfield, of Jackson, for appellee.

PER CURIAM. Affirmed.

HOWARD et al. v. BYRD et al. (No. 16623.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Chancery Court, Pearl River County; R. E. Sheehy, Chancellor.

Action between William Howard and others and Thomas R. Byrd and others. From the judgment, the parties first mentioned appeal. Affirmed.

J. E. Stockstill, of Picayune, and W. W. Stockstill, of Bay St. Louis, for appellants. J. M. Shivers, of Poplarville, for appellee.

PER CURIAM. Affirmed.

BURTON v. STATE. (No. 17731.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Marshall County; H. K. Mahon, Judge.

Annual Burton was convicted of murder, and appeals. Affirmed.

E. M. Smith, of Holly Springs, and Jas. R. McDowell, of Jackson, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

FAYE v. STATE. (No. 17989.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Hancock County; J. I. Ballenger, Judge.

Alex Faye was convicted of selling intoxicating liquors, and appeals. Affirmed.

Mize & Mize, of Gulfport, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

SCOTT v. STATE. (No. 17512.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Clarence Scott was convicted of grand larceny, and appeals. Affirmed.

Stokes V. Robertson, of Hattiesburg, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

HEMBY v. STATE. (No. 17759.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Simpson County; W. H. Hughes, Judge.

Needham Hemby was convicted of selling intoxicating liquors, and appeals. Affirmed.

W. M. Lofton, of Mendenhall, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

CURRIE v. STATE. (No. 17513.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

Charles Currie was convicted of assault and battery and appeals. Affirmed.

W. J. Croom, of Jackson, and J. E. Davis, of Hattiesburg, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

McLAIN v. STATE. (No. 17947.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Lincoln County; J. B. Holden, Judge.

Nathan McLain was convicted of unlawful retailing, and appeals. Affirmed.

J. F. Noble, of Brookhaven, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

WILLIAMS v. STATE. (No. 17276.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Jones County; P. B. Johnson, Judge.

C. S. Williams was convicted of embezzlement, and appeals. Affirmed.

R. L. Bullard, W. S. Welch, and Stone Deavours, all of Laurel, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

SPEIGHTS v. STATE. (No. 17800.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Talmadge Speights was convicted of murder, with life imprisonment, and appeals. Affirmed. V. B. Montgomery, of Gulfport, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

WALKER v. STATE. (No. 17801.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Harrison County; J. I. Ballenger, Judge.

Norman Walker was convicted of using profane language, and appeals. Affirmed.

Mize & Mize, of Gulfport, for appellant. Ross A. Collins, Atty. Gen., for the State.

PER CURIAM. Affirmed.

RODGERS v. STATE. (No. 17897.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Jones County; P. B. Johnson, Judge.

Oliver Rodgers was convicted of manslaughter, and appeals. Affirmed.

Halsell & Welch, of Laurel, and J. E. Davis, of Hattiesburg, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

THORNTON v. TOWN OF CHARLESTON.
(No. 17083.)

(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Tallahatchie County; N. A. Taylor, Judge.

Proceedings between P. H. Thornton and the Town of Charleston. From the judgment, Thornton appeals. Affirmed.

Wells, May & Sanders, of Jackson, Hall Sanders, of Charleston, and C. E. Harris, of Okmulgee, Okl., for appellant. Tim E. Cooper, of Jackson, and Dinkins & Caldwell, of Charleston, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. McGEHEE.
(No. 16719.)

(Supreme Court of Mississippi. March 8, 1915.)

Appeal from Circuit Court, Wilkinson County; E. E. Brown, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and Mrs. Hallie P. McGehee. From the judgment, the Railroad Company appeals. Appeal dismissed by appellant.

Mayes & Mayes, of Jackson, for appellant.

PER CURIAM. Appeal dismissed by appellant.

STATE v. LONGINO et al. (No. 17811.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Lawrence County; J. C. Ward, Special Judge.

Proceedings between the State and R. L.

Longino and others. From the judgment, the State appeals. Affirmed.

Ross A. Collins, Atty. Gen., and Geo. H. Ethridge, Asst. Atty. Gen., for the State. G. Wood Magee, of Monticello, and Longino & Ricketts, of Jackson, for appellees.

PER CURIAM. Affirmed.

ROBERTSON v. STATE. (No. 17741.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Forrest County; P. B. Johnson, Judge.

R. G. Robertson was convicted of embezzlement, and appeals. Affirmed.

Tally & Mayson, of Hattiesburg, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for the State.

PER CURIAM. Affirmed.

RICHMOND et al. v. ENOCHS. (No. 16912.)
(Supreme Court of Mississippi. March 22, 1915.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between John L. Richmond and others and I. C. Enochs. From the judgment, the parties first mentioned appeal. Motion to affirm (87 South. 649) sustained.

Green & Green, of Jackson, for the motion. V. Otis Robertson, of Jackson, opposed.

PER CURIAM. Motion to affirm sustained.

YAZOO & M. V. R. CO. v. TROTTER.
(No. 16867.)

(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Circuit Court, Sunflower County; Monroe McClurg, Judge.

Action by H. B. Trotter against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. S. D. Neill, Chapman & Johnson, and Chapman & Williams, all of Indianola, for appellee.

PER CURIAM. Affirmed.

WILSON et al. v. CAGE. (No. 16911.)
(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between D. W. Wilson and others and H. B. Cage. From the judgment, Wilson and others appeal. Affirmed.

Heintz & Williams, of Jackson, for appellants. Robertson & Bratton, of Jackson, for appellee.

PER CURIAM. Affirmed.

NEWTON OIL & MFG. CO. v. MAY.
(No. 16895.)

(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action between the Newton Oil & Manufacturing Company and Lee M. May. From the judgment, the manufacturing company appeals. Affirmed.

Byrd & Byrd, of Newton, for appellant. Wells, May & Sanders, of Jackson, for appellee.

PER CURIAM. Affirmed.

ANDERSON TOOL CO. v. HARBOUR.
(No. 16838.)

(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Circuit Court, Neshoba County; C. L. Dobbs, Judge.

Action between the Anderson Tool Company and C. D. Harbour. From the judgment, the Anderson Tool Company appeals. Affirmed.

Huddleston & Austin, of Philadelphia, for appellant. Geo. H. Ethridge, Asst. Atty. Gen., for appellee.

PER CURIAM. Affirmed.

WILLIAMS v. BETTELINE.
(Supreme Court of Florida. Feb. 18, 1915.)

(Syllabus by the Court.)

REFORMATION OF INSTRUMENTS §47—**MISTAKE IN DEED—REMEDY OF PURCHASER—DECREE.**

Where a purchase is made of a lot in a particular block, and a deed, placed in escrow pending final payment, conveys an adjoining lot instead of the one on which the purchaser builds his home with the knowledge of the vendor, and the mistake is not discovered till after the conveyance is delivered, equity will decree a conveyance of the lot built upon, and not a conveyance of 40 feet front of the lot, on the theory that the lot described in the deed of conveyance contained only 40 feet front while the lot built on with the knowledge of the vendor contains 60 feet front, since the purchase was of a lot, not a given number of feet front, and the evidence shows a relation of confidence between the parties and no negligence or laches on the part of the purchaser, an employé for many years of the vendor, such purchaser offering to do equity.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 195-198; Dec. Dig. §47.]

Appeal from Circuit Court, Duval County; D. A. Simmons, Judge.

Bill by Oscar Williams against Leonie Bettelini. From decree for defendant, complainant appeals. Reversed, with directions.

McGill & McGill, of Jacksonville, for appellant. O. M. Cooper, C. P. & J. J. G. Cooper, of Jacksonville, for appellee.

WHITFIELD, J. The bill of complaint herein alleges in effect that in 1906 Fred Bettelini the owner of a number of lots of land in block 19 of Auberts addition to La Villa, Jacksonville, offered to sell to Oscar Williams on the installment plan one of the lots for \$250, which offer was accepted, and said Bettelini instructed Williams to select his choice of the lots; that Williams selected lot 8 of

said block 19 upon which he built his home; that Williams informed Bettelini of the lot he had selected; that Bettelini looked at the location so selected and approved the same; that Bettelini and his wife, Leonie Bettelini, executed a warranty deed intending to convey to Williams said lot 8, "which was mutually intended between the complainant, Williams, and the said Fred Bettelini, but by mistake and inadvertence of the scrivener" the lot was described in the deed of conveyance as lot 9 instead of lot 8 as was mutually intended; that Bettelini furnished the necessary money for the house erected on the lot selected as aforesaid; that while the house was in process of erection, Bettelini, accompanied by his wife, the defendant here, looked at the same, and fully acquiesced in the location and selection of the lot; that pending the payment of the purchase money for the lot, together with the money with which the house was erected, the deed of conveyance to the lot was held in escrow; that about March 3, 1909, the deed was delivered to complainant, Williams, who was in ignorance of the mistake and inadvertence in the description of the lot, and without negligence on his part the complainant, Williams, had the deed recorded; that from the execution of the deed in 1906 until the summer of 1911 complainant Williams "rested in the belief that the said deed contained a correct description of the said lot 8 * * * which was intended to be conveyed to him"; that Bettelini died in April 1909, leaving his wife, the defendant, his sole devisee and legatee; that upon discovering the mistake complainant requested the defendant to correct the same as equity requires, which has not been done; that complainant "is ready and willing and hereby offers to the defendant the said described lot so by mistake and inadvertence conveyed to him as the court may direct." The prayer is for a reformation of the deed "so as to truly describe the said lot 8 * * * intended to be conveyed to the complainant," and for general relief.

By answer the defendant widow, upon information and belief, avers that her deceased husband "intended to sell to complainant, and did agree to sell and convey to complainant, lot 9"; that complainant himself attempted to locate on the ground said lot 9 without securing the assistance of any surveyor or civil engineer or any person who had adequate knowledge or information as to the location of the lots of said block, or who was competent to ascertain the same, and "said complainant by his own gross negligence and carelessness located the house which he began to build on lot 8 * * * instead of lot 9, and built a dwelling house thereon"; that Fred Bettelini did not see what lot complainant located on, but as complainant undertook himself to locate upon the right lot, and did not seek to have Fred Bettelini locate him thereon, that Bettelini supposed he was on the right lot, to wit, lot 9; that

the defendant, Mrs. Bettelini, did not intend to convey lot 8, and on information and belief denies that her husband intended to convey lot 8 to complainant; that Fred Bettelini did not acquiesce in the location of the lot; denies any mistake in the description of the lot in the deed of conveyance; that lot 9 fronts 40 feet while lot 8 fronts 50 feet; that defendant is willing to exchange 40 feet of lot 8 for a reconveyance of lot 9. Replication was filed and testimony taken. The chancellor decreed an exchange of conveyance covering 40 feet, and complainant appealed.

The theory of the bill is for a reformation of the deed to Williams so as to cover lot 8 instead of lot 9 upon a reconveyance by Williams of lot 9. Equity is contained in the allegations, and there was no demurrer to any parts of the bill.

It appears that Williams was a servant of Bettelini continuing through a long period; that Bettelini agreed to sell Williams a lot to be selected by the latter; that Williams selected the lot in 1906, and Bettelini more than once saw the dwelling house of Williams being erected at the place selected by Williams, which is on lot 8; that Williams did not see the deed of conveyance till 1909, when he had finished his payments for the lot and for the money loaned to build the house; that the deed was received from Bettelini's sister; that Williams had the deed recorded, and in 1910 discovered that his house was not built on lot 9 but on lot 8; that Williams "immediately" upon such discovery reported the mistake to Miss Bettelini from whom he received the deed; that Williams endeavored to have the deed corrected so as to cover lot 8 on which his home was built.

The evidence discloses unusual confidence of Williams in Bettelini, growing out of long employment of Williams as a servant, and there is shown no conduct constituting negligence on the part of Williams in not ascertaining when the deed was delivered to him, whether it in fact conveyed the lot on which he built his home. Under the circumstances Williams may well have assumed that Bettelini had conveyed the right lot. The deed of conveyance had been held in escrow by Bettelini's sister for several years, and until full payment was made. The course of dealing indicated confidence of an employé in his employer consequent upon long service, and difference in races, and no negligence or laches appear to deprive Williams of his equity.

The parties negotiated with reference to a lot; and the fact that lot 9 is 40 feet front while lot 8 is 50 feet front does not appear to have been a consideration when Williams was allowed to select the lot he desired, and Bettelini saw the house several times while being erected on the lot selected by Williams. The inevitable conclusion is that Bettelini mistakenly conveyed lot 9 under the impression that he was carrying out the sale he made to Williams of a lot.

The complainant's equities are not limited to 40 front feet of the lot on which his home was built under the circumstances stated; and the decree should have provided for a conveyance to Williams of the entire lot 8 upon a proper reconveyance by him of lot 9.

The decree is reversed, with directions to enter a decree in accordance with this opinion.

It is so ordered.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 217)

BEDELL v. JACKSONVILLE TRACTION CO.

(Supreme Court of Florida. Feb. 23, 1915.)

(Syllabus by the Court.)

1. PLEADING \S 367 — COMPULSORY AMENDMENT—RIGHT—DEFECTIVE MOTION.

Upon motion made under section 1433, General Statutes of 1906, an appropriate order may be made by the court for compulsory amendment of pleadings, where the pleading is so framed as to prejudice or embarrass or delay the fair trial of the action, even though the motion is not entirely appropriate in its terms.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 64, 1173-1193; Dec. Dig. \S 367.]

2. PLEADING \S 367—EJECTION OF PASSENGER—COMPULSORY AMENDMENT.

Where a declaration alleges that the plaintiff was a passenger on defendant's "street railway in the city of Jacksonville," to be "carried on a journey from a certain point . . . to a certain other point on its said railway," and the defendant "wrongfully ejected the plaintiff," without stating the point of the plaintiff's start or destination as such passenger, or the place at or near which the plaintiff was ejected, a compulsory amendment may be required as to the initial and terminal points of the "journey" and the locality of the alleged ejection, if it is within the plaintiff's knowledge.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 64, 1173-1193; Dec. Dig. \S 367.]

3. PLEADING \S 367—DEFECTIVE AMENDMENT—EFFECT.

Where an amendment of a declaration has been filed in response to an order of the court, and such amendment is relevant and material, but it is not regarded as sufficiently definite, further orders as to amendments may be made on proper application; and the amendment filed should not be stricken, or the cause abated or dismissed, as for failure to comply with the order of the court, where contumacy does not appear, and there is nothing to indicate a trifling with the court's procedure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. \S 64, 1173-1193; Dec. Dig. \S 367.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by Chester Bedell, a minor, by George C. Bedell, his next friend, against the Jacksonville Traction Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Bisbee & Bedell and A. H. King, all of Jacksonville, for plaintiff in error. J. L. Doggett, of Jacksonville, for defendant in error.

WHITFIELD, J. The declaration filed herein is as follows:

"Chester Bedell, a minor child, by George C. Bedell, his next friend, sues Jacksonville Traction Company, a corporation, defendant.

"For that the defendant was a carrier of passengers on a street railway in the city of Jacksonville, Duval county, Florida, for reward to the defendant, and plaintiff became and was received by defendant as a passenger to be by it safely and securely carried on a journey from a certain point upon its said railway in said city to a certain other point on its said railway for reward to the defendant, yet the defendant did not safely and securely carry the plaintiff upon the said railway on the said journey, but wrongfully ejected the plaintiff from the carriage in which the plaintiff was a passenger upon said railway on the said journey as aforesaid, and plaintiff was thereby subjected to great inconvenience, discomfort, and humiliation.

"Wherefore plaintiff sues, and claims five thousand dollars."

A demurrer to the declaration was filed, the ground being that "there is no negligence charged against the defendant." This demurrer was overruled. A motion was made under section 1433, Gen. Stats. of 1906, for a compulsory amendment of the declaration on the grounds:

"(a) More definiteness as to time and place of alleged ejection; (b) as to whether force was used; (c) that sufficient acts be alleged so that defendant may be able to definitely determine whether the alleged cause of action is ex contractu or ex delicto. Upon the ground that the said declaration as now framed tends to prejudice, embarrass, and delay the fair trial of said action."

The following order was made on the motion for compulsory amendment:

"It is ordered that ground (a) of the said motion be granted, and that the plaintiff be required to so amend his declaration as to show the point at which he boarded defendant's car, the point of his destination, and the point at which he was ejected from said car, such amendment to be made within ten days, and that the defendant plead further on the rule day in October, 1913.

"It is further ordered that grounds (b) and (c) of said motion be denied."

The plaintiff filed the following:

"Comes now the plaintiff in the above-styled cause, and in accordance with the order of the court entered on the eighth day of September, A. D. 1913, says:

"That the happenings in the declaration mentioned were on the second day of October, 1912, and that the point at which he boarded defendant's car in said declaration mentioned was on Ocean street, near Bay street, in the city of Jacksonville, Duval county, Florida, and that the point of his destination in said declaration mentioned was Fourth street, near Laura street, in said city, and the point at which he was ejected from said car was on Main street in said city, south of Hogan's creek."

The defendant filed the following motion:

"Comes now the defendant, by John L. Doggett, its attorney, and moves this court to strike out the paper which plaintiff has filed, and has attempted or pretended to file, herein, and in

which plaintiff attempts or pretends to set up certain circumstances as to the time and place of the alleged injury set up in the declaration herein, and defendant moves to strike out this said paper on the following grounds:

"1. The said paper is not an amendment to the declaration.

"2. The said paper is not an amended declaration.

"3. The said paper tends to prejudice, embarrass, and delay the fair trial of the cause.

"4. The said paper is wholly immaterial.

"5. The said paper is indefinite and uncertain.

"6. The said paper is contumacious and not in obedience to the order of the court herein."

On this motion the following order was made:

"This motion having been argued by counsel, submitted, and considered, it is ordered that the same be, and is, hereby granted."

Subsequently the defendant moved:

"That the court dismiss this suit as for want of a declaration, because of the failure of the plaintiff to amend his declaration as ordered to do herein by the court."

The court made the following order on the motion to dismiss:

"The above motion having been argued, submitted, and considered, it is ordered that the same be, and is, denied. It is further ordered that this cause stand abated until such time as the plaintiff shall amend his declaration in compliance with the order of the court made herein on September 8, 1913, and shall furnish to the attorney of record for the defendant a copy of such amendment, after the service of which copy the defendant shall be allowed fifteen days within which to plead further as it may be advised."

Subsequently the court rendered the following judgment:

"Plaintiff in the above-styled cause failing to amend his declaration as required, it is considered by the court that this cause stand dismissed, that the plaintiff take nothing by his suit, and that the defendant go thereof without day, and have and recover its costs herein expended."

On writ of error taken by the plaintiff below it is contended that the court erred in the order for compulsory amendment, in granting the motion to strike the amendment, in ordering that the "cause stand abated until such time as the plaintiff shall amend his declaration in compliance with the order of the court made herein," and in dismissing the cause.

[1] Section 1433 of the General Statutes is as follows:

"If any pleading be so framed as to prejudice or embarrass or delay the fair trial of the action, the opposite party may apply to the court to strike out or amend such pleading, and the court shall make such order respecting the same, and also respecting the costs, as it shall see fit."

It is in effect contended that the court had no authority under section 1433, General Statutes, to require the plaintiff to amend his declaration as directed in the order made for that purpose.

An allegation that the plaintiff was a passenger on the defendant's "street railway in the city of Jacksonville," to be carried on a journey from a certain point * * * to a certain other point on its said railway," and that the defendant "wrongfully ejected the

plaintiff," without in any way stating the place at or near which the "plaintiff became and was received by defendant as a passenger," or the point of the plaintiff's destination, or the place at or near which he was ejected, may not apprise the defendant of facts that are or may be within the knowledge of the plaintiff, and that are or may be regarded by the court as material to avoid prejudice, embarrassment, or delay in the fair trial of the action. Section 1433, Gen. Stats., was designed to meet a situation of this character. The statute requires merely that the complaining party "apply to the court to strike out or amend" as desired, "and the court shall make such order respecting the same * * * as it shall see fit." And an appropriate order may be made, "even though the motion be not entirely appropriate in its terms." Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 South. 922. The statute relative to striking and to compulsory amendment of "any pleading so framed as to prejudice or embarrass or delay the fair trial of the action" is independent of the rules of law relative to bills of particulars.

[2] It does not appear that the court abused its judicial discretion in making the order for compulsory amendment; but, on the contrary, the amendments required to be made seem to be appropriate to enable the defendant to concert its defense, the declaration merely alleging that the ejection was on the defendant's railway in the city of Jacksonville. The amendment states that the plaintiff "was ejected from said car on Main street in said city, south of Hogan's creek"; and it is admitted here that this statement locates the expulsion within eight or ten blocks. This amendment is an apparent attempt to comply with the order of the court, it is not immaterial nor so indefinite and uncertain as to warrant the court in striking it, and no contumacy appears in the transcript. If for any reason the statement that the ejection was "on Main street in said city, south of Hogan's creek," is calculated "to prejudice or embarrass or delay the fair trial of the action," further amendment may be required upon a proper application; but the statement filed in obedience to the order to amend in stated particulars is relevant and material, and if it is not entirely satisfactory to the defendant the entire amendment should not for that reason have been stricken. The paper containing the statements being in effect an amendment to the declaration filed under an order of the court, it is binding on the plaintiff in making out his cause of action. The order for compulsory amendment does not violate sections 1428 and 1450, Gen. Stats., relative to the contents and form of pleadings.

[3] It appears from the transcript, and the plaintiff by counsel asserts, that the paper filed pursuant to the order for compulsory

amendment was intended as an amendment to the declaration under the order made, and the amendment is apparently a substantial compliance with the order. There is, therefore, nothing in the transcript to sustain the order made "that this cause stand abated until such time as the plaintiff shall amend his declaration in compliance with the order of the court." The amendment as filed is not a plain disregard of the order, but apparently it is at least a substantial compliance with the order, in that the plaintiff, a minor, whose age is not stated, may not know the exact point at which he was ejected "on Main street, * * * south of Hogan's creek," and the statement as to the place of ejection may be sufficient to avoid embarrassment in the fair trial of the action.

As the paper intended to be an amendment of the declaration, made by virtue of an order for compulsory amendment, was improperly stricken, the judgment dismissing the action, because the plaintiff "failed to amend his declaration as required," was erroneous, and is hereby reversed, and the cause remanded for appropriate proceedings.

It is so ordered.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 46)

J. S. BETTS CO. v. SOUTH GEORGIA RY. CO.

(Supreme Court of Florida. Jan. 27, 1915.
Rehearing Denied March 30, 1915.)

(Syllabus by the Court.)

1. INJUNCTION ¶163—MANDATORY INJUNCTION—DISSOLUTION—GROUNDS.

A mandatory injunction, enjoining the refusal to carry out a contract, is properly dissolved upon a showing that the complainant repeatedly violated many essential provisions of that contract.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. ¶163.]

2. EQUITY ¶48 — BREACH OF CONTRACT — EQUITABLE RELIEF—EXISTENCE OF LEGAL REMEDY.

Where the legal remedies for a breach of a contract are ample, the basis for equitable relief should be otherwise shown.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 156, 158; Dec. Dig. ¶48.]

Appeal from Circuit Court, Taylor County; M. F. Horne, Judge.

Suit by the J. S. Betts Company, a corporation, against the South Georgia Railway Company, a corporation. From an order dissolving a temporary injunction, complainant appeals. Affirmed.

Wm. T. Hendry, of Perry, for appellant.
W. B. Davis, of Perry, for appellee.

COCKRELL, J. This is an appeal from an order dissolving a temporary injunction, granted without notice, enjoining the railroad company from refusing or preventing

the Betts Company operating its log train upon the tracks of the railroad company, under the terms of a contract theretofore entered into between the two companies.

[1] We are of the opinion that the only error committed by the circuit court was in issuing the injunction, and that its dissolution was entirely proper. See *Florida East Coast R. Co. v. Taylor*, 56 Fla. 788, 47 South. 345.

The contract so sought to be enforced by this drastic writ in advance of a final hearing is somewhat lengthy, but its main features may be summarized in these words: The railway company and the predecessor of the Betts Company agreed, upon a consideration of \$1 mutually paid and of the covenants, agreements, and payments thereafter named, that the predecessor of the Betts Company, called for convenience the lumber company, should have the right to run its log trains on certain portions of the tracks of the railroad company. There were numerous conditions and restrictions upon this right, looking to proper compensation for the injury that might be done by the lumber company to the safety of the railroad company as a common carrier of passengers and freight, for compensation to be paid periodically to the railroad company, for the delivery of the logs to this company for the long haul, rather than to its rivals, and other provisions not necessary to mention. "It is understood by all parties of this contract that it shall remain in force as long as complied with, until all the timber owned by the said Greenville Yellow Pine Company, its successors and assigns, has been hauled."

Upon the hearing before the chancellor for dissolution of the injunction, there was considerable evidence that the Betts Company had violated substantially every provision of this contract; that it had not made its periodical payments; that it was careless in the operation of the log trains, endangering the safety and lives of the passenger service of this common carrier; that it carried freight forbidden by the contract; that it turned over the logs to a rival carrier; and other derelictions were charged in the answer filed, supported by affidavits.

[2] We have difficulty in ascertaining the appellant's theory as to a basis for equity jurisdiction. It asserts here that time was not made of the essence of the contract, and that therefore the railway company was not permitted to cancel the contract, but was remitted to an action at law for its breach. Merely noting that the contract remains in force only so long as "complied with" until the lumber be removed, it would seem to us that the Betts Company is seeking a court of equity to avoid the legal offsets occasioned by its own breach of the contract, and is asking a court of conscience to compel the other party to perform, despite its own past and future violations of that contract.

Again, irrespective of the defensive matter set up in the answer, the equity of the bill is not clear. The railroad is a common carrier, and must carry the logs of the lumber company for a definite freight rate fixed by law. It would seem that the measure of damages for an unauthorized breach of the contract, the difference between the rate prescribed by law and the cost of carrying the logs under the contract, is readily ascertainable. The public at large is not interested in behalf of this appellant, as in the case of *Taylor v. Florida East Coast R. Co.*, 54 Fla. 635, 45 South. 574, 16 L. R. A. (N. S.) 307, 127 Am. St. Rep. 155, 14 Ann. Cas. 472. The bill sets out merely the breach of a contract, for which the legal remedy is ample.

The order dissolving the injunction is affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 104, 123)

AMERICAN SECURITIES CO. v. GOLDSBERRY.

(Supreme Court of Florida. Feb. 3, 1915.
On Application for Rehearing,
Feb. 23, 1915.)

(*Syllabus by the Court.*)

1. MORTGAGES — 393 — FORECLOSURE — DEFENSE — AGREEMENT EXTENDING TIME.

An agreement between a mortgagee and mortgagor for an extension of the time for the payment of the indebtedness secured by the mortgage, based on a valid consideration, is a good defense in a suit to enforce the mortgage lien before the expiration of the extended time against a purchaser of the mortgaged property who has assumed the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1159; Dec. Dig. — 393.]

2. EQUITY — 346 — MATTERS IN AVOIDANCE — BURDEN OF PROOF.

Matters set up in an answer by way of avoidance, but which are not responsive to the bill, must be proved by the defendant; the burden being upon him to establish such matters by a preponderance of the testimony.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 725, 726; Dec. Dig. — 346.]

3. EQUITY — 373 — PLEADING — ANSWER — REQUISITES.

The rule making an answer evidence in favor of the defendant, where the case is heard on bill, answer, and replication, requires that the answer should be responsive, direct, positive, and unequivocal.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 711-713; Dec. Dig. — 373.]

4. MORTGAGES — 289 — FORECLOSURE — RIGHTS OF PURCHASER — SEPARATE SALE.

One who purchases a part of the mortgaged premises and assumes the payment of the entire mortgage debt has no equitable right to demand that the mortgaged premises be segregated and sold separately.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 789; Dec. Dig. — 289.]

5. MORTGAGES — 479 — FORECLOSURE — DETERMINATION OF EXPENSES — REFERENCE.

In a proceeding to enforce a mortgage lien, where the mortgage provides for the payment to

the mortgagee of attorneys' fees and expenses incurred in enforcing the payment of the mortgage debt, a master may be appointed to ascertain what expenses have been incurred and what is a reasonable attorney's fee in the case, and report such finding to the court, although the time prescribed by the rule for taking testimony has expired.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1395-1398; Dec. Dig. — 479.]

6. INTEREST — 38 — RATE — MORTGAGES — DECREE.

In adjudicating the amount due on a mortgage debt for interest, the rule is the debt bears interest at the contract rate to the date of the final decree, after which date the total amount found by the decree to be due for principal, interest, attorneys' fees, and expenses bears interest at the rate prescribed by the statute.

[Ed. Note.—For other cases, see *Interest*, Cent. Dig. §§ 79-82; Dec. Dig. — 38.]

7. JUDGMENT — 526 — CONSTRUCTION — REFERENCE TO PLEADINGS.

Reference may be made to the pleadings and orders in a cause to explain any ambiguity in the final decree, and for the purpose of construing its language.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 969; Dec. Dig. — 526.]

On Application for Rehearing.

8. MORTGAGES — 125 — DEBT SECURED — EXPENSES — ABSTRACT OF TITLE.

Expense incurred in obtaining an abstract of the title to mortgaged property from the date of the mortgage to the beginning of a foreclosure proceeding to enforce the lien of the mortgage is a proper item of expense to be allowed the mortgagee or his assigns in such proceeding where the mortgage provides for the payment of attorney's fees and all expenses the mortgagee may reasonably incur or pay because of the failure of the mortgagor or his assigns to comply with the agreements and covenants contained in the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 211½, 244, 245; Dec. Dig. — 125.]

9. APPEAL AND ERROR — 901 — PRESENTATION OR ERROR — PRESUMPTION.

In appellate proceedings the burden is upon the appellant to make the error apparent; the presumption being in favor of the chancellor's decree.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1771, 3670; Dec. Dig. — 901.]

Appeal from Circuit Court, Duval County; D. A. Simmons, Judge.

Bill by Samuel S. Goldsberry against the American Securities Company, a corporation, and others. From decrees for complainant, the defendant named appeals. Affirmed, and rehearing denied.

Samuel S. Goldsberry filed his bill to foreclose a mortgage in the circuit court for Duval county against Charles D. Mills and Etta F. Mills, his wife, and the American Securities Company, a corporation organized under the laws of Florida. The bill alleges that on or about the 19th day of March, A. D. 1910, the defendant Charles D. Mills made and delivered to the complainant his promissory note whereby he agreed to pay to the complainant \$12,500, with interest at the rate of 7 per cent. per annum from date

until paid, interest payable semiannually according to the tenor of six interest coupon notes of \$437.50 attached thereto; a copy of the note being attached to the bill as Exhibit A, and made a part thereof; that on the 4th day of May, 1910, the defendant Charles D. Mills paid on the note \$4,500, thereby reducing the principal sum of said note to \$8,000. In paragraph 2 of the bill it is alleged that to secure the payment of the note, with interest, the said Charles D. Mills and his wife executed and delivered to the complainant a certain mortgage upon certain lots in the city of Jacksonville; that in and by the mortgage Charles D. Mills covenanted and agreed to pay the said promissory note, with interest thereon when due as provided in the note and the coupons thereto attached, and that the mortgage further provided that the said Mills should pay all the costs and expenses, including reasonable attorney's fees, incurred by the complainant in the collection and enforcement of the mortgage; the original mortgage being attached to the bill and marked Exhibit B, and made a part thereof. In paragraph 3 it is alleged that the complainant, by an instrument dated May 2, 1910, released from the lien of the mortgage the east 100 feet of fractional block 114, Springfield, being situated near the corner of Main and Tenth streets, and fronting 53 feet on Main street and 100 feet on Tenth street, but that the mortgage remains in full force and effect as to the remaining property described therein.

The fourth paragraph alleges that the indebtedness evidenced by the promissory note set forth in paragraph 1, after the credit of \$4,500 has been made thereon, became due and payable on the 19th day of March, A. D. 1913, and that the same was not paid at maturity, and has not been paid since, but remains as to the \$8,000 of the principal of said note, due and payable; that the interest is also due from the 19th day of March, 1913, on said sum; that the said several sums of money have not been paid. The bill then continues as follows:

"(5) And your orator alleges further that he is informed and believes, and from such information and belief alleges that the defendant the American Securities Company has entered into a contract of purchase of the property described above from the defendants Charles D. Mills and Etta F. Mills, and have been let into possession of said premises by the said Charles D. Mills under the said contract, and claims some interest in the said premises, and your orator is informed and believes, and upon such information and belief alleges, that in the said contract of purchase from the said Charles D. Mills and wife the defendant the American Securities Company covenanted and agreed to assume and pay the note and mortgage hereinbefore referred to as your orator, and that the said defendant the American Securities Company has accepted whatever rights they have in and to the property aforesaid, subject to the prior claim of your orator under and by virtue of the mortgage aforesaid.

"Therefore, the premises considered, your orator prays that an account may be had and taken by and under the direction of this honorable

court to ascertain the amount due your orator on account of said note and mortgage and for attorney's fees, and that a decree may be made and entered requiring the aforesaid defendants to pay the amount found to be due, or, in default thereof, that the said mortgaged premises be sold by a master of this court, at public sale, in accordance with law, and further decreeing that after said sale a master's deed be made and executed to the purchaser at said sale, and that all defendants and all parties claiming by, through, or under them shall be forever barred and foreclosed of all right, title, interest, and right of redemption in and to the aforesaid mortgaged premises."

Then follows prayer for subpoena and general relief.

Decree pro confesso was entered against C. D. Mills and Etta F. Mills, his wife. On the 1st day of September, 1913, the defendant American Securities Company filed its answer, which, omitting the venue and title, is as follows:

"This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is or are material or necessary for it to make answer unto, answering, says:

"(1) It admits the allegations of the first, second, and third paragraphs of said bill.

"(2) It also admits that it is the equitable owner in fee of said lands described in the bill as east half of fractional block 113, Springfield, and lots 5, 6, and 7 in block 2, Warren; that it is in possession thereof under a contract of purchase between Charles D. Mills, of the first part, and J. A. Holloman and D. H. McMillan, of the second part, assigned to it by said Holloman and McMillan; that it assumed, as did its assignors, to pay the said mortgage indebtedness sought to be collected through said bill. And your orator further says, upon information and belief, that at the time of making said contract of purchase aforesaid between said Mills, the mortgagor in said mortgage, and the assignors of this defendant, to wit, February 12, 1913, prior to the maturity of said note, the mortgagee, Samuel S. Goldsberry, agreed with the mortgagor to extend the time of payment of said note for one year, and which said promise was communicated to said Holloman and McMillan by said mortgagor, Charles D. Mills, and, relying thereon, said Holloman and McMillan assumed the payment of said note and mortgage, and in turn said promise and agreement was communicated to this defendant, and, relying thereon, it assumed the payment of said note and mortgage; wherefore, and by reason whereof, this defendant says the said note and the indebtedness evidenced thereby is not due and payable.

"And this defendant, further answering, denies that the complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, and prays to be dismissed with its reasonable costs and charges in this behalf most wrongfully sustained."

The answer was under the seal of the corporation and sworn to by its president.

On the 21st day of October, 1913, the complainant, Goldsberry, filed his general replication to the answer of the American Securities Company, and on the 22d day of January, 1914, the complainant filed his praecipe setting down the cause for hearing on bill, answer, and replication.

On the 19th day of February, 1914, the

court made and entered a decree as follows, omitting venue and title:

"This cause coming on to be heard upon the bill, the answer of the American Securities Company, and the complainant's replication thereto, and the pro confesso against the defendants Charles D. Mills and Etta F. Mills, and the same having been argued by counsel:

"It is ordered, adjudged, and decreed that the equities of the cause are with the complainant, and that the complainant is entitled to a decree foreclosing the mortgage set forth in the bill of complaint, and is entitled to have this cause referred to a special master, to take and state the account of the moneys due to the complainant, and in pursuance of the said right it is ordered, adjudged, and decreed that Carl Noble be, and he is hereby, appointed special master in the above-entitled cause, with directions to take and state an account of all moneys due the complainant on the note and mortgage set forth in the bill of complaint, together with a reasonable attorney's fee to be allowed complainant's solicitors for their services in this cause, and to ascertain whether or not there are any other or further sums due the complainant for or on account of any of the terms or conditions contained in the mortgage set forth in the bill of complaint; said master to report his findings to this court with all convenient speed.

"Done and ordered this 19th day of February, A. D. 1914.

"Daniel A. Simmons, Judge."

On the 24th day of February, 1914, the special master filed his report, in which he stated that, pursuant to notice, a hearing was held in his office in Jacksonville on the 23d day of February, 1914, for the purpose of taking such evidence as might be introduced by the respective parties; that both parties were represented by counsel; and that after receiving in evidence the promissory note signed by C. D. Mills and a receipted bill for an abstract, and hearing the testimony of two witnesses as to a reasonable attorney's fee, all of which being fully set out in the report, his findings were as follows:

"Findings.

"Your master would further specially report that under and by virtue of said decree he is required to take an account of moneys due to the complainant on the note and mortgage set forth in the bill of complaint. Your master finds the accounting to be as follows:

On account of principal.....	\$8,000.00
Interest for eleven months and four days.....	519.55
Solicitors' fees.....	800.00
Amount paid by complainant for abstract	8.60
Interest on same.....	.25

Total \$9,328.40

"Respectfully submitted.

"Carl Noble, Special Master."

To the report was attached the receipted bill for the abstract and the promissory note of C. D. Mills.

On the 14th day of March, 1914, the defendant filed its exceptions to the master's report, in the following words, omitting the venue, title, and formal parts:

"1. The defendant objects and excepts to the introduction in evidence (page 2 of the report) of receipted bill for an abstract of the Peninsular Title Company for \$8.60, and also moves

to strike the same from the record, upon the following grounds:

"(a) The same is immaterial and irrelevant, and is not authorized by the mortgage averred in the bill of complaint to be due.

"(b) The time for taking testimony had expired in this cause on, to wit, January 21, 1914; and the cause had been set down by complainant for hearing on bill of complaint, answer and replication on January 22, 1914, and heard by the court on final hearing as thus set down on February 18, 1914.

"(c) That the decree appointing the special master, dated February 19, 1914, does not and did not authorize the special master to take or receive any testimony.

"(2) The defendant objects, and excepts to the testimony of L. W. Baldwin, as to reasonable attorney's fees in this cause, and also moves to strike the same from the record, upon the same grounds set forth in the first exception herein.

"(3) The defendant objects, and excepts to the testimony of A. H. King, as to reasonable attorney's fees in this cause, and also moves to strike the same from the record, upon the same grounds set forth in the first exception herein.

"(4) The defendant objects, and excepts to each and every the following items in the findings of the special master in stating the account in this cause, to wit:

Solicitors' fees.....	\$800.00
Amount paid by complainant for abstract	8.60
Interest on same.....	.25
	<hr/>
	\$808.85

—and moves to exclude and strike the same from the statement of said account, upon the same grounds set forth in the first exception herein."

On the 3d day of April, 1914, the court made and entered its decree overruling the exceptions filed by the defendant to the report of the special master, adjudicating the amount due and owing to the complainant—

"on account of the note and mortgage sued on, for principal and interest up to the 24th day of February, 1914, the sum of eight thousand five hundred and nineteen and $\frac{55}{100}$ dollars (\$8,519.55), and the further sum of eight and $\frac{25}{100}$ dollars (\$8.85), expense incurred by the complainant for the purchase of abstract of title, with interest on the same from the time of its payment, and the further sum of eight hundred dollars (\$800.00) for the services of complainant's solicitors in this suit.

"And it is further ordered, adjudged, and decreed that, unless the defendants do forthwith pay to the complainant the said sum of eight thousand five hundred and nineteen and $\frac{55}{100}$ dollars (\$8,519.55), and the further sum of eight and $\frac{25}{100}$ dollars (\$8.85) hereinbefore referred to, together with interest thereon at the rate of 8 per cent. per annum from the 24th day of February, 1914, and the further sum of eight hundred dollars (\$800.00) for the services of the solicitors for the complainant, the mortgaged premises described in the bill of complaint—to wit, the east half of fractional block one hundred and thirteen (113), Springfield, and lots five (5), six (6), and seven (7) in block two (2) of Warren, all of which is situated at the northwest corner of Tenth and Hubbard streets, in the city of Jacksonville, and measuring two hundred and nine (209) feet on Tenth street by four hundred feet on Hubbard street, and also lot twenty-four (24) in block eighteen (18), Campbell's addition to Jacksonville, and being at the northwest corner of Argyle and Van Buren streets, in the said city of Jacksonville, county of Duval, and state of Florida—be sold by a master of this court at public sale before the door of the court house of Duval

county, Fla., on a legal sales day, during the legal hours of sale, and that said master, prior to said sale, give notice of the same by publication in a newspaper published in Duval county, Fla., for four consecutive weeks prior to said sale, giving the time and place of sale and a description of said mortgaged premises, and that after said sale said special master shall execute and deliver to the purchaser at said sale a good and sufficient deed for said mortgaged premises.

"It is further ordered, adjudged, and decreed that after said sale the said defendants, Charles D. Mills, Etta F. Mills, and the American Securities Company, a corporation, and all persons claiming by, through, or under them since the commencement of this suit, shall be forever barred and foreclosed of all right, title, claim, interest, or right of redemption in and to the said mortgaged premises.

"It is further ordered, adjudged, and decreed that after said sale the said special master shall distribute the proceeds arising therefrom as follows."

Then follow the directions as to the disbursement of the proceeds.

From these decrees the defendant American Securities Company entered its appeal on the 30th day of April, 1914.

Gibbons, Maxwell, McGarry & Daniel, of Jacksonville, for appellant. Axtell & Rinehart, of Jacksonville, for appellee.

ELLIS, J. (after stating the facts as above). Under the first assignment the appellant contends that the averments in the answer in respect to the alleged agreement of the complainant, Samuel S. Goldsberry, with the mortgagor to extend the time of payment of the note for one year should have been accepted by the chancellor as true, and the bill dismissed. The answer does not deny the execution of the note by Charles D. Mills, the delivery of it to the complainant, the execution and delivery of the mortgage by Mills and wife to the complainant to secure the payment of the note, nor the assumption by the American Securities Company of the mortgage indebtedness described in the bill, but avers, upon information and belief, that at the time of making the contract of purchase for a part of the mortgaged premises, "between the said Mills, the mortgagor in said mortgage, and the assignors of this defendant, to wit, February 12, 1913, prior to the maturity of said note, the mortgagee, Samuel S. Goldsberry, agreed with the mortgagor to extend the time of payment of said note for one year, and which said promise was communicated to said Holloman and McMillan by said mortgagor, Charles D. Mills, and, relying thereon, said Holloman and McMillan assumed the payment of said note and mortgage, and in turn said promise and agreement was communicated to this defendant, and, relying thereon, it assumed the payment of said note and mortgage." It is perfectly clear that the principal fact in the quoted part of the answer is the alleged agreement between Goldsberry, the mortgagee, and Mills, the mortgagor and maker of the note, whereby Goldsberry agreed to

extend the time of payment of said note for one year. If the agreement was not made, it would be of no importance that Mills made such representation to Holloman and McMillan, and that such representation was made to the American Security Company. The answer does not allege that Goldsberry told Holloman and McMillan or the American Securities Company that he had made such agreement with Mills, although Goldsberry is the man against whom the agreement is invoked.

[7] There is no doubt that an agreement between the complainant Goldsberry and the defendant Mills for an extension of the time for the payment of the indebtedness based upon a good consideration would be valid and a good defense. But such an allegation would be an affirmative one of new matter, and not responsive to the bill, and the burden would have rested upon the defendant to establish it by a preponderance of the testimony. *Pinney v. Pinney*, 46 Fla. 550, 35 South. 96; *Tyler v. Toph*, 51 Fla. 597, 40 South. 624; *Parsons v. Ramsey*, 53 Fla. 1055, 43 South. 503; *Griffith v. Henderson*, 55 Fla. 625, 45 South. 1003.

[2] If the complainant had told Holloman and McMillan or the American Securities Company at the time the indebtedness was assumed that there was such an agreement between Goldsberry and Mills, that would have been a good defense upon the principle of estoppel. Such an allegation would have been responsive to the bill, would have set up matter which discharged the defendant, and would have shown that the matter charging him and discharging him grew out of the same transaction, and would have been evidence in favor of the defendant. *Maxwell v. Jacksonville Loan & Imp. Co.*, 45 Fla. 425, 34 South. 255. But the rule making an answer evidence in favor of the defendant where a case is heard on bill, answer, and replication, requires that it should not only be responsive, but direct, positive, and unequivocal. *Southern Lumber & Supply Co. v. Verdier*, 51 Fla. 570, 40 South. 676; *Kellogg v. Singer Mfg. Co.*, 35 Fla. 99, 17 South. 68. The averments of the answer in this regard were neither direct, positive, nor unequivocal. The averments are that Mills told Holloman and McMillan of such an agreement, and that "in turn said promise and agreement was communicated to this defendant," etc. By whom it was communicated to defendant the answer does not state. It is not permissible to infer that it was communicated to it by Goldsberry. The averment that Mills told Holloman and McMillan of the agreement is immaterial, and not responsive to the bill. Goldsberry was not bound by any statement made to Holloman and McMillan or the American Securities Company by Mills, in the absence of any showing in the answer that Mills acted with authority from Goldsberry.

[3] The cause was heard on bill, answer, and replication; the allegations of the bill necessary to entitle the complainant to relief were admitted by the answer. The averment of the answer as to the alleged agreement between Goldsberry and Mills concerning an extension of time for the payment of the indebtedness evidenced by the note, not being responsive to the bill, and being an affirmative allegation of new matter set up by way of defense upon information and belief, was not evidence for the defendant, and the chancellor rightfully declined to accept it as true. Neither was the averment in the answer as to the communication of such an alleged agreement to Holloman and McMillan by Mills, or the communication of such information to the defendant, evidence for the defendant. *Simpson v. Barnard*, 5 Fla. 528; 1 Ency. Pl. & Pr. 920.

[4] Under the second subdivision of the first assignment of error, the appellant urges that, inasmuch as the bill alleges that the American Securities Company had entered into a contract of purchase of the property described in the bill from Charles D. Mills and his wife, and had been let into possession of the premises and claims some interest in the premises, and had assumed to pay the note and mortgage, and that the answer set up a contract of purchase of a part of the premises from Mills, and an assignment of the contract to the American Securities Company, and an assumption of the indebtedness by the company, that the complainant should have submitted evidence as to the contract alleged in the bill, and that without such evidence the decree was erroneous in view of the averments in the answer.

We do not agree with appellant's solicitors on this point. The assumption of the indebtedness by the appellant placed it in the same situation with reference to the property purchased as the defendant Mills occupied with reference to it. The lien of the mortgage existed upon all of the property without any right of the appellant to insist that the one part of the premises or the other should be sold first. The American Securities Company assumed the indebtedness, the debt thereupon became its debt, so far as the mortgagor Mills was concerned, and it was the failure of the American Securities Company to pay it when it became due that brought about the foreclosure. Mills might have complained with some reason, but we think that appellant had no equity as to this feature of the case.

[5] Under the second assignment of error several questions are discussed by appellant's solicitors relating to the decree of April 3, 1914. It is urged that the appellant's exceptions to the master's report, based upon the allowance of \$8.60 for an abstract of the property, and \$800 for solicitors' fees, should not have been overruled, but that the exceptions on the contrary should have been sustained, and the items disallowed.

The bill alleges, and the mortgage which is attached to the bill and made a part of it recites, that the mortgagor should pay all costs and expenses, including reasonable attorneys' fees, incurred by the mortgagee in the collection and enforcement of the mortgage. The decree of February 19, 1914, adjudged the equities to be with the complainant; that he was entitled to a foreclosure of the mortgage, and to have the cause referred to a special master to take and state an account of the moneys due to the complainant. A special master was appointed, with directions to take and state an account of all moneys due the complainant on the note and mortgage set forth in the bill of complaint, together with a reasonable attorney's fee to be allowed complainant's solicitors for their services in the cause, and to ascertain whether there were any other or further sums due the complainant for or on account of any of the terms or conditions in the mortgage set forth in the bill of complaint, with directions to the master to report his findings to the court.

The master proceeded to ascertain by the testimony of witnesses what sum should be allowed as a reasonable attorney's fee for complainant's solicitors. This was objected to by defendant American Securities Company on the grounds that the testimony was immaterial and irrelevant; that the time for taking the testimony had passed; and that the decree did not authorize the master to take such testimony. The complainant offered a receipted bill for \$8.60 for an abstract of the property. This was also objected to by the defendant upon the same grounds. The note was received without objection.

[6, 7] These objections were again urged by the defendant upon exceptions to the master's report. The master's report was made on the 24th day of February, 1914, and found the amount due on the note and mortgage to the complainant to be \$8,000 for principal; \$519.55 interest for 11 months and 4 days; solicitor's fee \$800; amount paid by complainant for abstract \$8.60, and 25 cents interest on the same—making a total sum of \$9,328.40. The exceptions to the report also contained a motion to exclude and strike from the statement of the account the amount found by the master for solicitor's fees, the amount paid by complainant for the abstract, and the interest on same; also to strike from the record the testimony as to attorneys' fees.

These objections and exceptions were not well taken. The decree of February 19, 1914, adjudged that the complainant was entitled to the relief prayed. It determined the equities in the cause. The matter of ascertaining the amount due under the terms of the mortgage was a mere matter of detail to be worked out by a master before a decree could do full and complete justice. There

was no objection offered to the introduction of the receipt for the amount paid for the abstract upon the grounds of incompetency; the objection related only to its relevancy or materiality. Expense incurred in obtaining an abstract of the title to the property was a legitimate item of expense under the terms of the mortgage, and appellant does not show that the item allowed was improper. In taking testimony as to the reasonableness of an attorney's fee to be allowed complainant's solicitor, and receiving evidence as to the expense to which complainant had been subjected by reason of the failure of the mortgagor or his assigns to comply with the agreement and covenants in the mortgage, the special master complied with the directions and instructions of the court. It is difficult to perceive how he could have proceeded in any other way. The amount of the attorney's fee, or the amount of expense to which the mortgagee had been subjected because of the failure of the mortgagor or his assigns to perform the agreements on their part to be performed, were not matters upon which the equities of the case were determined, but mere matters of detail to be ascertained by a master and reported to the court in order that a decree doing full justice might be made and entered. Equity rule 71, requiring testimony to be taken within three months, relates to the testimony to be taken on the issues presented by the bill and answer and replication which must be determined to settle the equities in the cause. The master's duties are clerical, not judicial. The evidence in examinations before him is required to be taken down in writing and filed with his report. This is for the purpose of enabling the chancellor to determine the correctness of his findings.

It is contended that the decree of April 3, 1914, was erroneous in allowing interest upon the amount reported by the special master to be due, at 8 per cent. per annum, from the date of the report, instead of at 7 per cent., the rate specified in the note. The amount of the indebtedness on the note and mortgage found by the special master to be due, exclusive of interest, should have continued to bear interest at the contract rate to the date of the final decree, which was April 3, 1914; that is to say, the principal should bear interest at the contract rate to the date of the final decree, after which the total indebtedness, including principal and interest, attorney's fees and expenses adjudged by the decree to have been incurred, bears interest at the rate prescribed by the statute.

The error complained of consists in allowing interest on the amount found by the master to be due, at 8 per cent. per annum, from the date of the report, instead of at 7 per cent., the contract rate, and the period during which the interest was compounded.

This error amounted to approximately \$11 in the complainant's favor, in a decree involving \$9,328. This error was not called to the attention of the court. It was partly corrected by the master in his report of the sale. It does not appear that the error caused injury to the appellant, or handicapped or prevented him from paying or tendering the amount actually due before the sale took place. It does not appear to have in any way affected the price the property brought at the sale, which was considerably less than the amount adjudged to be due. This small error in the calculation of interest was one which should have been brought to the attention of the circuit court. See *Brevard Naval Stores Co. v. Commercial Bank of Jacksonville*, 67 Fla. 281, 64 South. 943. If a deficiency decree is entered for the complainant, the correction may be made.

The appellant contends that the decree is erroneous because it does not find from whom the amounts found to be due are due to complainant; that the decree does not require the special master to sell the property to the highest bidder; that it does not fix the terms and conditions of the sale; nor does it require notice of the terms to be given.

There is no merit in any of these objections. While the decrees could have been prepared with more clearness than they were, we think that the decrees of February 19th and April 3d show that the defendants are required to pay the amount found to be due on the note and mortgage for principal, interest, attorney's fees, and expenses; that the latter required a public sale for cash because the master was required to distribute the proceeds arising from the sale as directed in the decree, and was required to give notice of the sale by publication in a newspaper.

The decree is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

On Application for Rehearing.

ELLIS, J. [8, 9] Appellant filed a petition for a rehearing on the ground that this court overlooked the fact that the bill of complaint did not allege any expense incurred by the complainant for obtaining an abstract of the title to the mortgaged property, nor for attorney's fees. The mortgage, which was attached to the bill of complaint and made part of it, provided for the payment of attorney's fees and all expenses the mortgagee "may reasonably incur or pay because of the failure of the mortgagor or his assigns to comply with the agreements, covenants," etc., of the promissory note. The record does not disclose that the bill for the abstract did not relate to the property. It was the duty of appellant to make the error apparent. The presumption obtains in fa-

vor of the correctness of the chancellor's decree.

The application for rehearing is denied.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(69 Fla. 283)

PARRISH et al. v. HAAS.

(Supreme Court of Florida. March 2, 1915.)

(Syllabus by the Court.)

1. INFANTS — 115 — ACTIONS — REVIEW — RIGHTS OF INFANT DEFENDANT—FORECLOSURE PROCEEDINGS.

Where it appears in a suit to enforce the lien of a mortgage that the interests of a minor are involved, the court should protect the interests of such minor whether his claim or defense be properly pleaded or not, and for this purpose the court should look to the record in all its parts, and of its own motion give to such minor the benefit of all objections and exceptions that may appear, or require the representative of such minor to make such exceptions or file such pleadings as may be necessary to fully protect such rights and interests as the minor may appear to have.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 305, 326-332; Dec. Dig. —115.]

2. INFANTS — 78 — GUARDIAN AD LITEM — DUTY TO APPOINT.

Where it is made to appear to the court, although informally, that one of the parties defendant in a cause pending in court is a minor, the court should appoint a guardian ad litem of such minor and direct him to file such pleadings as may be necessary to protect and guard such minor's interests in the suit.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 195-207, 209; Dec. Dig. —78.]

Appeal from Circuit Court, Manatee County; F. A. Whitney, Judge.

Suit by Ethan S. Haas, as executor of the last will and testament of A. Z. Haas, deceased, against W. E. Parrish, by J. T. Richards, as his next friend, and another. From decree for complainant, defendants appeal. Reversed.

W. B. Shelby Crichlow, of Bradentown, for appellants. C. T. Curry, of Bradentown, for appellee.

ELLIS, J. Ethan S. Haas as executor of the last will and testament of A. Z. Haas, deceased, brought his bill in the circuit court for Manatee county against W. E. Parrish and H. E. Chalker to enforce the lien of a chattel mortgage executed by the defendants in favor of A. Z. Haas to secure a note made by the defendants payable to the order of the said A. Z. Haas for \$500. The property mortgaged was:

"All of the equipment and stock of the said W. E. Parrish and H. E. Chalker in their garage known as the Parish & Chalker Garage, situated on Main street, in the town of Palmetto, county of Manatee, and state of Florida."

The bill alleges that subsequently to the execution of the note and mortgage A. Z. Haas died, leaving a will in which Ethan S. Haas was appointed executor, and that at

the time of the death of Ethan S. Haas he was the owner of the note and mortgage. Subpoena was issued and served upon both defendants. On the 3d day of August, 1914, which was the rule day next succeeding that fixed for the appearance of the defendants, the defendant W. E. Parrish filed what the record refers to as his plea. The document was as follows:

"In the Circuit Court, Manatee County, Florida.

"In Chancery.

"Ethan S. Haas, as Executor of the Last Will and Testament of A. Z. Haas, Deceased, Complainant, v. W. E. Parrish and H. E. Chalker, Defendants.

"Foreclosure of Mortgage.

"Plea of W. E. Parrish, defendant, to the bill of complaint of Ethan S. Haas, etc.

"This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the complainant's said bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, doth plead thereunto, and for plea says: That at the time of the commencement of this action the said defendant W. E. Parrish was and now is a minor, being under the age of 21 years, and is incapable of suing or being sued. All of which matters and things this defendant avers to be true, and pleads the same to the whole of said bill, and demands judgment of this honorable court whether he ought to be compelled to make any answer to the said bill of complaint and prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained. W. E. Parrish, Defendant.

"W. B. Shelby Crichlow,

"Attorney for W. E. Parrish, Defendant."

To which said plea the following affidavit was attached:

"State of Florida, County of Manatee:

"Before me, a notary public, personally came W. E. Parrish, who, being duly sworn, says that the matters and facts set forth in the above and foregoing plea are true to the best of his information and belief, and that deponent is 19 years and 3 months of age.

"W. E. Parrish.

"Sworn to and subscribed before me this 3d day of August, 1914.

"[Official Seal.]

Emma K. Moor,

"Notary Public.

"Filed 3d day of Aug., 1914.

"Robt. H. Roesch, Clerk,

"By Jas. A. Herrin, Deputy Clerk."

On the same day the complainant caused to be entered a decree pro confesso in the chancery order book against the defendants for failure to plead, answer, or demur to the bill of complaint.

Upon the application of the complainant a special master in chancery was appointed to take the testimony in said cause and report the same to the court as soon as may be, together with his findings and conclusions.

A final decree was entered on the 22d day of September, 1914, adjudging the amount due on this note and mortgage for principal, interest, expenses, and attorney's fees, from the defendants to the complainant, ordering the defendants or some of them to pay to the complainant the amount so found to be due within 5 days from the date of the de-

cree, and, in default, that the mortgaged property be sold, appointing a special master to make the sale and report the same to the court for confirmation.

The defendant W. E. Parrish moved the court to vacate the final decree in so far as it affects the person and property of the defendant W. E. Parrish, upon the ground that W. E. Parrish was an infant under 21 years of age; that no guardian ad litem had been appointed to represent the interests of the minor; that no notice was given to the defendant of the taking of testimony; that no guardian ad litem for the defendant was "served" or answered in the cause. The motion was overruled. An appeal to this court was taken from the final decree by H. E. Chalker and by W. E. Parrish, by his next friend J. T. Richards.

[1] In the case of Walker v. Redding, 40 Fla. 124, 23 South. 565, this court said:

"It is the duty of a court of equity to see that the interests of minors are protected in suits before it, whether the claim or defense be properly pleaded or not, and for this purpose the chancellor should look to the record in all its parts, and of his own motion give to the minors the benefit of all objections and exceptions appearing thereon as is specially pleaded, or require the representative of such minor to take such exception or file such pleadings as may be necessary to fully secure and protect such rights and interests as the minors appear by the record to have."

See Mote v. Morton, 52 Fla. 548, 41 South. 607; Lucas v. Wade, 43 Fla. 419, 31 South. 231; Parken v. Safford, 48 Fla. 290, 37 South. 567. In the latter case the court said that the same rule obtains on appeal, although no objection or exceptions are taken, and even though there is no appeal on the part of the infant.

[2] It was made apparent to the court by the document called a plea that W. E. Parrish was an infant. It thereupon became the duty of the court to see that the interests of the minor were protected in the suit before it. The court should not have disregarded the "so-called" plea of the infant, but should have appointed a guardian ad litem and directed him to file such pleading as was necessary.

The decree is reversed so far as it applies to W. E. Parrish, with directions to set aside the order pro confesso taken against him.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

(39 Fla. 155)

TOWNSEND et al. v. BROWN et al.
(Supreme Court of Florida. Feb. 16, 1915.)

(Syllabus by the Court.)

1. TAXATION §734—TAX SALE—DEFECTIVE PROCEEDINGS—EFFECT.

A failure to comply strictly with those provisions of tax laws which are intended for the guidance of officers in the conduct of business devolved upon them, designed to secure order,

system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void; but, where the requisites prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and a disregard of them might and generally would injuriously affect his rights, they cannot be disregarded, and failure to comply with them will render the proceeding invalid.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1408, 1470-1473; Dec. Dig. § 734.]

2. TAXATION §660—TAX SALE—PUBLICATION OF NOTICE—SELECTION OF NEWSPAPER.

The provision of the statute requiring a publication in a newspaper, "said newspaper to be selected * * * in February," is not mandatory as to the time of the selection, but the duty continues till properly performed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1338-1340; Dec. Dig. § 660.]

3. TAXATION §660—TAX SALE NOTICE—TIME OF PUBLICATION.

The provision of chapter 5596, Acts of 1907, that notice of tax sales shall be published "once each week for five consecutive weeks," does not, in view of the terms, purpose, and policy of the statute and the practical conditions to be met, require a publication covering a period of 35 days before the sale day. This statute requires a construction different from chapter 4129, Acts of 1893, construed in *Myakka v. Edwards*, decided at this term.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1338-1340; Dec. Dig. § 660.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Ejectment by Carrie A. P. Townsend and others against H. D. Brown and others. Judgment for defendants, and plaintiffs bring error. Reversed.

John C. Cooper & Son, of Jacksonville, for plaintiffs in error. Gibbons, Maxwell, McGarry & Daniel, of Jacksonville, for defendants in error.

WHITFIELD, J. In an action of ejectment brought in April, 1913, by the plaintiffs in error against the defendants in error to recover lot 1, block 33, Springfield, part of the city of Jacksonville, Duval county, Fla., a plea of not guilty was filed, and at the trial the court directed a verdict for the defendants, on which judgment was rendered, and the plaintiffs took writ of error.

The plaintiffs introduced a tax deed to Carrie A. P. Townsend dated September 25, 1912, based upon a sale for the nonpayment of taxes on the lot assessed for the year 1908, and rested; the tax deed by statute being "prima facie evidence of the regularity of the proceedings from the valuation of the land described in such deed * * * by the assessor, to the date of the deed, * * * inclusive."

For the purpose of showing the tax deed to be invalid, the defendants, over objections by the plaintiffs, were permitted to prove that the newspaper in which the notice of the tax sale was published was designated in May, 1909, and not in February, 1909, as contem-

plated by the statute, and to prove that the notice of the tax sale was published on Saturday, June 5, Saturday, June 12, Saturday, June 19, Saturday, June 26, and Saturday, July 3, 1909, and that the sale was on Monday July 5, 1909. The court directed a verdict for the defendants on the theory that the tax deed under which the plaintiffs claimed title was void, because the newspaper was not designated in February, but in May, and because the statute requires a publication of the notice of the sale to begin 5 weeks or 35 days before the day of the sale.

[1] The statute provides that:

"The list shall be published once each week for five consecutive weeks in some newspaper published in the county, * * * and said newspaper to be selected by the board of county commissioners at their first regular meeting in February of each year." Section 50, c. 5596, Acts of 1907.

A failure to comply strictly with those provisions of tax laws which are intended for the guidance of officers in the conduct of business devolved upon them, designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, will not usually render the proceedings void; but where the requisites prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and a disregard of them might, and generally would, injuriously affect his rights, they cannot be disregarded, and failure to comply with them will render the proceeding invalid. *Starks v. Sawyer*, 58 Fla. 596, 47 South. 513; *Clark-Ray-Johnson Co. v. Willford*, 62 Fla. 453, 58 South. 938.

[2] The provision of the statute requiring a publication in a newspaper, "said newspaper to be selected * * * in February," is not mandatory as to the time of the selection, but the duty continues till properly performed. A failure to select the newspaper in February, followed by a proper selection in due time for the required publication of the notice of a tax sale, apparently would not injuriously affect the taxpayer's rights; therefore the indicated delay in selecting the newspaper does not, under the circumstances shown, render the tax sale void.

[3] Publication of the notice of the tax sale is required by the statute to be "once each week for five consecutive weeks," and the controlling question to be determined is whether the quoted statutory provision as to publication requires 5 weeks or 35 days to intervene between the date of the first publication of the notice and the date of the sale.

In *Myakka Co. v. Edwards*, 67 South. 217, decided at the last term, it was held that the statute authorizing constructive service by publication of initial process "once each week for four consecutive weeks" to acquire jurisdiction of a nonresident defendant in an equity suit to remove cloud from title to land requires the first publication to be at least four weeks prior to the day on which the de-

fendant is required to appear in the suit, to which appearance day the publication has reference. The opinion on rehearing in the *Myakka Case* contains the following:

"There is a great deal of apparent conflict of opinion between the decisions of the various states on this question of publication of notice, but that contrariety of opinion arises upon the construction of the various statutes of the different states. We have found no case in which the statute construed was couched in precisely the same language as ours. Similar language occurs in many statutes. In some states the statute contains additional provisions that control or influence the construction. Some of the statutes relate to tax sales, sheriff's sales, probate proceedings, attachment, notice in elections, legislative proceedings, etc.; but in each case some word or phrase contained in the particular statute, or the character of the proceedings, leads the court to its particular conclusion."

In this case the publication is not of initial process to acquire jurisdiction of a nonresident defendant for the purpose of adjudicating his rights in property located in this state, where the publication, having reference to the appearance day to be fixed in the publication, is designed to cover a definite period of four weeks; but the publication here considered is of notice of a sale of property for nonpayment of taxes previously assessed, to which taxes the property is subject in all events, and the day to which the publication has reference must be on a Monday, while the publications are generally the latter part of the week. Section 1632 General Statutes provides that "all sales of property under legal process shall take place * * * on the first Monday in every month"; and this provision fixes the day of the month on which tax sales are to be made.

Chapter 4322, Acts of 1895, required the publication to be "once each week for four consecutive weeks." Under this provision experience demonstrated that, as the sale must take place on Monday, the publication of the notice of sale "once each week for four consecutive weeks" would not give 4 weeks' notice where the first publication occurred on a day of the week after Monday 4 weeks before the sale day; the publications being generally in weekly newspapers that for the most part in this state are published the latter part of each week. To remedy this, and to have the publication begin at least 4 weeks or 28 days before the sale day, the statute of 1897 (chapter 4515) required the notice of sale to "be published once each week in five consecutive weeks." In practice under the 1897 enactment the last of the five publications would be on a day in the latter part of the week previous to the week in which Monday, the sale day, occurred; thus securing at least 28 days' notice prior to the sale day, which must be on a Monday. This has been the practice since the 1897 statute was enacted, even though in section 558 of the General Statutes of 1906, and in section 50 of chapter 5596, Acts of 1907, the provision reads "once each week for five consecutive weeks"; there

being nothing in the statutes as amended to indicate that a change in the construction of the law or in the practice thereunder should be observed from a publication "once each week in five consecutive weeks," except the substitution of the word "for" in place of the word "in." The purpose to be accomplished, and the conditions to be met, were the same under the act of 1897, where the word "in" is used, as they are under the subsequent statutes, where the word "for" is used; and that purpose is to give to owners of land to be sold for nonpayment of taxes previously assessed at least 4 weeks' notice by a series of weekly publications, the last of which publications cannot be made in the week when the sale is required to be, for the reason that the sale is to be on Monday; in other words, the policy, shown by the statute of 1895 to require a notice covering 4 weeks by prescribing a publication "once each week for 4 consecutive weeks," could not conveniently be accomplished in practice by four publications in 4 consecutive weeks; therefore the 1897 act required the publication to be "once each week in five consecutive weeks," so that 4 weeks' notice would be given by publication even though the last publication be made the latter part of the week preceding the week in which Monday, the sale day, occurs.

When the change from "in" 4 weeks to "for" 4 weeks was made no other change in the statute affecting this subject was made, and, the purpose and policy of the statute and the practical conditions to be met remaining the same, no change in the construction and effect of the statute was intended by the mere substitution of "for" for "in" in the requirements as to publication.

As the publication here considered is not of initial process to acquire jurisdiction of a nonresident, so as to adjudicate his rights in property in this state, but it is a publication of notice of a tax sale, which is a step in the subjection of property to a tax previously assessed, and default is made in the payment of the tax to which all property similarly situated and conditioned is subject, and as the conditions to be met and the history and purpose of the statute here considered do not require a construction that the publication shall cover a period of 5 full weeks before the day to which the publication has reference as in the Myakka Case supra, but the policy and the purpose of the tax statute under the existing conditions as above stated are to give 4 weeks' notice by a publication once each week in 5 consecutive weeks in newspapers that are generally published the latter part of the week, the sale to take place in every instance on Monday, if the last publication is the latter part of the week, and the sale must take place on Monday of the next week, full 35 days' publication cannot be had, unless the publication begins so far back that, to have only five publications, no publication is to be made in the week imme-

diately preceding the week in which Monday, the sale day, occurs, or else six publications would be required, when the payment is by the statute expressly limited to five publications. It follows that 35 days' previous publication was not contemplated. Therefore the statute here considered, by its policy and its purpose to meet practical conditions, contemplates and requires only that there shall be five publications once "in" each of 5 consecutive weeks prior to the week in which Monday, the sale day, must come.

As stated in the Myakka Case:

"Some word or phrase contained in the particular statute, or the character of the proceedings, leads the court to its particular conclusion."

In this case the requirement that the sale day be on Monday and the limitation on the number of publications to be paid for, considered in connection with the purpose of the act and the character of the proceeding, control the decision here made.

The judgment is reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 260)

WISE v. STATE.

(Supreme Court of Florida. Feb. 24, 1915.)

(Syllabus by the Court.)

HOMICIDE —332—VERDICT—REVIEW—EVIDENCE.

In a prosecution for murder, alleged to have been committed from a premeditated design to effect the death of the decedent, where there is substantial evidence from which the jury may fairly find the requisite premeditated design as alleged, a verdict of murder in the first degree will not be disturbed; no errors of law being asserted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. —332.]

Error to Circuit Court, Palm Beach County; Jas. W. Perkins, Judge.

Shelby Wise, alias Shebby Wise, was convicted of murder in the first degree, and brings error. Affirmed.

Gordon R. Broome and J. E. Wideman, both of West Palm Beach, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

WHITFIELD, J. The plaintiff in error was convicted of murder in the first degree, and on writ of error contends in effect merely that there is no substantial evidence that the homicide was committed from a premeditated design to effect the death of the decedent as alleged.

There is substantial evidence that after midnight and just before the homicide the decedent and the accused, after drinking from a bottle of whisky, uttered angry words towards each other at the home of a woman with whom the accused associated; that on

leaving the house at the command or request of the accused, the decedent struck the accused on the head with a whisky bottle; that the decedent ran, followed by the accused, who cut the decedent in the neck and back, resulting in the death. No particular length of time is required within which a premeditated design to effect death may be formed and acted upon; and in this case the jury were warranted in finding that the fatal cutting in the neck and back was done from a premeditated design to effect the death of the decedent.

The judgment is therefore affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 261)

CHAPIN et al. v. FLORIDA COMMERCIAL CO. et al.

(Supreme Court of Florida. Feb. 24, 1915.)

(Syllabus by the Court.)

1. EQUITY \S 362 — PLEADING — FAILURE TO FILE REPLICATION — DISMISSAL.

An equity cause may, upon application and without notice, be dismissed by the chancellor in open court, for failure to file a replication as required by chancery rule 67.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. \S 362.]

2. EQUITY \S 362 — PLEADING — FAILURE TO FILE REPLICATION — DISMISSAL — CORPORATIONS.

Where, in a suit against a corporation, a stockholder is duly admitted as a party defendant to defend for the corporation, and presents for the corporation an answer tendering an issue going to the whole merits of the cause, and the complainant does not except thereto, or file a replication, as required by the rules, the entire cause may be dismissed on the motion of such stockholder defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 758-761; Dec. Dig. \S 362.]

Appeal from Circuit Court, Hillsborough County; F. M. Robles, Judge.

Suit by Jacob Edwards, revived in the name of Francis L. Chapin and another, as executors and trustees under the last will and testament of Jacob Edwards, deceased, against the Florida Commercial Company and others. From decree for defendants, complainants appeal. Affirmed.

N. B. K. Pettingill, of Tampa, and A. F. Odlin, of Acadia, for appellants. D. C. McMullen and Geo. P. Raney, both of Tallahassee, and E. B. Drumright and Sparkman & Carter, all of Tampa, for appellees.

WHITFIELD, J. In October, 1897, Jacob Edwards brought suit against the Florida Commercial Company for the appointment of a receiver to collect the assets of the company, to sell the same and pay a judgment previously obtained against the defendant company, and for other similar purposes. F. Q. Brown was on October 21, 1897, appointed

receiver with appropriate powers. On January 6, 1913, upon application, an order was made reviving the suit in the name of Francis L. Chapin and Robert J. Edwards, as trustees and executors under the last will of Jacob Edwards, deceased. On March 10, 1913, F. Q. Brown filed a petition in the cause stating:

"That he is a stockholder, and has for many years past been vice president and treasurer, of the Florida Commercial Company, and having custody of its seal, and, intervening in said cause for the purpose, among other things, of asking the court to revoke and vacate the order heretofore made reviving said cause, says: 'That the said Robert J. Edwards, above named as one of the executors of the last will and testament of Jacob Edwards, deceased, is the same Robert J. Edwards who purports to act as president of said Florida Commercial Company, and who empowered and authorized E. B. Drumright, as attorney for said corporation, to request an order reviving the above-entitled cause; that long prior to the death of Jacob Edwards all the indebtedness of the Florida Commercial Company to the said Jacob Edwards was fully settled and discharged, and that the said executors of the said Jacob Edwards have no interest whatsoever in the pending litigation; that under the law and the by-laws of said corporation, whenever the president is disqualified to act for and on behalf of the corporation, the duties to be performed by him devolve upon the vice president. And your petitioner further shows that, in the particular matter now pending before the court, the said president, Robert J. Edwards, is disqualified to act for and on behalf of said corporation on account of the fact that he is one of the complainants in said cause, and in the year 1902 the said Robert J. Edwards resigned and abandoned his office as president of said corporation.'

"Wherefore your petitioner prays that he may be made a party in said cause, for the purpose of protecting the rights of himself as a stockholder, and all other stockholders like interested."

A similar petition was filed by D. H. Thomas, asking that he be allowed to intervene, among other purposes, to protect "his rights as a stockholder and those of the other stockholders like interested as he." Orders were made granting the petitions, and petitioners were allowed till the rule day in April, 1913, to file pleadings in the cause. This time was subsequently extended to April 14, 1913. On April 14, 1913, D. H. Thomas by answer averred that he is and for a number of years has been a stockholder in the Florida Commercial Company; that no creditors have at any time intervened in the cause, and that there are now no creditors of the defendant company; that the issue in the cause rests solely between complainants and the defendant company; that Robert J. Edwards, one of the complainants, purporting to act as president of the defendant company, designated an attorney to appear for the defendant company herein and consent to an order reviving this cause; that D. H. Thomas files this answer in behalf of said corporation, for the reason that it would be useless to ask said corporation, through the said Robert J. Edwards, purporting to act as its pres-

ident, to raise the issues herein presented; that for a separate and distinct defense herein he alleges that the indebtedness of the company to Jacob Edwards had been paid and discharged in a manner and by the means specifically stated; that the complainants are in laches; that Robert J. Edwards, being a complainant herein, was without authority to appoint an attorney to consent to a revival of this suit. A similar answer was on April 14, 1913, filed by F. Q. Brown as stockholder.

On January 31, 1914, a petition was filed in the cause for D. H. Thomas which—

"shows unto the court that on the 11th day of March, A. D. 1913, an order was duly made by this court authorizing the said David H. Thomas, a stockholder in the defendant corporation, to intervene in said cause and file an answer on behalf of said corporation, on account of the disqualification of the officers of said corporation to act; that under and by virtue of said order, on the 14th day of April, A. D. 1913, the said David H. Thomas duly filed an answer on behalf of said corporation; and * * * that from that time up to the present the complainants in said cause have failed to either except to said answer or to file a replication thereto, and that under the rules of this court the defendant is entitled to have said cause dismissed. Wherefore he prays that this court may render an order dismissing said cause."

The court made the following order on the petition:

"The above-entitled petition coming on to be heard, and it appearing to the court that the facts therein stated are true:

"It is, on this 31st day of January, A. D. 1914, in open court, duly ordered and adjudged that said cause be and the same is hereby dismissed."

An application to vacate the dismissal and to reinstate the cause was denied. From these orders the complainants, Chapin and Edwards, as executors and trustees under the will of Jacob Edwards, appealed. Errors are assigned on the dismissal of the bill of complaint and on the denial of the motion to vacate the dismissal and to reinstate the cause.

[1] It is contended for appellants: (1) That the rules regulating procedure in chancery causes have not been followed in dismissing the bill of complaint, in that the order of dismissal was not entered *as of course* on a rule day by the clerk under equity rules 3 and 67, but the order of dismissal was granted by the judge in open court, without the notice required by equity rule 5; and (2) that, as Thomas was merely an intervenor to protect his interests, and those of others similarly interested, as stockholders in the defendant corporation, the bill of complaint should not on his motion have been dismissed as to the other defendants, who did not ask for a dismissal. The pertinent provisions of the chancery rules are as follows:

"Rule 2. The circuit courts, as courts of equity, are by law deemed always open, and may dispose of all motions and grant all orders and render all decrees, whether interlocutory or final, either in term time or vacation. The clerk's office shall be open at all times for the

purpose of receiving, entering, entertaining, and disposing of all motions, rules, orders and other proceedings, which are grantable of course and applied for, or had by the parties or their solicitors, in all causes pending in equity, in pursuance of the rules hereby prescribed.

"Rule 3. All motions, rules, orders, decrees and other proceedings made and directed at chambers, or on rule days at the clerk's office, whether special or of course, shall be entered by the clerk in an order book, to be kept at the clerk's office, on the day when they are made and directed, which book shall be open at all office hours to the free inspection of the parties in any suit in equity, and their solicitors; and except in cases where personal or other notice is specially required or directed, such entry in the order book shall be deemed sufficient notice to the parties and their solicitors, without further service thereof, of all orders, rules, acts, notices and other proceedings, entered in such order book, touching any and all matters in the suits to and in which they are parties and solicitors. No notice of the filing of any answer, plea, demurrer, replication or other paper shall be necessary to be served upon the opposite party or his solicitor, unless such notice is directed by special order of the judge; and notice to the solicitors shall be deemed notice to the parties for whom they appear and whom they represent, in all cases where personal notice on the parties is not otherwise specially required.

"Rule 4. All motions and applications in the clerk's office for the issuing of mesne process and final process to enforce and execute decrees; for filing bills, answers, pleas, demurrers and other pleadings; for making amendments to bills and answers; for taking bills pro confesso; for filing exceptions, and for other proceedings in the clerk's office, which do not by law or by the rules of the court require an allowance or order of the court or judge, shall be deemed motions and applications, grantable of course by the clerk of the court. But the same may be suspended or altered or rescinded by the judge or court upon special cause shown.

"Rule 5. All motions for rules or orders and other proceedings, which may not be grantable of course, may be made at any time before the judge of the court, due notice being given to the adverse party, and if the adverse party or his solicitor does not appear on the day named in the notice or order of the judge fixing the day, or shall not show good cause against the same, the motion may be heard by the judge and granted or refused, as the right of the matters may seem to him to require."

"Rule 67. Whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter; and in all cases where the general replication is filed, the cause shall be deemed to all intents and purposes at issue, without any rejoinder or other pleading on either side. If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order as of course for a dismissal of the suit; and the suit shall thereupon stand dismissed, unless the court or judge shall, upon motion for cause shown, allow a replication to be filed nunc pro tunc, the plaintiff submitting to speed the cause, and to such other terms as may be directed."

Section 1874, Gen. Stats., provides that:

"General replications to answers shall be filed at the rule day next succeeding the filing of the answer."

Rule 3 relates to the effect of orders, etc., that are entered by the clerk in an order book, as notice to the parties and their solicitors, of the orders, etc., as made without further service thereof. Rule 4 relates to

orders, etc., that are "grantable of course by the clerk of the court," and includes those "which do not by law or by the rules of the court require an allowance or order of the court or judge." Rule 5 relates to notice to be given of "proceedings which may not be grantable of course." Rule 67 provides that, if a plaintiff shall omit or refuse to file on or before the next succeeding rule day a replication to an answer duly filed and not excepted to, "the defendant shall be entitled to an order as of course for a dismissal of the suit." Rule 67 expressly provides that the order of dismissal shall be "as of course," which excludes the operation of rule 5, requiring notice to be given in "proceedings which may not be grantable of course." Such "order as of course for a dismissal of the suit" does not "require an allowance or order of the court or judge"; but it may be made by the judge, even though it may also "be grantable of course by the clerk of the court," "on rule days." If the clerk may on a rule day, and without notice to the opposite party being first given, enter an order of dismissal when "the plaintiff shall refuse or omit to file a replication within the prescribed period," certainly the judge, on such omission or failure of the plaintiff being shown, may in open court, and without notice being given, grant the order of dismissal; and the rules contemplate the granting of such an order by the judge at chambers or in open court.

No exceptions to the answers were filed, and the plaintiff having omitted to file any "replication within the prescribed period," the defendants who had answered were "entitled to an order as of course for a dismissal of the suit" under rule 67, and such order could be made without notice by the judge in open court.

It is not contended that the court in this chancery cause was without power to admit, or that it erred in admitting, severally Brown and Thomas, as intervening stockholders in the defendant corporation, to defend in the suit "for the purpose of protecting his rights as a stockholder and those of other stockholders like interested."

[2] But it is contended that, on the motion of Thomas, the suit should not have been dismissed as to the other defendants. It is apparent that, if the complainants are in default and have no peculiar equity justifying their conduct in the cause, they cannot avoid the operation of the rules applicable to the proceeding, when such rules are invoked by a defendant who acts in the cause for the corporation defendant, particularly where the material issue tendered, and on which tender the complainants defaulted, goes to the whole merits of the entire subject-matter of the suit; the defendant tendering such issue, and those represented by him being all who are interested in the entire subject-matter in controversy. A stockholder is admitted as a party to defend, not for himself, but

for the corporation, and, whether the corporation defends or not, the event of the suit is for or against the corporation, not the stockholder.

In this case the bill of complaint was filed in 1897, on which a receiver was appointed. The corporation did not plead to the bill, but no decree pro confesso was entered. In 1902 the complainant, Jacob Edwards, died, apparently without taking any action in the premises. His executors took no steps until 1913, when they asked for a revival of the suit; it being averred that one of the reviving complainants, purporting to act as the president of the defendant company, authorized an attorney to appear for the defendant company and acquiesce in the revival of the suit. Upon petition, D. H. Thomas, a stockholder, alleging that Robert J. Edwards, one of the complainants who revived the suit, and who purports to be president of the defendant corporation, was by virtue of being a plaintiff disqualified to act for and on behalf of the defendant corporation, that all claims of the complainant's testator, Jacob Edwards, were duly settled and discharged prior to the death of the testator, and that there is now no existing claim against said corporation whatever, prayed to be allowed to intervene in the cause, among other things, "for the purpose of protecting his rights as a stockholder, and those of other stockholders like interested as he." The petition was granted. The defendant D. H. Thomas by answer averred that no creditors had intervened in the cause, that there are no creditors of the defendant company, that the issue in the cause is solely between the complainants and the defendant company, but Robert J. Edwards, one of the complainants, purporting to act as president of the defendant company, designated an attorney to appear for the defendant company and consent to the revival of the cause. Therefore David H. Thomas, the defendant, "filed his answer in behalf of said corporation, for the reason that it would be useless to ask said corporation, through the said Robert J. Edwards, purporting to act as its president, to raise the issues herein presented," and avers that the "receiver, in behalf of the defendant company above named, its stockholders and creditors, paid off and discharged all claims held by said complainant, Jacob Edwards, against said defendant company," as specifically stated in the answer, and that Jacob Edwards accepted such settlement "in full accord and satisfaction of all indebtedness existing in favor of said Edwards and against said defendant Florida Commercial Company." The answer prays for a decree that the indebtedness has been paid, and that the complainants have no interest in the property, assets, and effects of the defendant company. A similar answer was filed by F. Q. Brown, another stockholder, who was the receiver mentioned as having paid the debt. Both

answers being filed on behalf of the defendant corporation, tendering a material issue going to the entire merits of the cause, and such issue not being accepted or in any way contested as required by the rules, the complainants were in default, remaining in default for several months, and as the defendant Thomas represented all stockholders of the defendant corporation and presented a full defense to the entire suit, applicable to and made on behalf of the defendant corporation and all interested parties who could be defendants, the motion made by Thomas, an intervening stockholder, admitted as a defendant and allowed to "file an answer on behalf of said corporation, on account of the disqualification of the officers of said corporation to act," was properly granted, dismissing the cause for failure for several months to file a replication under rule 67 of the circuit court rules; no special equity appearing in favor of the complainants, who were in laches in not accepting an issue duly tendered going to the entire suit. The motion to dismiss was not made and granted for failure to prosecute the suit, but for failure to file a replication, as required by the statute and the rules of court. Such dismissal not being on the merits, no notice of the motion was required as of right, and the rules make such dismissal to be "as of course."

Affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 210)

STATE ex rel. RAILROAD COM'RS v. LOUISVILLE & N. R. CO.

(Supreme Court of Florida. Feb. 23, 1915.)

(Syllabus by the Court.)

1. CARRIERS \S 10—FREIGHT—RULES GOVERNING TRANSPORTATION—APPLICATION.

Rules 3, 15, and 17 of the Rules Governing the Transportation of Freight, promulgated by the State Railroad Commission, do not contemplate that a railroad common carrier, having switching and terminal facilities for its own use, at a particular point, shall be forced, at least without adequate necessity, compensation, and protection, to collect and distribute within its own terminal and switching limits for a competing line, car loads of freight destined to or arriving from points reached by its line; such carrier having no part of the line haul or compensation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 12, 14-20; Dec. Dig. \S 10.]

2. MANDAMUS \S 10—RIGHT—GROUNDS FOR QUASHING—RULES OF RAILROAD COMMISSION.

Where the rules of the Railroad Commission as validly construed do not require the service commanded by an alternative writ of mandamus, and such service cannot lawfully be enforced, the alternative writ will be quashed on appropriate motion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. \S 10.]

Mandamus by the State, on the relation of the Railroad Commissioners, against the Louisville & Nashville Railroad Company. Writ quashed.

F. M. Hudson, of Tallahassee, for relators. Blount & Blount & Carter, of Pensacola, for respondent.

WHITEFIELD, J. The alternative writ of mandamus issued by this court herein commands the respondent railroad company to observe and obey rules 3, 15, and 17 of the Rules Governing the Transportation of Freight, promulgated by the State Railroad Commission, in this: That the respondent (1) shall withdraw from its tariff "regulations governing terminal arrangements at Pensacola, Florida, all rules and provisions which eliminate, prevent or prohibit the switching by the said company of traffic offered by connecting lines, or for delivery to connecting lines at Pensacola, Florida, originating at or delivered to points on or via the Louisville & Nashville Railroad"; (2) "shall, on demand, place cars at warehouses or on side tracks or other points on its line (at Pensacola) to be loaded for shipment via connecting lines (at Pensacola) to points reached by the Louisville & Nashville Railroad"; and (3) "shall transport, switch and transfer car load shipments and other traffic offered by connecting lines at Pensacola, Florida, or offered for delivery to connecting lines at Pensacola, Florida, which originate at or are destined to points on or via the Louisville & Nashville Railroad; and that the Louisville & Nashville Railroad Company shall receive any such cars from any connecting railroad for such purposes, and in all respects fully to comply with, observe and obey the said" rules 3, 15, and 17 of the Rules Governing the Transportation of Freight—or that respondent shall on a day fixed show cause for not obeying the writ.

The respondent moved to quash the alternative writ, which motion is, in effect, a demurrer, on numerous specific grounds which in effect are that the writ is vague, indefinite, uncertain, and insufficient; that the rules and the writ require respondent to do more than the law requires, and more than the Railroad Commission has the power to require, and are therefore invalid as to the command; that the requirement sought to be enforced unlawfully burdens interstate commerce and violates the respondent's property rights that are secured by the state and federal Constitutions.

[1] Rules 3, 15, and 17 referred to are as follows:

"3. No common carrier shall decline or refuse to act as such to transport any article proper for transportation, and a failure to transport such article within a reasonable time after the same has been offered for transportation shall be deemed a violation of this rule. The term 'common carrier' is used in this rule

in the sense defined in the statutes of the state of Florida relating to the railroad commissioners, and this rule is to be construed as applying to common carriers under the jurisdiction of the railroad commissioners."

"15. A charge of not more than two dollars per car, without regard to its weight or contents, will be allowed, except to the railroad having the line haul of the same, for transporting, switching or transferring a loaded car from any point on any railroad to a connecting railroad or to any warehouse, side track or other point within the switching limits of the place; and no railroad shall decline or refuse to transport, switch or transfer any such car or to receive it from any connecting railroad for such purposes. The switching limits of any place, within the meaning of this rule, shall be the switching limits usually operated there, but in no case less than three miles. No railroad shall reduce any of its switching limits without first obtaining the approval of the railroad commissioners."

"When in the transfer, switching or transportation of a car between such points, it is necessary to pass over the track or tracks of any intermediate railroad or railroads, said maximum charge of two dollars shall be equitably divided between the railroads at interest, excluding that having the line haul."

"When a charge is made for the transfer, switching or transportation of a loaded car between such points, no additional charge shall be made for the accompanying movement of the empty car in the opposite direction. No charge whatever shall be made by a railroad having the line haul for placing, for loading an empty car at any warehouse or other point on its own line or side track, or for switching the loaded car to or from the same either for delivery or for transportation."

"Provided that this rule shall not interfere with any prevailing legal rate for the transportation of freight between different stations; and shall not apply to any freight that does not pay a direct freight transportation charge in connection with a switching charge."

"17. The right of a shipper to direct by what line or lines of railroad in this state his shipments shall be transported within the state of Florida shall be observed by all railroads in this state."

Rule 15 relates to compensation for switching loaded cars, and provides that the carrier shall not "decline or refuse to transport, switch or transfer any such car, or to receive it from any connecting railroad for such purposes." Rule 3 announces the duty of the common carrier "to transport any article for transportation," and rule 17 prescribes "the right of a shipper to direct by what line or lines of railroad * * * his shipments shall be transported within the state of Florida." The service commanded is to be rendered "at Pensacola, Florida."

The provision of rule 17 as to the right of a shipper to direct by what line his shipments shall be transported, apparently relates to *transportation* or a *line haul* and not to terminal or switching movements; and rule 15 expressly provides that it "shall not apply to any freight that does not pay a direct freight transportation charge in connection with a switching charge." This latter provision has reference to roads having a part of the transportation, or line haul, since the rule also expressly provides that:

"No charge whatever shall be made by a railroad having the line haul for placing, for

loading an empty car at any warehouse or other point on its own line or side track, or for switching the loaded car to or from the same either for delivery or transportation."

These rules do not contemplate that a carrier, having switching and terminal facilities for its own use, at a particular point, shall be forced, at least without adequate necessity, compensation, and protection, to collect and to distribute, within its own terminal and switching limits for a competing line, car loads of freight destined to or arriving from points reached by its line, such carrier having no part of the line haul or compensation. Such a requirement would, for the purpose of originating and delivering at a point reached by competing lines, in effect give to a carrier for a mere switching charge the use for its own purposes of its competitor's terminal facilities, equipment, and motive power, thereby amounting to a taking of property in violation of organic rights, within the principle announced in *Louisville & N. R. Co. v. Central Stockyards Co.*, 212 U. S. 132, 29 Sup. Ct. 246, 53 L. Ed. 441, and *Central Stockyards Co. v. Louisville & N. R. Co.*, 192 U. S. 568, 24 Sup. Ct. 339, 48 L. Ed. 565. This principle has not been departed from by the federal Supreme Court, the final arbiter herein.

In *Grand Trunk R. Co. v. Michigan Railroad Commission*, 231 U. S. 457, 34 Sup. Ct. 152, 58 L. Ed. 310, the service was not a switching movement, but a *transportation* service in which there was *unlawful discrimination*, the points of origin and destination both being within a city, and at points reached by team tracks or other sidings upon the carrier's roads. In this case the city of Pensacola is only one of the terminal of the freight included in the service here required between points reached by the respondent carrier and its competitors, the respondent only having the terminal and switching facilities, and will get no part of the charge for the transportation or line haul, but only switching charges.

This case is essentially different from *Chicago, Milwaukee & St. Paul Railway Co. v. State of Iowa*, 233 U. S. 334, 34 Sup. Ct. 592, 58 L. Ed. 988, where the order sought to be enforced merely required the continuance of a former practice by receiving cars already loaded and in suitable condition when tendered by a connecting carrier, not for delivery by switching, but for further reshipment to other parts of the state.

In *Pennsylvania Co. v. United States* (D. C.) 214 Fed. 445, the order related to an *arbitrary* and *unlawful discrimination* in service being rendered by receiving cars "at a place where the common carrier has established a point of interchange." In *Thompson v. Missouri, K. & T. Ry. Co.*, 103 Tex. 372, 126 S. W. 257, 128 S. W. 109, the service was a transportation line haul, a portion of which the initial carrier had to the connecting point, away from the initial point.

In Public Service Commission of Maryland v. Northern Cent. Ry. Co., 122 Md. 355, 90 Atl. 105, the service was not a terminal delivery, but "further transportation," and for "reasonable compensation" to be provided. In Chicago, I. & L. Ry. Co. v. Railroad Commission of Indiana, 175 Ind. 630, 95 N. E. 864, the "carrier is not required to do switching service, if it is able and willing to transport the freight, with reasonable dispatch, at the same rate as that of the competitor," and "for switching service a carrier is authorized to impose and collect a 'reasonable transportation charge,' * * * and this would include more than the labor cost of moving the car, and might include the element of a return on the capital invested in terminal facilities."

[2] As a valid construction should be given to the rules, and as when validly construed rules 3, 15, and 17 do not require the service here sought to be enforced, the motion to quash the alternative writ is granted.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(63 Fla. 225)

WILLIAMS et al. v. BAILEY et al.

(Supreme Court of Florida. Feb. 23, 1915.)

(Syllabus by the Court.)

1. WITNESSES \S 275—CROSS-EXAMINATION—EXTENT—ATTORNEY AND CLIENT.

Where an attorney at law seeks the specific performance of a verbal agreement with his client for the conveyance of land, and testifies in his own behalf as to the existence of such agreement, it is permissible, on cross-examination, to inquire fully into the transaction, to ascertain the consideration, the relation the parties bore to each other, and whether the requisite good faith and fair dealing was practiced by the attorney. A wide latitude of cross-examination is allowed.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. \S 275.]

2. SPECIFIC PERFORMANCE \S 8—LAND SALE CONTRACT—DISCRETION.

Specific performance of a contract for the sale of land is a matter to be determined by the court in the exercise of a sound reasonable discretion, after considering and applying to the facts of the particular case the established principles of equity jurisprudence that are appropriate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 17, 18; Dec. Dig. \S 8.]

3. SPECIFIC PERFORMANCE \S 121 — PAROL CONTRACT TO CONVEY LAND—EVIDENCE—REQUISITES.

The degree of proof required to establish the existence of a parol agreement to convey lands in a proceeding to enforce specific performance of such agreement is greater than a mere preponderance of evidence. The evidence should be clear, full, and free from suspicion.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. \S 121.]

4. FRAUDS, STATUTE OF \S 129—PAROL CONTRACT TO CONVEY LAND—AVOIDANCE OF STATUTE—SUFFICIENCY OF POSSESSION.

Where possession of the land is relied on as part performance of a parol agreement to convey it, in order to take the agreement out of the statute of frauds, it should appear, not only that possession was taken of the land in pursuance of the contract, but that the possession was exclusive, notorious, and continuous.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 287-292, 303, 306-308, 310-312, 314, 318-320, 322, 323, 325, 326; Dec. Dig. \S 129.]

5. ATTORNEY AND CLIENT \S 125—TRANSACTIONS WITH CLIENT—FAIRNESS—BURDEN OF SHOWING.

In transactions between attorney and client, where the former acquires the subject-matter of the litigation, there is no presumption of innocence or improbability of wrongdoing on the part of the attorney, but the burden is upon him to establish the utmost of good faith and fairness on his part in such transactions; he has the responsibility of proving that his diligence to do the best for his client has been as great as if he were only an attorney dealing for his client with a stranger.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 250-263; Dec. Dig. \S 125.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Suit by J. A. Williams and another, co-partners doing business as Williams & Hardee, and another, against Annie E. Bailey and another. From decree for defendants, complainants appeal. Affirmed.

Robert E. Davis, of Gainesville, for appellants. W. S. Broome and Evans Halle, both of Gainesville, for appellees.

ELLIS, J. This was a suit brought in the circuit court for Alachua county, in equity, by the appellants against the appellees for the specific performance of a parol agreement to convey lands.

The bill alleges: That the appellee Annie E. Bailey, on or about the 16th day of April, 1913, sold to the appellants Williams and Hardee all her title, interest, and claim to certain lands in Alachua county, Fla., described as follows: The S. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 24, and the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$, of the N. W. $\frac{1}{4}$, of section 25, all in township 10 south, range 15 east, containing 200 acres of land, more or less. That Annie E. Bailey was the holder of the legal title to the lands, and promised to execute and deliver to Williams and Hardee a quitclaim deed thereto for the consideration of \$300 and the further consideration of a quitclaim deed, to be executed and delivered to her by J. A. Williams and wife and L. B. Hardee to certain other lands, to wit, the S. W. $\frac{1}{4}$ of section 7 in township 10 south, range 19 east, in Alachua county, containing 160 acres, more or less. That the appellants Williams and Hardee paid to the appellee Annie E. Bailey the sum of \$300 by

check, in which was included the further sum of \$128.39, which was due to her as guardian of her minor children from the sale of certain lands, upon a final and complete settlement with her, making the total amount named in the check \$428.39. That the check was accepted and paid. That on the same day J. A. Williams and wife and L. P. Hardee executed and delivered to Mrs. Bailey their quitclaim deed to the 160-acre tract. That while the consideration in that quitclaim deed is expressed to be \$193.04, the real consideration as known to Mrs. Bailey was her right, title, interest, and claim in the 200-acre tract. That after the said agreement appellants Williams and Hardee, with the consent of Mrs. Bailey, entered into the possession of the 200-acre tract; that they carried out in every particular their part of the contract with Mrs. Bailey, and on the 17th day of February, 1913, presented to her a quitclaim deed to themselves for the 200-acre tract, and requested her to execute it, but she refused, and still refuses, to comply with the request. That appellants Williams and Hardee have received no consideration from Mrs. Bailey for the \$300 paid to her and the quitclaim deed to the 160-acre tract, other than her agreement to quitclaim to them the 200-acre tract. That on June 14, 1912, Mrs. Bailey sold to R. S. Tucker the 160 acres of land. That on December 2, 1912, appellants Williams and Hardee contracted with W. L. Abbott, one of the appellants, to sell to him the 200 acres of land which Mrs. Bailey had agreed to convey to them. That they delivered possession of the land to W. L. Abbott, who has ever since remained in possession of it. That W. L. Abbott has made permanent improvements upon the lands to the amount of \$500. That after the agreement made by Mrs. Bailey with Williams and Hardee to quitclaim to them the 200 acres, and after they had delivered possession of the land to W. L. Abbott, and after he had expended a large sum of money in improvements upon the premises, and while he was in possession of the land, Mrs. Bailey, on January 11, 1913, sold the 200-acre tract to Thomas W. Fielding, one of the appellees, and on the same day commenced her suit in ejectment for the use of Thomas W. Fielding against W. L. Abbott to "obtain possession" of the said land. That in March, 1913, W. L. Abbott filed his plea of not guilty in that suit, and a plea setting up the equitable title of Williams and Hardee. That Mrs. Bailey is the head of a family, and has not sufficient property to satisfy a judgment against her if complainants should obtain one against her, in an action at law. That Williams and Hardee have no adequate defense at law in the action of ejectment, if they should be made defendants therein, although they have a complete equitable defense, but which is not available at law.

There are other allegations in the bill, to

the effect that Williams and Hardee have not sufficient time before the trial of the ejectment suit to have their legal title to the lands "established in a court of equity"; that a judgment in the ejectment suit in favor of the plaintiff therein would create a cloud on the title of Williams and Hardee to the lands; that a judgment in the ejectment suit in favor of the plaintiff for mesne profits would work an irreparable injury upon the complainants; that the plaintiff in the ejectment suit is seeking to obtain an unconscionable advantage over the complainant in the bill by trying to secure the immediate possession of the land. The bill waives answer under oath, and prays for an injunction to restrain the plaintiffs in the action of ejectment from the further prosecution of that suit; that Annie E. Bailey be required to execute and deliver to Williams and Hardee a good and sufficient quitclaim deed to the 200-acre tract, or that a decree be made vesting in Williams and Hardee all the right, title, claims, and interest that Annie E. Bailey had on the 16th day of April, 1913, in the said lands; for general relief and subpoena. The complainants on May 13, 1913, filed the affidavits of J. N. Williams and L. P. Hardee and W. L. Abbott in support of the bill. Annie E. Bailey and Thomas W. Fielding filed separate answers. The answer of Annie E. Bailey denies the agreement to sell the land referred to as the 200-acre tract; that on the 16th day of April, 1912, and long prior thereto, Williams and Hardee were representing her as attorneys at law in "many matters, and particularly in suits and matters involving title to property belonging to her, and in which she claimed an interest"; that Williams and Hardee did not give her information about her property and her rights therein that she was entitled to receive from them, but on the contrary, they failed to give her such information as she was entitled to receive from them; that they, with intent to obtain her property, advised her that it was necessary for her, as guardian of her minor children, to convey to them the 200-acre tract; that she, relying upon the advice of her counsel, executed the deed as guardian as aforesaid; that at the time she executed the deed as guardian, the lands described therein belonged to her in her own right, but that Williams and Hardee sought by that means to obtain the title from her, believing at the time that by that deed they obtained title to the lands; that she executed the deed because Williams and Hardee, her attorneys, told her it was necessary to protect her and her property.

The answer admits that Annie E. Bailey was the holder of the legal title to the land on the 16th day of April, 1912, but denies that she agreed to convey the same to Williams and Hardee for \$300, or for any consideration, and avers that she owned the land when she conveyed the same to Thomas W. Fielding. She admits receiving the check

for \$428.39 from Williams and Hardee, but denies that any part of that sum was paid to her for or in part payment for the land, but that the check was given to her as part payment for money that Williams and Hardee as her attorneys had collected for her. She admits that J. A. Williams and wife and L. P. Hardee executed a quitclaim deed to her for the 160-acre tract, but denies that it was by way of consideration for a quitclaim deed by her to them for the 200-acre tract; that the 160-acre tract rightfully belonged to her at the time Williams and Hardee quitclaimed to her; that Williams and Hardee never entered into possession of the 200-acre tract with her knowledge and consent, and denies that they ever entered into possession of the land. She admits that she refused to execute a quitclaim deed to them in February, 1913, when they requested her to do so; that she did sell the 160-acre tract as alleged in the bill, but Williams and Hardee were not injured thereby. She denies the agreement between Williams and Hardee and Abbott; denies that Abbott took possession of the land and made improvements thereon. She admits conveying the 200-acre tract to Fielding; that he paid her a valuable consideration therefor; denies the ejectment suit so far as there are any allegations in the bill that she brought it; and says that if there is such a suit in her name, it is for the use of Fielding. She admits that she is the head of a family, but denies that she is insolvent.

The answer of Thomas W. Fielding denies all allegations of the bill except that Annie E. Bailey executed a warranty deed to him on January 11, 1913, as alleged, which allegation he admits. His answer avers that at the time of such purchase he had no notice that any person other than Mrs. Bailey had any claim to or on the land, and that the complainants have no interest in the land, nor any title thereto. A demurrer to the bill is incorporated in the answer on the grounds: That the bill is without equity; that this court has no jurisdiction; that complainants have an adequate remedy at law; that there was no contract in writing between Mrs. Bailey and Williams and Hardee for the conveyance of the land by her to them, and that the bill affirmatively shows this to be true; that the possession of the land by Abbott was not notice of the alleged equitable title of Williams and Hardee, but was presumed to be the possession of Mrs. Bailey, the holder of the legal title; that the bill does not show that he had notice of the agreement between Mrs. Bailey and Williams and Hardee; that Williams and Hardee are not proper parties complainant because they had, before filing the bill, conveyed their interest in the land to Abbott; that Williams and Hardee never attempted to obtain a conveyance from Mrs. Bailey until after the ejectment suit was brought, and that the bill contains no offer to do equity, and shows

no reason for the granting of an injunction as prayed.

On May 13, 1913, an order was made granting a temporary injunction as prayed, upon the complainants' entering into a bond in the sum of \$1,000, with sufficient sureties to be approved by the clerk, conditioned upon paying the defendant all costs, damages, and expenses that he may sustain if the injunction be dissolved, or the bill dismissed on final hearing. The bond was filed and approved by the clerk, and an injunction was issued on June 7, 1913, enjoining the defendants Annie E. Bailey and Thomas W. Fielding from further prosecuting the ejectment suit to obtain possession of the 200-acre tract.

Replications were filed to the answers of the defendants, and on July 1, 1913, an examiner was appointed to take testimony. In December, 1913, the examiner filed his report, and on March 5, 1914, the cause was set down by defendants for final hearing. The complainants and defendants filed motions before the chancellor, insisting upon their respective objections made before the examiner to the reception and rejection of evidence. These motions were heard and disposed of by the chancellor, and a final decree was made and entered, finding the equities "are not with the complainants," dissolving the injunction theretofore issued, and dismissing the bill at complainants' costs. From this decree the complainants appealed.

From the evidence in this case it appears that Annie E. Bailey was once the wife of J. S. Bailey, and divorced him. J. S. Bailey died, leaving about 16 children, many of whom were minors, 4 of whom were minor children by his wife Annie. During the year 1909 he conveyed to J. D. Guthrie the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 24, and the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, of section 25, township 10 south, range 15 east, in Alachua county, hereafter referred to as the 200-acre tract. This is the tract over which the litigation occurred. There was another tract, hereafter called the 160-acre tract, described particularly as the S. W. $\frac{1}{4}$ of section 7, township 10 south, range 19 east, in Alachua county, of which he appears to have died seised and possessed. Bailey left a will, the contents of which was not given in evidence. Roland and Holt were executors. In —, 1910, J. D. Guthrie conveyed the 200-acre tract to Annie E. Bailey, hereafter referred to as Mrs. Bailey, who is one of the appellees here. During June, 1911, Mrs. Bailey obtained a judgment at law against Roland and Holt as executors of the will of J. S. Bailey, in the sum of \$4,145, and court costs amounting to \$73.40.

The complainants Williams and Hardee, two of the appellants here, are attorneys at law, and as such represented Mrs. Bailey in her suit against the executors and in looking after her interests in the estate as guardian of her minor children, for which service it

does not appear what compensation they were to receive. On April 6, 1912, the sheriff of Alachua county, under instructions from Williams and Hardee, levied the execution which issued upon Mrs. Bailey's judgment, upon the two tracts of land, and after advertising the sale, sold them at public outcry. Williams and Hardee became the purchasers of the 200-acre tract for \$100, and obtained a sheriff's deed therefor, while the 160-acre tract was purchased by them for Mrs. Bailey. Prior to this sale Mrs. Bailey had obtained quitclaim deeds from many of the heirs of J. S. Bailey through their guardians to the 200-acre tract, and Williams and Hardee had obtained quitclaim deeds to the 160-acre tract. Mrs. Bailey protested to the sheriff against the sale of the lands under the execution, and prior to the sale went with him to the office of Williams and Hardee to talk over the matter, where she seemed to be convinced by Williams and Hardee that it was proper to sell the land under the execution, and the sale was made in due course with the result as stated. Prior to this sale Mrs. Bailey, upon the request of Williams and Hardee, as guardian of her four minor children, executed a deed to Williams and Hardee to the 200-acre tract, and the 160-acre tract, Williams and Hardee acting as her attorneys in securing the order of court. It seems that Williams and Hardee also acted as attorneys for the guardians of some of the minor children of Bailey in their claims against the estate. It seems that these claims were adverse to the claim of Mrs. Bailey to the 200-acre tract, while they were equally interested with Mrs. Bailey's four children in the 160-acre tract, and it was through Williams and Hardee, her attorneys, that Mrs. Bailey secured quitclaim deeds from some of the heirs of J. S. Bailey to the 160 acres. Roland and Holt, the executors of the will of J. S. Bailey, had on hand \$891.96 in money belonging to the estate. After the judgment was obtained by Mrs. Bailey against them, Williams and Hardee collected that money, Mrs. Bailey receiving only \$128.39, which was paid to her on April 16, 1912, by Williams and Hardee by check. This check was for the sum of \$428.39, and included the \$300 which they claim was the price agreed upon between them and Mrs. Bailey to be paid in money for the 200 acres. At the same time they executed in her favor a quitclaim deed to the 160 acres, which they claim was the remainder of the consideration for the 200 acres to be quitclaimed by her to them. At that time they took from her the guardian's deed to both tracts as stated.

In August, 1912, Williams and Hardee entered into a contract with W. L. Abbott, one of the complainants below, to sell him the 200-acre tract. Abbott went upon the place, built some houses, and repaired fences and spent in improvements about \$500. Mrs. Bailey at the time was living on the place, her son had planted a crop on it, but had

abandoned it, and she was in charge of the crop and pasturing her stock on the land. The price which Abbott agreed to pay Williams and Hardee for the place was \$2,000; he paid \$10 cash and went on the place and made the improvements as stated. In ———, 1912, Mrs. Bailey conveyed the 200 acres to Thomas W. Fielding by warranty deed, for a consideration of \$400, and on the same day Fielding instituted an action of ejectment in the circuit court for Alachua county, in the name of Mrs. Bailey for his use, against Abbott, for the possession of the 200 acres. This suit was without the knowledge of Mrs. Bailey.

It is contended by Williams and Hardee, and such contention is the basis of this suit, that they entered into a parol agreement with their client Mrs. Bailey, whereby for the consideration of \$300 in money and a quitclaim deed from them to her for the 160-acre tract she would execute a quitclaim deed to them for the 200-acre tract; that pursuant to such agreement they paid her the \$300 which was included in the check mentioned, and executed and delivered to her the quitclaim deed to the 160 acres; that they took possession of the 200 acres, but she refused to comply with the agreement on her part, and has not executed the quitclaim deed to them for the 200 acres. This suit is to compel the specific performance of that alleged agreement. Mrs. Bailey denies the existence of such an agreement; denies that she authorized them to take possession of the land; avers that she was in possession during the year 1912, had never surrendered possession to any one, nor authorized any one to go on the land and make improvements; that the \$300 paid to her by Williams and Hardee was collection by them for her from the sale of timber on the 160-acre tract; that in executing the guardian's deed to them for the 200-acre tract and in consenting to the sale of the land under the execution, she acted according to their advice as her counsel, and that she has never received any part of the \$891.96 except the sum of \$128.39, included in the check for \$428.39 paid to her on April 16, 1912, and \$50 at some prior time; that she never signed any agreement in writing, nor entered into one orally with them to convey to them the 200-acre tract.

[1] Many of the assignments of error are based upon the defendants' objections to questions propounded by solicitors for the defendants to complainants' witnesses. These questions sought to elicit from L. P. Hardee and J. A. Williams, who constituted the law firm of Williams & Hardee, who were complainants below and witnesses in their own behalf, information as to their professional relations with Mrs. Bailey, the manner of the discharge of their duties to her, and the particular details of the various transactions which led up to and culminated in the alleged contract between them and Mrs. Bailey for the purchase by them of the 200-acre tract.

We do not regard the information sought by these questions as either "improper, immaterial, or irrelevant," nor that the questions were improper in cross-examination. These two witnesses in their own behalf testified concerning an agreement which they said Mrs. Bailey had made with them for the conveyance of certain lands, and which they were seeking to enforce. It was permissible to inquire fully into this transaction to discover its faults, if any, to inquire into the consideration, to ascertain the relations the parties bore to each other, and whether the requisite good faith and fair dealing had been practiced. All of this went to the very vitals of the agreements about which the witnesses testified. In such matters a wide latitude of cross-examination is allowed. If the evidence sought could throw light on the transaction, it was admissible. *Volusia County Bank v. Bigelow*, 45 Fla. 638, 83 South. 704.

The above was a case involving fraud, and the court said:

"Especially should extreme latitude be permitted on the cross-examination of the party asserting title under a sale to her, alleged to be fraudulent."

The court quoted approvingly from *Zerbe v. Miller*, 16 Pa. 488, text 495, in which it was said:

"This latitude can never injure an honest man. Covin and deceit avoid the light; but fair dealing invites investigation."

But the case at bar is analogous. The relations of attorney and client existing between Williams and Hardee and Mrs. Bailey exacted from them the very highest degree of good faith in the minutest detail of this transaction. It was therefore important to show the relation and examine the transaction closely. If there was any circumstance which discredited their good faith, it was proper to bring it to light. *Fields v. State*, 46 Fla. 84, 35 South. 185.

[2] The record in this case leaves some very salient and important points in doubt which it was absolutely necessary for the complainants to make clear, not by a preponderance of the evidence merely, but indisputably certain almost to the degree of demonstration to entitle them to the relief prayed for in the bill. In all their dealings with Mrs. Bailey, their client, particularly in making the agreement with her for the purchase of the 200-acre tract, did Williams and Hardee explain to her fully and fairly every detail of the transactions, did they exercise toward her that *uberrima fides* which the relations between them of attorney and client required, and the law demanded? Why did it become necessary to distribute between the heirs of J. S. Bailey the \$891.96 collected by the attorneys for Mrs. Bailey from the executors of the will of J. S. Bailey on the judgment obtained by them for Mrs. Bailey? Why was Mrs. Bailey required to share that sum so collected on her judgment with the heirs of J. S. Bailey and what, by way of

consideration, did she receive for it, having already the legal title to the 200-acre tract? If Williams and Hardee collected \$891.96 from the executors and paid Mrs. Bailey only \$128.39 of that sum while she had already the legal title to the two hundred acres, why were they to receive the 160-acre tract valued by them at about \$2,000? Why did they represent some of the heirs of J. S. Bailey whose interests were inimical to those of Mrs. Bailey? Did they make compromises with the former at the expense of the latter to their personal financial advantage? What became of the \$100 which the 200-acre tract brought at sheriff's sale, and what did the 160-acre tract bring at that sale, and who received the money? Why were the deeds from J. S. Bailey to J. D. Guthrie, and from Guthrie to Mrs. Bailey, for the 200-acre tract treated as void, and were the reasons for so treating them, as well as the effect on Mrs. Bailey's interests, fully explained and made clear to Mrs. Bailey? When, at what time, and for what consideration did Williams and Hardee acquire an interest in the 160-acre tract, and to whom was the consideration paid? If the \$300 paid by Williams and Hardee to Mrs. Bailey on April 16, 1912, were the proceeds from the rental or sale of timber on the 160-acre tract, what consideration did they pay for the quitclaim deed from Mrs. Bailey to the 200-acre tract? What acts of open, notorious, and exclusive possession of the 200-acre tract did Williams and Hardee exercise after their alleged agreement with Mrs. Bailey for the purchase of that land? These and a few other pertinent questions are not clearly and satisfactorily answered in the record.

It is a well-established principle of law that specific performance of a contract for the sale of lands is not a matter of right in either party, but a matter of sound reasonable discretion in the court. The question is not what the court must do, but what it may do, under the circumstances. *Maloy v. Boyett*, 53 Fla. 956, 43 South. 243; *Asia v. Hiser*, 38 Fla. 71, 20 South. 796; *Nobles v. L'Engle*, 58 Fla. 480, 51 South. 405. Whether the specific performance of a contract for the conveyance of real estate will be enforced by judicial procedure is determined by the application of the established principles of equity designed for administering justice that are appropriate to the facts and circumstances of the particular case. *L'Engle v. Overstreet*, 61 Fla. 653, 55 South. 381.

[3] It is the rule that the degree of proof required to establish the existence of a parol contract to convey lands in order to warrant enforcement of specific performance is greater than a mere preponderance of evidence. *Dunn v. McGovern*, 116 Iowa, 663, 88 N. W. 938; *Dalzell v. Dueber Watch Case Manuf'g Co.*, 149 U. S. 315, 13 Sup. Ct. 886, 37 L. Ed. 749; *Sands v. Sands*, 112 Ill. 225; *Langston v. Bates*, 84 Ill. 524, 25 Am. Rep. 466.

The evidence must be clear, full, and free from suspicion. *Harris v. Elliott*, 45 W. Va. 245, 32 S. E. 176. See, also, *Knight v. Knight*, 51 W. Va. 518, 41 S. E. 905; *Purcell v. Miner*, 4 Wall. (U. S.) 513, text, 517, 18 L. Ed. 435; *Beall v. Clark*, 71 Ga. 818; *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565; *Rice v. Rigley*, 7 Idaho, 115, 61 Pac. 290; *Wilmer v. Farris*, 40 Iowa, 309. In the latter case it was held that admissions of the defendant, made in conversations with third persons, is insufficient to establish the existence of the contract, when it is denied by the defendant under oath as a witness.

[4] On the question of the character of possession, when possession is relied on as part performance to lift a parol contract for the conveyance of lands out of the statute, the Supreme Court of Kansas said it must be notorious, exclusive, continuous, and in pursuance of the contract. *Baldwin v. Baldwin*, 73 Kan. 39, 84 Pac. 568, 4 L. R. A. (N. S.) 957; *Brown on Statute of Frauds*, §§ 472-476; *Roberts v. Templeton*, 48 Or. 65, 80 Pac. 481, 3 L. R. A. (N. S.) 790, note page 813.

In the case at bar it was not made to appear that Williams and Hardee took such possession that could be called distinct, exclusive, or notorious. It does not appear that there was ever a change of possession from Mrs. Bailey to them.

[5] Another very important consideration in this case was the undoubted relation of attorney and client that existed between Williams and Hardee and Mrs. Bailey. This relation had extended over a period of years, and existed immediately prior, if not at the actual time of, the making of the alleged contract. These gentlemen had represented her in all her litigations and claims against the estate of J. S. Bailey. It was the duty of counsel to advise, counsel, and fully protect and advance her interests. This relation admits of so much influence and so much confidence and abuse of confidence, and of so great an opportunity for extortion, that transactions between attorney and client, when the former seemingly profits at the expense of the latter, will, if not regarded as presumptively void, be examined with the closest scrutiny, to the end that it may be determined whether the attorney has exercised toward his client the utmost of good faith in every detail of the transaction. See *Vanasse v. Reid*, 111 Wis. 303, 87 N. W. 192; *Stubinger v. Frey*, 116 Ga. 396, 42 S. E. 713; *Burnham v. Heselton*, 82 Me. 495, 20 Atl. 80, 9 L. R. A. 90; *Lewis v. Broun*, 36 W. Va. 1, 14 S. E. 444. The burden is upon the attorney, when he acquires the subject-matter of the litigation, to affirmatively establish utmost of good faith and fairness of the transaction, as well as adequacy of consideration, also that he informed his client of the material facts and gave her the same disinterested advice he would have given had the sale been made to a stranger. There is

no presumption of innocence or improbability of wrongdoing. He has the heavy responsibility of proving that his diligence to do the best for his client has been as great as if he was only an attorney dealing for her with a stranger. *Gibson v. Jeyes*, 6 Ves. Jr. 266; *Holman v. Loynes*, 4 De Gex, M. & G. 270; *Young v. Murphy*, 120 Wis. 49, 97 N. W. 496; *Cox v. Delmas*, 99 Cal. 104, 33 Pac. 836; *Condit v. Blackwell*, 22 N. J. Eq. 481; *Day v. Wright*, 233 Ill. 218, 84 N. E. 226; *Dunn v. Record*, 63 Me. 17; *Klein v. Borchert*, 89 Minn. 377, 95 N. W. 215; *Crocheron v. Savage*, 75 N. J. Eq. 589, 73 Atl. 33, 23 L. R. A. (N. S.) 679. In many states it has been held that the transaction is presumptively void. *Keenan v. Scott*, 64 W. Va. 137, 61 S. E. 806; *Stubinger v. Frey*, supra; *Roby v. Colehour*, 135 Ill. 300, 25 N. E. 777; *Condit v. Blackwell*, supra. And voidable at the option of the client. *Lane v. Black*, 21 W. Va. 617. In the case of *Bolles v. O'Brien*, 63 Fla. 342, 59 South. 133, this court said the whole burden of establishing by clear and convincing evidence the fairness of the agreement, and that it was made upon full and adequate consideration, is cast upon the attorney. See 2 R. C. L. 966-975.

The assignments of error are numerous. Because of the view we take of this case, it is unnecessary to discuss them in detail here. They have been urged with diligence and force by appellants' counsel, and all of them have been examined and considered by this court. Those assignments which are based upon objections to questions propounded by defendants' counsel upon cross-examination of the witnesses L. P. Hardee and J. A. Williams, which sought to elicit information as to the relations existing between them and Mrs. Bailey as attorneys and client; the manner and particulars of the discharge by them of the duties to Mrs. Bailey arising out of that relation; the acquisition by them of the subject-matter of their fee or the property affected by the litigation which they were conducting, or had conducted for her, and which figured in the transaction on which this suit was based; their knowledge of the character of the claims of the Bailey heirs to the two tracts of land and Mrs. Bailey's interests or claims thereto as they were known to her attorneys; their dealings with the other heirs of Bailey in so far as their claims were inimical to the interests of Mrs. Bailey—we think were relevant and material, and proper in cross-examination of those witnesses, and went directly to the good faith and fair dealing of the attorneys with their client, which they were bound to make clear; that it was not matter of affirmative defense, but, on the contrary, essential to be shown by the complainants in order to maintain their cause.

The 100th and the 101st assignments we think are not well taken. The evidence sought was clearly admissible as tending to show Mrs. Bailey's interest in the 160-acre

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tract which Williams and Hardee offered as part of the consideration for the other tract which they seek to obtain from Mrs. Bailey. As to the matter which was made the basis of the 108th and 109th assignments, the substance was brought out in the cross-examination by the defendants' counsel of the witnesses Williams and Hardee which we hold to have been proper; this being true, the documents themselves were not material. The case of Volusia County Bank v. Bigelow, 45 Fla. 638, 33 South. 704, does not support appellants' 110th assignment. In that case Mrs. Bigelow's husband was in possession of the goods; his declaration at that time concerning the disposition of the property the court held need not have been brought home to her. In this case the declarations of Mrs. Bailey to Williams and Hardee could not affect Fielding's rights, unless they had been brought home to him. The circumstances of the parties were different from those in the Bigelow Case, and nothing short of the notorious possession of the lands by Williams and Hardee would have availed them.

The substance of the matter made the basis of the 117th assignment has been considered in the other assignments, and we think this assignment is not well taken.

Complainants moved to strike the testimony of Thomas W. Fielding as to conversations he had with Mrs. Bailey concerning the possession of the land, presumably her possession, as the testimony of Mr. Fielding related to that. The burden was upon Williams and Hardee to show their possession open, notorious, exclusive. Mrs. Bailey's statements to Mr. Fielding as to her occupancy of the land could not possibly affect their possession if it existed. The question was, Had Williams and Hardee met the burden which rested upon them in this case as to actual possession of the land, as well as to the other elements necessary for them to establish in order to obtain the relief they prayed for in the bill? and not the good faith of Fielding; therefore the statements made by Mrs. Bailey to him became immaterial, it is true, but harmless nevertheless.

This disposes of all the assignments of error except the last, which is directed against the decree. The chancellor, reviewing all the facts in the case, decreed that the injunction should be dissolved, and the cause dismissed. No error has been made to appear in this record. The decree was based largely on questions of fact. The principles of the law which he evidently applied to those facts we think are sound, and were correctly applied. Every presumption is in favor of the ruling of the trial judge. *Guerra v. Guterrez*, 66 Fla. 576, 64 South. 232; *Mock v. Thompson*, 58 Fla. 477, 50 South. 673.

The decree is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and WHITFIELD, JJ., concur.

LEE v. STATE.

(Supreme Court of Florida. Feb. 24, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 393 — INCRIMINATING EVIDENCE—ADMISSIBILITY.

Where one under arrest hands his shoe to the officer in charge, who places the shoe in a track near the scene of the homicide, the latter may testify that the shoe fitted the track exactly, even though he did not warn the former against incriminating evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 871-874; Dec. Dig. § 893.]

2. CRIMINAL LAW § 844 — APPEAL — EXCEPTION TO INSTRUCTIONS—SUFFICIENCY.

A single exception to three refused instructions will not avail, where one of the instructions is argumentative and the others covered by the general charge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2025; Dec. Dig. § 844.]

3. SUFFICIENCY OF EVIDENCE.

The evidence sustains the verdict.

Error to Circuit Court, Nassau County; Geo. Couper Gibbs, Judge.

James Lee, Sr., was convicted of murder in the first degree, and brings error. Affirmed.

Marion & Waybright, of Jacksonville, for plaintiff in error. T. F. West, Atty. Gen., and C. O. Andrews, Asst. Atty. Gen., for the State.

COCKRELL, J. The plaintiff in error was convicted of murder in the first degree, and, there being a recommendation to mercy, he was sentenced to life imprisonment.

We might refuse to entertain any of the assignments of error, by reason of the very great irregularity in the settlement of the bill of exceptions, upon which all the assignments of error are based; but the state has declined to take advantage of the irregularity, and the bill was actually signed by the circuit judge who tried the case.

[1] A few hours after the homicide, this accused was taken to the scene. The officer in charge testified to the similarity of the tracks made by Lee with those plainly marked in soft sand going from the scene. The accused at the officer's suggestion took off a shoe, and the officer testified that it fitted the track exactly. This testimony was objected to upon the sole ground that he could not testify as to how that track is compared with Jim Lee's, which was merely repeating that he objected. No objection was then urged as to the officer not warning the defendant as to his right to decline incriminating evidence, and it would appear to have been entirely voluntary. After the whole matter had been thoroughly threshed out, there was a motion interposed to strike all the evidence in regard to placing the shoes in the tracks, on the ground of compulsion. We think the motion was properly refused, as being not timely made, and further that,

even though the act of handing over the shoe be considered as constructively compulsion, yet the evidence was competent. See *Dickens v. State*, 50 Fla. 17, 38 South. 909; *Moss v. State*, 40 South. 340;¹ *State v. Fuller*, 34 Mont. 12, 85 Pac. 369, 8 L. R. A. (N. S.) 762, 9 Ann. Cas. 648; *Myers v. State*, 97 Ga. 76, 25 S. E. 252; *State v. Arthur*, 129 Iowa, 235, 105 N. W. 422; *Krens v. State*, 75 Neb. 294, 106 N. W. 27; *People v. Van Wormer*, 175 N. Y. 188, 67 N. E. 299; *State v. Graham*, 74 N. C. 646, 21 Am. Rep. 493; *State v. Sanders*, 75 S. C. 409, 56 S. E. 35; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *Thornton v. State*, 117 Wis. 338, 93 N. W. 1107, 98 Am. St. Rep. 924; 4 Wigmore on Ev. § 2265; 2 Wharton's Crim. Ev. § 965. This is not a case where an inference is sought to be drawn from a refusal to permit the use of a shoe, or to make a track.

[2] There was a single exception to the refusal to give three instructions requested by the accused. Error is assigned as to two of them only; a tacit admission that one was properly refused. One of them is clearly argumentative, and the others sufficiently covered by the court's general charge.

[3] Great stress is laid upon the alleged insufficiency of the evidence to identify the accused with the commission of the homicide. We think, however, that the state made out a plain case, while the jury was amply justified in declining to accept the defense of an alibi.

Judgment affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

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No. 20516.

SIBLEY, L. B. & S. RY. CO. v. ELLIOTT, Tax Collector, et al.

(Supreme Court of Louisiana. June 29, 1914.
On Rehearing, March 8, 1915.)

(Syllabus by the Court.)

1. TAXATION — 196 — EXEMPTION — RAILROADS — "CONSTRUCTED AND COMPLETED."

The words "constructed and completed," as used in article 230 of the Constitution, and as used in the amendment to the Constitution proposed by Act No. 16 of 1904, in connection with the exemption of railroads from taxation, mean substantially the same thing, in both instances, and in neither are they susceptible of the interpretation that a railroad, the construction of which was begun before, or which was completed after, the period or date stated in the article and in the amendment, respectively, is entitled to the exemption therein granted.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 314; Dec. Dig. — 196.]

2. TAXATION — 231 — EXEMPTION — RAILROADS — "COMPLETED."

A railroad cannot be said to have been "completed," within the meaning of the amend-

ment to the Constitution granting exemption from taxation to "any railroad or part of railroad that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909," where it was built as a logging road, for a particular concern, and, up to the date last above mentioned, had been provided with no equipment that would have enabled it to serve the public, generally, as a carrier of either passengers or freight.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 371-378; Dec. Dig. — 231.

For other definitions, see *Words and Phrases*, First and Second Series, Complete.]

Appeal from Eleventh Judicial District Court, Parish of Red River; W. T. Cunningham, Judge.

Action by the Sibley, Lake Bisteneau & Southern Railway Company against W. H. Elliott and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

R. G. Pleasant, Atty. Gen., Harry Gamble, Asst. Atty. Gen., and John F. Stephens, Dist. Atty., of Coushatta, for appellants. W. B. Thurmond, of Kansas City, Mo., and Scheen & Blanchard, of Shreveport, for appellee.

PROVOSTY, J. In this case, the plaintiff railroad company claims that that part of its railroad situated in Red River parish is exempt from taxation under article 230 of the Constitution, as amended by Joint Resolution No. 16, p. 19, of 1904, exempting from taxation for ten years from the date of its completion any railroad "constructed subsequently to January 1, 1905, and prior to January 1, 1909."

We will deal first with that section of plaintiff's road extending from the line of Red River parish to Hall Summit, and next with that section below Hall Summit.

With reference to the first of these sections, plaintiff's witness Wimberly testified that he began doing business at Hall Summit in September, 1904, and that his recollection is that the roadbed was built into Hall Summit in 1903. Plaintiff's witness Walter testified that the roadbed was constructed down to a quarter of a mile below Hall Summit in 1903. And a letter dated January 4, 1904, written to the secretary of the railroad commission by J. W. Martin, general manager of the plaintiff company, was produced by defendant, in which the report is made that five miles of the railroad was completed in Red River parish in 1903. This would comprise this entire first section, and more. The same general manager confirms that statement as a witness by saying that that part of the road was then completed in so far as grade is concerned, but that the rails were not yet laid.

In order to be entitled to the said constitutional exemption, the railroad must not only have been "completed" subsequently to January 1, 1905, but must also have been "constructed" subsequently to that date; 1

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 146 Ala. 686.

e., the construction must have begun subsequently to that date. This first section of plaintiff's road had been in large measure constructed at that date, since its roadbed was built, and is therefore not entitled to the exemption.

The second section, from a point about a quarter of a mile below Hall Summit, was begun to be constructed within the exemption period; but whether completed within that period is left doubtful by the evidence. Plaintiff's same witness Walter, whose occupation was to haul logs to and on this section, says that if any freight was hauled on it he does not recall the fact; that about 1911 they hauled some bolts and fertilizer on it in box cars. The general manager testifies that they did not begin to haul freight or passengers on this section of the road until 1909 or 1910, but that he does not know when they began. A railroad that is not yet in a condition for hauling freight cannot be said to be completed within the meaning of the said constitutional exemption.

The judgment appealed from is therefore set aside, and the suit of the plaintiff is dismissed, at plaintiff's cost in both courts.

On Rehearing.

MONROE, C. J. In the petition with which this suit was begun, plaintiff alleges that 6 miles of its main track and three-fourths of a mile of side track were "constructed and completed" in 1906, and that 2½ miles of its main track were "constructed and completed" in 1907; and that the 6 miles and the three-fourths of a mile are exempt from taxation, because completed subsequently to January 1, 1905, and prior to January 1, 1909, notwithstanding that the construction was begun prior to January 1, 1905; and that the remaining 2½ miles are exempt because they were begun and completed between the two dates last above mentioned.

According to the testimony of Mr. J. W. Martin, who has been plaintiff's general superintendent since 1901, exemption is claimed for 8½ miles of road, of which 4¼ miles should lie between the parish line, to the north, and "Hall Summit," to the south, and the remaining 4¼ miles should lie between Hall Summit and some point to the southward of that village. But, from the same testimony, it would appear that there never were but 3 miles of road below Hall Summit, and that at some time, not definitely stated, plaintiff removed the rails from one of those miles. Beyond that, the witness, though diligently examined and cross-examined upon the subject, persistently declined to fix the date at which the extension of the company's road, below Hall Summit, was operated, or was ready to be operated. We make the following excerpt from his examination by plaintiff's counsel, to wit:

"Q. Approximately how many miles of railroad have you in Red River parish? A. Eight and a half miles, and there is about seven and a half miles of steel now down. Q. Now part of that has been abandoned; part of that was never used? A. Yes, sir. Q. You used it at the time that it was down, but afterwards you stopped using it? A. We took it up to the water station. Q. Originally you had it built below the water station? A. Yes, sir; but the water station was as far as we had occasion to go. We had no territory beyond Hall Summit, and the water station is about two miles below there."

On the cross-examination, counsel for defendants, after trying time and again, to ascertain from the witness at what time, if at all, the road, below Hall Summit, had been operated, asked the question and received the answer as follows:

"Q. Did I under stand you to say that you did not begin operations on that last 4¼ miles until 1909? A. I told you that I could not give you the exact date."

Reconsidering the testimony, we are confirmed in the view that the extension below Hall Summit was not completed prior to January 1, 1909.

[1] We are also confirmed in the view, expressed in the opinion heretofore handed down (and the point is conceded by plaintiff's counsel), that the road, from the parish line to Hall Summit, was in process of construction, and had so far progressed that the roadbed had been graded as early as 1903; and, upon the other hand, our re-examination of the testimony leaves in doubt the question whether a "railroad," within the meaning of the constitutional exemption here claimed, had been completed, between the points mentioned prior to January 1, 1909.

Article 230 of the Constitution of 1898 reads (so far as it need be here quoted) as follows:

"There shall also be exempt from taxation for a period of ten years from the date of its completion any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1, 1904; * * * nor shall the exemption hereinabove granted apply to any railroad or part of such railroad the construction of which was begun and the roadbed of which was substantially completed at the date of the adoption of this Constitution."

The evident purpose of the exemption so declared was not to exempt railroads, the promoters of which had so far committed themselves to their construction in this state as to acquire rights of way and substantially to complete roadbeds, but to encourage enterprises in railroad building not already undertaken, and to induce promoters to build roads which they might not otherwise be tempted to build. *Amos Kent & Co. v. Tax Assessor*, 114 La. 865, 38 South. 587.

"The framers of that instrument [this court has said, referring to the Constitution of 1898], in order to encourage the construction of new railroads, offered a bonus in the form of an exemption from taxation for ten years." *Louisiana & A. R. Co. v. Shaw*, 121 La. 1004, 46 South. 997.

It is contended, however, that the policy thus declared was abandoned, and that by

the amendment to the Constitution, proposed by Act 16 of 1904 and subsequently adopted, the people of the state, in effect, declared that any road or part of a road in this state, the construction of which may have been completed, save as to what are sometimes called "finishing touches," should be exempt from taxation for ten years from the date at which the "touches" should be added, provided that the addition should be made between January 1, 1905, and January 1, 1909.

That such is the meaning of the argument now pressed upon the court will be seen from the following excerpt from the latest brief filed herein by plaintiff's counsel to wit:

"It was in the interpretation of this Act 16 of 1904 that the court held that the construction of the roadbed had to begin subsequent to January 1, 1905, but we think that a careful comparison of this act, amending the Constitution of 1898, will convince the court that no such meaning was ever intended, but that the real meaning was that any railroad or part of railroad that was constructed would be entitled to the exemption if it was completed subsequent to that date and prior to January 1, 1909."

On the other hand, plaintiff's general superintendent, being cross-examined in order to ascertain whether the piece of road here in question had been "completed" prior to January 1, 1909, gives it to be understood that a road may be "completed," although the finishing touches are still lacking. Thus we find:

"Q. As a matter of fact, you were not operating a railroad to Hall Summit in 1906? A. It was not built in 1906, but it was built in 1907, but, just when we began to operate, I could not give the date. Q. I understood you, a while ago, to say that you did not finish that until 1909, and on further questioning you said that it had been built in 1907; will you explain how that is? A. You misunderstood; I said we did some work on it after 1907. In 1907 we reported it as finished, and it was practically; there were some finishing touches to be put on it. Q. As a matter of fact, it was not finished until 1909; it was not in a state as being finished? A. You may consider it that way, and you might consider the T. & P. on the other side of the river unfinished, as they might have some good work that they want to put on it. * * * Q. But you did not begin to operate until 1909 or 1910? A. We carried passengers down there after that. Q. You did not carry passengers down there until 1909? A. I don't know when we began; I would not like to put it in testimony."

At another place in his testimony, the witness admits that he wrote to the state board of appraisers on January 9, 1904, saying "five miles of main line [meaning the road from the parish line to Hall Summit] complete in 1903." And he is further interrogated and answers as follows:

"Q. At any time, or anywhere, in this letter, did you advise the state board of appraisers, when you were telling them about the completion of this road, that you only meant that the roadbed had been thrown up? A. I don't find it there, but it is a fact that can be proven very easily. Q. Do you recall [under] what condition you wrote the secretary of the state board of appraisers, stating that to him, the date of the completion of the mileage? A. I presume the first paragraph would tell you. Q.

The first paragraph of the letter begins: 'In answer to your favor of December 2, with reference to the amount of construction of the Sibley, Lake Bisteneau & Southern Railway Company, completed prior to the adoption of the Constitution of 1898, and also that part completed since,' etc. Did you not purport, in the communication to the state board of appraisers, to get them to understand that the mileage had been completed in your understanding of the term? A. No; not that it was laid, because I knew that the rails had not been laid, but the roadbed had been thrown up and the grade was done."

In January, 1904, therefore, plaintiff, in order to get the benefit of the exemption declared by article 230 of the Constitution, in favor of railroads thereafter constructed and completed prior to January 1, 1904, represented to the state authorities that the stretch of road here in question had been completed in 1903, though in point of fact they had but completed the grading of the roadbed. By the amendment to the Constitution, adopted in 1904, the exemption was extended to railroads, "constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909," and the contention now is that the same stretch of road was not only *not* completed in 1903, or at any time prior to January 1, 1905, but that the grading of the roadbed, prior to January 1, 1905, is not to be considered at all in determining within what period, or between what dates, the road was "constructed and completed," and that the only work which should be considered for the purposes of that question is that which was done between January 1, 1905, and January 1, 1909, the period required to give plaintiff the benefit of the exemption.

The amendment of 1904, reads, in part, as follows:

"There shall be exempt from taxation * * * from the date of its completion any railroad or part of railroad that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909. This exemption shall include and apply to all the rights of way, roadbed, sidings, rails and other superstructures upon such rights of way, roadbed or sidings, and to all depots, station houses, buildings, erections, and structures appurtenant to such railroads and the operation of the same, but shall not include the depots, warehouses, station houses and other structures and appurtenances nor the land upon which they are erected at terminal points, and for which franchises have been granted and obtained: * * * And provided further that this exemption shall not apply to double tracks, sidings, switches, depots or other improvements or betterments which may be constructed by railroads now in operation within the state, other than extensions or new lines constructed by such railroads."

[2] Counsel for plaintiff, referring to article 230 of the Constitution, on the one hand, and the provision above quoted, on the other (which provision, we may add, contains no reference to the article), say in their brief:

The one provides for the exemption to all railroads and parts of railroads that are "*constructed and completed subsequent to the adoption of the Constitution and prior to Jan. 1, 1904,*" while the other provides for the exemption to apply to all roads or parts of railroads that are

"constructed and completed subsequent to Jan. 1, 1905, and prior to Jan. 1, 1909," but that this does not mean the construction of the road bed and the beginning of the building should have been subsequent to the adoption of the Constitution on the one hand or subsequent to Jan. 1, 1905, on the other hand. It only means that the completion of the railroad should be subsequent to those dates, and this regardless of the time when the construction began, and this is conclusively shown by the proviso in the original article 230 of the Constitution of 1898 and which reads as follows: "Nor shall the exemption hereinabove granted apply to any railroad or part of such railroad, the construction of which was begun and the road bed of which was substantially completed at the date of the adoption of this Constitution."

We have quoted the counsel literally and have given his inverted commas and italics, and, as may be seen, either the counsel or the printer have fallen into some errors, the most peculiar of which consists of the insertion in the supposed quotation from article 230 of the Constitution of 1898 of the word "subsequent," in place of which the word "hereafter" appears in the article, as written.

We say peculiar, because the learned counsel immediately argue that neither the language of article 230 nor that of the amendment "mean" (that) the construction of the roadbed and the "beginning of the building should have been subsequent to the adoption of the Constitution * * * or subsequent to January 1, 1905."

The article, however, grants the exemption to "any railroad or part of such railroad that may hereafter be constructed and completed prior to January 1, 1904," which means that the construction and the completion were alike to have been accomplished between the date that the Constitution became the supreme law and January 1, 1904; and the amendment grants the exemption to any such road or part of road "that shall have been constructed and completed subsequently to January 1, 1905, and prior to January 1, 1909"; the intention evidently being to again open the door, which, under article 230 of the Constitution, had been closed on January 1, 1904, to belated new enterprises, and at the same time the exclude from the exemption granted by the amendment investments already made, and which had already become subject to taxation, in terminal facilities or franchises, and which, with such exemption, and no obligation resting upon the owners to build railroads, might have been used merely as a basis for private speculation. Mr. Martin, the witness to whom we have heretofore referred, was unable to say, with any degree of certainty, at what time freight or passengers were carried between Hall Summit and the parish line, or to say that the road, between those points, was equipped, prior to January 1, 1909, with a single passenger or freight car; the most that he was willing to testify to on that subject being that they had a caboose, in which white and

colored passengers were separated, and 108 logging cars. But it was admitted that the road was owned by the same persons who owned the Globe Lumber Company, and was run in their interest as a logging road, and necessarily the caboose had to be provided for their employes, but the proposition that the road was thereby equipped for the carriage of passengers is rather too strong food for ordinary mental digestion; and the same thing may be said of logging cars as an equipment for a freight carrying railroad, since it is fairly well known that they will hold nothing but logs and will hold them only when they are securely chained.

The word "completed," as applied to a railroad, in connection with the obligation to pay stock subscriptions, and with the right to public aid to be granted on "completion," has been held to mean that the road was carrying passengers and freight. *O'Neal v. King*, 48 N. C. 517.

That the road is in condition to be operated for regular passenger and freight traffic, and is actually in use. *Tower v. Detroit*, 34 Mich. 328.

That it should be so far completed that it might be properly and regularly used for the purpose of transferring freight and passengers. *Southern Kansas & P. R. v. Towner*, 41 Kan. 72, 21 Pac. 221.

That it shall be reasonable, safe, fit, and convenient for public use and accommodation. *Manchester & K. R. v. City of Keene*, 62 N. H. 81.

It has been held by this court that the exemption granted by article 230 of the Constitution "was intended to encourage enterprises of some importance and was never intended to apply to a private logging railroad or a tramway." *Louisiana & Ark. R. Co. v. State Board*, 135 La. 69, 64 South. 985.

Plaintiff having failed to show that the section of road here in question was constructed and completed between January 1, 1905, and January 1, 1909, it is not entitled to the exemption claimed.

The judgment heretofore rendered herein is therefore reinstated and made the final judgment of the court.

(136 La. 803)

No. 20615.

CAIRE & GRAUGNARD v. HICKOX et al.
Intervention of HICKOX.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(Syllabus by the Court.)

HOMESTEAD §84 — EXEMPTION — PROPERTY HELD IN INDIVISION—MORTGAGES.

Property, while held in indivision, cannot become affected by the homestead exemption; and property which is not affected by such exemption, when mortgaged, cannot become so affected, afterwards, to the prejudice of the mortgagee.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 121, 122; Dec. Dig. §84.]

Appeal from Twenty-Third Judicial District Court, Parish of St. Mary; Thomas M. Milling, Judge.

Action by Caire & Graugnard against Mrs. L. S. Hickox and others, wherein Mrs. Lelia S. Hickox filed intervention and third opposition. From an adverse judgment, intervenor appeals. Affirmed.

Borah & Himel, of Franklin, for appellant. Frank E. Rainold and Foster, Milling, Brian & Saal, all of New Orleans, for appellees Caire & Graugnard.

MONROE, C. J. Plaintiffs obtained an order of seizure and sale upon certain matured notes for the aggregate amount of \$55,000, secured by mortgage, by authentic act, importing confession of judgment, on Luckland Plantation, in the Parish of St. Mary, which notes and mortgage were executed by the defendant Mrs. L. S. Hickox, widow of Chas. R. Hickox, and Mrs. Rilma Sanders, wife of Dr. J. L. Caldwell. After the sale, Mrs. Hickox intervened and obtained an order directing the sheriff to retain out of the proceeds the sum of \$2,000, with prospective interest, to satisfy a claim of homestead exemption set up by her, under article 244 of the Constitution; her allegations in support of her claim being, in substance, that she is the owner in possession of said property, that the same is her home, that she has an elderly aunt living with her, who is supported by and entirely dependent upon her, and that she has no other means or property.

Plaintiffs moved to rescind the order, upon the grounds that the mortgage sued on was executed by the intervenor and Mrs. Caldwell, as owners in indivision of the mortgaged property, and that intervenor cannot now be heard to say, to the prejudice of the rights of the mortgagee, that she is the sole owner of the same, that her aunt is not a "person" whose dependency upon her entitles her to the exemption claimed, that the property seized consisted of more than 1,000 acres, with a dwelling thereon, and that intervenor, having permitted the whole of it to be sold, in globo, before setting up her claim, cannot now be heard in that behalf; and, the motion having been allowed, intervenor prosecutes this appeal.

The act of mortgage sustains the first ground of the motion, which renders the consideration of the others unnecessary. "Property, while held in indivision, cannot become affected by the homestead exemption." Bank of Jeanerette v. Stansbury, 110 La. 301, 34 South. 452. And property which is not affected by such exemption, when mortgaged, cannot become so affected afterwards, to the prejudice of the mortgagee. Ellis v. Freyhan, 124 La. 53, 49 South. 975; Coltharp v. West, 127 La. 434, 53 South. 675. The cases of Garner v. Freeman, 118 La. 184, 42 South.

767, 118 Am. St. Rep. 361, and Harrelson v. Webb, 124 La. 1007, 50 South. 833, 134 Am. St. Rep. 529, have no application to rights such as were acquired by plaintiff.

Judgment affirmed.

No. 20656.

LUTENBACHER v. MITCHELL-BORNE
CONST. CO. et al.

(Supreme Court of Louisiana. Feb. 8, 1915.
Rehearing Denied March 8, 1915.)

(Syllabus by the Court.)

1. MASTER AND SERVANT ⇨ 318—MUNICIPAL CORPORATIONS ⇨ 744—NEGLIGENCE OF INDEPENDENT CONTRACTOR.

The mere fact that a proprietor retains a general supervision over work to be constructed for him by another, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him, the proprietor, responsible for the wrongs done to third persons in the prosecution of the work, as where a sewerage and water board, as a branch of a municipality, employs an engineer to superintend the general progress of the construction of the city's sewers and water mains, which have been contracted for, and to see that the work is done according to contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1257, 1258; Dec. Dig. ⇨ 318; Municipal Corporations, Cent. Dig. § 1565; Dec. Dig. ⇨ 744.]

2. MASTER AND SERVANT ⇨ 101, 102—SAFE PLACE TO WORK—DUTY OF MASTER.

Individuals and corporations are not bound, as employers, to insure the absolute safety of the places which they provide for the use of their employes. They are, however, bound to use all reasonable care and prudence for the safety of those in their service, by providing them with suitable and reasonably safe places to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. ⇨ 101, 102.]

3. MASTER AND SERVANT ⇨ 85—INJURY TO SERVANT—LIABILITY OF MASTER.

"The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged through the neglect of the master, it is but meet that he should be recompensed."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 136, 139, 140; Dec. Dig. ⇨ 85.]

4. MASTER AND SERVANT ⇨ 231—COMPETENCY OF COEMPLOYÉ—RIGHTS OF EMPLOYÉ.

"A prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 675-677; Dec. Dig. ⇨ 231.]

5. MASTER AND SERVANT ⇨ 289—INJURY TO SERVANT—QUESTION FOR JURY.

Where a servant did not assert his judgment in opposition to the judgment or stronger will of his master, the law usually allows the jury to determine whether he was negligent, or acted in reliance on the judgment of his master, or out of a constrained acquiescence in the

rule of obedience which his relation as servant has imposed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. ¶289.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Widow Blanche Lutenbacher against the Mitchell-Borne Construction Company and the Sewerage & Water Board of the City of New Orleans; the Southwestern Surety Company of Oklahoma, warrantor. From the judgments, defendants appeal. Judgment for plaintiff against the Construction Company affirmed and judgments for plaintiff and against the Sewerage & Water Board and for the board against the Southwestern Surety Company reversed.

Walter L. Gleason, Howe, Fenner, Spencer & Cocke, John P. Sullivan, Arthur Landry, Dinkelspiel, Hart & Davey, and J. C. Hollingsworth, all of New Orleans, for appellant Mitchell-Borne Const. Co. Dufour & Dufour, of New Orleans, for appellant Southwestern Surety Co. Charles Louque, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff, the widow of John Baptiste Lutenbacher, sues the Mitchell-Borne Construction Company and the Sewerage & Water Board of the city of New Orleans, in solido, in the sum of \$10,004, for the loss and death of her husband, May 25, 1913, while in the employ of the Mitchell-Borne Construction Company as a carpenter, while at work on a syphon under the bed of the Carondelet canal in the city of New Orleans. She alleges gross negligence and want of skill on the part of the contractors who were doing the work, which work was being prosecuted under the full control of, and with the consent and approval of, the Sewerage & Water Board.

The construction company answered, admitted that Lutenbacher was in its employ at the time and on the work indicated, and denied that he, "Lutenbacher, did not contribute in any way to the said accident, and that he had a right to believe, and did believe, that his employers had furnished a safe place to do his work which was as safe as could be expected, considering the inherent dangers of the work in which he was employed."

It further alleged that:

"Lutenbacher did assume the necessary and unavoidable risks which were involved in the character of employment in which he was engaged, and defendant further averred that it was in consequence of one of these risks that the said John B. Lutenbacher came to his unfortunate death."

They deny that the collapse of the cofferdam, which caused the death of Lutenbacher and others, was due to any defect in any of the plans or specifications in accordance with which the said cofferdam was constructed, or

in the manner in which the same was constructed; and it averred that the collapse was due to causes over which it had no control.

In a supplemental answer, the defendant company admitted that the cofferdam referred to was in a dangerous condition about one-half hour before the collapse which resulted in the death of plaintiff's husband, and that the representative of said firm on the work ordered all the workmen to leave the pit in which they were working, which order was complied with; that the floodgate was opened, and water admitted for the purpose of equalizing the pressure of the water from the outside; that the dam needed additional bracing, and that workmen, after full warning as to the dangerous situation, went down again into the excavated place and proceeded with the work of putting in said additional bracing; that subsequently, on the same day, other workmen, including Lutenbacher, after additional bracing had been done, were advised by the foreman of the defendant "that they were not required to go back into the dam, and that he wanted no one of them to do so who was in any way afraid to do so, it being thoroughly understood that there was, in view of the then condition of the structure, a risk involved in so doing; thereupon, after consultation among themselves, four or five of the said workmen out of about twenty-five who had left the dam under direction of John O. Chisolm, as above set forth, went back therein; that a very short time thereafter, without any warning, the collapse of the said dam suddenly occurred," and that Lutenbacher assumed the risk of the accident which resulted in his death.

The Sewerage & Water Board answered, admitting that the Mitchell-Borne Construction Company, under contract with said board, was doing the work, and alleged that said company was an independent contractor, that it, the board, is a quasi municipal corporation, and exercises the rights and functions of a municipality quo ad sewerage, water, and drainage, and that any rights which plaintiff may have would be against the city of New Orleans, and not the board. It denies the liability for damages resulting from the laches or faults of the defendant company.

There was judgment in favor of plaintiff, and defendants have appealed.

[1] The allegation in plaintiff's petition that the sewerage and water board had made itself responsible with the contractors for defective work which had been done by the contractors, and which resulted in the death of her husband, and the allegation in the answer of the defendant company, to the effect that it was "not an independent contractor, under the general and special specifications of" the contract with the sewerage

and water board, are not borne out by the evidence in the record.

The Sewerage & Water Board was organized in the year 1899 for the purpose of providing a sewerage and water system for the city of New Orleans; it was made the duty of the board to adopt a system covering the habitable portions of the city, and to adopt plans and specifications for the establishment of such system. It was directed to let the contracts for the work decided to be done to the lowest bidders, upon giving satisfactory bonds.

The defendant company entered into a contract with the board for the construction of a canal in Broad street from the lower side of St. Bernard avenue to a line near Carondelet walk; and of a syphon under the Carondelet Navigation canal, etc. The specifications which formed part of the contract between the defendant company and the board contained certain specifications which plaintiff and the defendant company both argue make the board responsible to plaintiff. The plaintiff claims that the company and the board are jointly responsible to her, and that the defendant company was not an independent contractor.

The contract between the board and the company is, in writing, wherein the company agreed to do the work mentioned therein and to furnish all work, material, and construction at its own cost and expense, and to build in a good, strong, and substantial manner the canals of every kind complete, of the dimensions specified in the contract, and in accordance with the plans of the Sewerage & Water Board for the sum \$124,262, to be paid to it by the Sewerage & Water Board. It gave a bond to the board for the faithful performance of the contract, as was specified should be done in the act of the Legislature.

The specifications for the work contain provisions to the effect that the general superintendent of the board had authority to require the contractor to discontinue the use of excavating machinery which, in his judgment, was not adapted to the purpose for which it was being used, and that the work should be executed under the supervision of the general superintendent of the board, and as he might direct through assistants employed by the board. It was provided, further, that the general superintendent and his assistants should measure and calculate the quantities and amounts of the several kinds of work performed and the compensation to be paid therefor; the contractor was to repair or be responsible for all damages to public or private property resulting from the execution of the work, and to indemnify and hold harmless the board against all damages resulting from personal injuries; the contractor, at the request of the engineer, was to discharge any men, who, in his opinion, were disorderly, incompetent, or unfaithful; the work was to be executed at such location and in the order of preced-

ence as indicated by the engineers; the contractor was to be guided in the work by the lines staked, and the instructions given to him by the engineer; the contractor was obliged to follow at all times, without delay, all orders and instructions of the engineer in the prosecution and completion of the work; the contractor was obliged to remedy any neglected portions of the work, and all improperly constructed work on notice in writing from the engineer; and, if he failed to so act, the engineer might perform such work at the contractor's expense. Article 136 of the specifications reads:

"The contractor shall be responsible for the work until completed and accepted by the contractor."

Added to these stipulations or general specifications was the following:

"It is well understood that the right of supervision by the general superintendent and other employes of the board will not make the contractor an agent of the board, and that the liability of the contractor for all damages to public or private property arising from the contractor's execution of the work shall not be lessened because of such right of supervision. Such right of supervision is retained in order to insure to the board the completion of the work according to the specifications, and to insure the public in general from all unnecessary inconveniences, during the construction of the work."

The section last quoted is binding upon the defendant company. It was agreed between it and the board that it should not become the agent or servant of the board under the contract entered into, and that the board should not become the master.

With reference to the claim of the plaintiff against the Sewerage & Water Board, the law is, as laid down by Thompson in his commentaries on the Law of Negligence, § 660, p. 598:

"The mere fact that the proprietor retains a general supervision over the work, for the purpose of satisfying himself that the contractor carries out the stipulations of his contract, does not make him responsible for wrongs done to third persons in the prosecution of the work, as where a railway company employs an engineer to superintend the general progress of the construction of its road, and to see that the work is done according to contract."

The citation of authorities in support of the section quoted is quite full, and others might be added.

Labatt on Master and Servant states the rule thus:

"The accepted doctrine is that, in cases where the essential object of an agreement is the performance of work, the relation of master and servant will not be predicated, as between the party for whose benefit the work is to be done and the party who is to do the work, unless the former has retained the right to exercise control in respect to the manner in which the work is to be executed. This attribute of the relation supplies the single and universally applicable test by which the servants are distinguished from independent contractors." Section 64.

The specifications have been examined carefully, and there was not reserved to the board the right to exercise control in re-

spect to the manner in which the work was to have been executed. It was to have been done under the supervision of the engineer of the board, or his employés. They were to prescribe the order in which the materials were to have been placed; and they were to have given the lines and levels to be used. The contractor was to have kept upon the work at all times responsible employés, and he had to remove from the work, at the request of the engineer in charge, any person who was not acceptable, and all material, supervision, and labor furnished by the contractor was subject to the approval of the said engineer in charge, and nothing more. The contractor was solely responsible for the work until it was completed and accepted by the board.

The master's liability rests upon his right to select the servants and to control their work; but, when this selection and control rests in a contractor, he, the master, is freed from such liability. Where the contractor undertakes to perform certain work without interference from the contractee as to the mode or manner of doing the work, and the contractor employs the men who are to do the work, the latter is an independent contractor, and not the servant of the contractee. *Callan v. Bull*, 113 Cal. 593, 45 Pac. 1017.

In the case of *Uppington v. New York*, 165 N. Y. 225, 59 N. E. 92, 53 L. R. A. 551, a contract was under consideration which contained the stipulation, as does the one now being considered, that:

"All damages resulting to buildings, etc., through the negligence of the contractors, were to be paid by them, and they were required to give a bond to indemnify the city against all suits brought on account of injuries sustained through the construction of the work, or by or on account of any act or omission of [on the part of] the contractors or their agents."

And the city was authorized to retain enough money going to the contractor to make good all losses to third persons. Other stipulations, similar in scope to those under consideration in this case, were contained in that contract; and it was held that, where the city had the power to let work, and had entered into a contract with competent contractors, doing an independent business, who agreed to furnish the necessary materials and labor, and make the improvement, according to the specifications, for a lump sum, or its equivalent, they were not the servants or agents of the city, but were independent contractors. The court there held:

"Independence in control in employing workmen and in selecting the means of doing the work is the test usually applied by courts to determine whether the contractor is independent or not."

The Mitchell-Borne Construction Company, competent contractors, engaged in an independent business, undertook to build the canal and syphon in question, with its own materials and with its own laborers; by spe-

cific agreement, it was to furnish both. It represented the will of the board as to the result of the work, but not as to the means of doing it. The men, the machinery, and the details were all under the control of the company. The board could not employ workmen for the company or direct the work or men employed by it. The board could not select the tools and appliances to be used, or require them to be used in any particular way at any particular time. The will of the contractor, and not of the board, controlled in these respects. The stipulations to secure faithful compliance with the specifications on the part of the contractor do not make it a servant of the board, as was held in *Kelly v. New York*, 11 N. Y. 432. To the same effect is the decision in *Casement v. Brown*, 148 U. S. 815, 13 Sup. Ct. 672, 37 L. Ed. 582, and *Norwalk v. Norwalk*, 63 Conn. 495, 28 Atl. 82.

Complaint is made that the board permitted a change of the specifications with reference to the building of the cofferdam. The dam did not form part of the permanent work. It was for temporary use while the syphon was being placed. The specifications called for a dam of the mud box type. The board permitted the construction company to substitute grooved metal sheet piling instead. It was explained by the engineer of the board that the specifications, with reference to the mud box type of cofferdam, were not intended as a plan of construction to be followed by the contractor, as the board was not concerned with the manner of construction; but it was intended only to indicate to the contractor the amount of sheet piling which the board deemed was necessary, and for which alone the board was willing to pay. The cofferdam was to be constructed for temporary service, to keep the waters of the canal back while the syphon in the Broad street canal was being built of concrete, under the Carondelet canal. The board did not undertake, in the specifications, to direct the manner in which the cofferdam should be built. And, because it was built in a faulty manner, and caused the death of plaintiff's husband, the board cannot be charged with the fault of the construction company.

The board is not liable to plaintiff for the damages suffered by her through the loss of her husband.

Reference has been made to the decision of this court in the case of *Quayle v. Sewerage & Water Board*, 131 La. 26, 58 South. 1021, where it was held that the Sewerage & Water Board was responsible to plaintiff for damages in that case. It has no application to this case. There it was testified that the contractors, who were engaged in repairing sidewalks which had been torn up by the Sewerage & Water Board, were doing what was called "task" work; and the superintendent of the board testified that said contractors were subject to discharge at a moment's notice by the board, and that the in-

spector of the board remained on the work and directed how it should be done; that if the work was done wrong, the inspector would command the contractor to do the work in a better way. The contracts in the two cases are altogether dissimilar in their effects.

The cofferdam which was under construction by the defendant company, and which was a temporary structure, designed to keep the waters of the canal back while the work on the syphon was being done, had proceeded so far as the placing in position of metal sheet piling on either side of an excavation which had just been completed. The sides had been braced so as to make them secure, and to permit carpenter work being done in the excavation between the two tiers of sheet piling. On the day of the accident, one row of sheet piling bulged in such a manner as to indicate very clearly that the work was defective, and that there was danger of a collapse. All of the men in the pit, including the husband of plaintiff, were ordered out by the representative of the defendant company. The water was turned into the pit, so as to equalize the pressure on both sides of the bulged piling. Additional braces were then put in, and the sides of the pit were strengthened. About one-half hour after this work had been accomplished, plaintiff's husband, together with other laborers, was directed, by the representative of the defendant company in charge of the work at that time, to go down into the pit and to resume work. The giving of this order is contradicted by the representative of the company, who testified that he warned the workmen under him of the danger of the situation, and he says that he left it optional with them to work or to refrain from working. But the preponderance of evidence shows that the order was given by said representative to proceed with the work. Thereupon several men descended into the pit, and were at work when the grooved metal sheet pilings on one side of the excavation gave way, and five of the workmen were drowned; among them was plaintiff's husband.

The fact that the metal sheet piling had bulged to an alarming and dangerous extent was fully known to the representative of the defendant company in charge of the work at the time. He knew, or he should have known, that the place was dangerous at that time. He knew, or he should have known, that a total collapse of one side of the cofferdam was threatened after one side of the dam had bulged. It is true that he strengthened the timber braces which held the two sides of the dam in position, and it is also true that this additional bracing was insufficient to secure the sides of the dam, because, within one half hour after the work was done, one side of the dam collapsed, and five workmen were drowned, who had gone into the pit to work. Defendant has not undertaken to show that the accident was due to a *vis major*; and, in the nature of things,

it must be assumed that the accident happened because of insufficient and insecure bracing of the sides of the dam. Defendant offered the testimony of an expert, to the effect that the accident might have happened as a result of some latent defect in the metal sheet piling, or because of a sand boll at the base of the piling. If either of these conditions existed, it would have been an easy matter for defendant to have introduced evidence concerning them. The fact of the absence of such evidence is conclusive that neither of these conditions existed. The fault was evidently in the bracing, either because an insufficient amount was used, or it was improperly placed.

The fact that the servant, at the time he was killed, was complying with a direct, specific, personal order of his master's representative has a material bearing upon the question whether or not the master may be held responsible. The servant did not voluntarily encounter the danger which resulted in his death. He obeyed the order of the representative of the defendant company, which order was negligently given, and which resulted in the death of some of those workmen who obeyed it. The direction given by the representative of the defendant company to the men under him to proceed with the work in course of construction may not have been of a formally imperative character, but those directions nevertheless were the inducing cause of the husband of plaintiff, together with other workmen, to go down into the pit and resume work; it was the inducing cause of the accident which resulted in the injury complained of. The deceased would not have, or could not have, resumed the work except under the special directions of the defendant's representative. He was in charge of the construction of the dam, and, he only, employed the workmen and directed their conduct.

[2] It was the duty of the defendant company to have given a safe place to the men in its employ in which to work. The place in this instance was not safe; it was dangerous, and defendant's representative knew it to be so. The employer is bound to use all reasonable care and prudence for the safety of those in his service by providing a place reasonably safe and suitable for the use of the latter. And the greater the risk which attends the work to be done and the machinery to be used the more imperative is the obligation resting upon him. Reasonable care, then, becomes a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery. *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 664, 21 Sup. Ct. 275, 45 L. Ed. 361.

The assumption of risk, pleaded by the defendant company, is eliminated in view of the fact that the servant lost his life in obey

ing a direct command of the representative of the defendant. Under such conditions, the representative took upon himself the risk which might otherwise have been assumed by the servant. *Hunley v. Patterson*, 116 La. 736, 41 South. 54; 20 A. & E. Ency. 148.

[3, 4] In the case of *Patterson v. Pittsburg & C. R. Co.*, 76 Pa. 389, 18 Am. Rep. 412, it is laid down as a fundamental principle that:

"The servant does not stand on the same footing with the master. His primary duty is obedience, and if, when in the discharge of that duty, he is damaged, through the neglect of the master, it is but meet that he should be recompensed."

This essential inequality in the positions of the parties is deemed to warrant the deduction that "a prudent man has a right, within reasonable limits, to rely upon the ability and skill of the agent in whose charge the common master has placed him, and is not bound, at his peril, to set his own judgment above that of his superior." *Labatt, Master & Servant* (7th Ed.) p. 3935; *Faren v. Sellers*, 39 La. Ann. 1011, 1020, 3 South. 363, 4 Am. St. Rep. 256; *Camp v. Church Wardens*, 7 La. Ann. 321.

[5] In this case the jury found that the husband of plaintiff was not negligent, and that he acted in reliance upon the judgment of his master, or out of a constrained acquiescence in the rule of obedience which his relation as servant imposed.

The evidence in the case shows that the bracing in the cofferdam had been finished, and the work of excavation had been proceeded with, when one of the walls of the dam yielded to the pressure of the water in the canal, and bulged to such an extent that it became necessary for the defendant company to reinforce the bracing. It was clear to the representative of the defendant in charge of the work at that time that the bracing was insufficient. It was equally clear to the minds of the jury, and to the court, that the second bulging and collapse of the side of the cofferdam was due to insufficient bracing. This condition was testified to by competent engineers, and there is no doubt on the point. It is also true that the servant lost his life while obeying the orders of his master. It, therefore, becomes unnecessary to discuss the doctrine of *res ipsa loquitur* which was urged in argument, oral and printed, on behalf of the defendant company, and of the application of that doctrine to a cause between a master and his servant. *Labatt* in his work on *Master & Servant* cites authorities on both sides of the question, with a preponderance in favor of its being applied in such cases.

The husband of plaintiff, who met his death in the manner herein indicated, was forty-nine years of age, and in the enjoyment of good health. He was a carpenter, earning from \$2.50 to \$3.50 per day. By his death plaintiff has been deprived of the support and the companionship of her husband. The

verdict of the jury in her favor for \$10,004 will not be disturbed.

It is therefore ordered, adjudged, and decreed that the judgment in favor of plaintiff and against defendant the Mitchell-Borne Construction Company is affirmed.

It is further ordered, adjudged, and decreed that the judgments in favor of plaintiff and against the Sewerage & Water Board of New Orleans, and in favor of said board against the Southwestern Surety Company of Oklahoma, are annulled, avoided, and reversed; and, as thus amended, the judgment is affirmed. Costs of appeal to be paid by the Mitchell-Borne Construction Company.

(136 La. 320)

No. 21246.

VIDRINE v. DUPRE et al.

(Supreme Court of Louisiana. March 27, 1915.)

(Syllabus by the Court.)

1. COURTS \S 207—JURISDICTION OF SUPREME COURT—ISSUANCE OF WRITS.

The Constitution, art. 101, confers upon the Supreme Court alone the right to issue writs of certiorari, and other writs, to the Courts of Appeal throughout the state, where applications have been made to said court, or to one of the justices thereof, within thirty days after the decisions of the Courts of Appeal have been rendered and entered.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. \S 613; Dec. Dig. \S 207.]

2. COURTS \S 485 — COURTS OF APPEAL — TRANSMITTING CASES TO SUPREME COURT.

It is incompetent for the Courts of Appeal to transmit to the Supreme Court cases finally decided by those courts on the request of either party to the suit, although the Legislature may have attempted to authorize said courts to transmit such records.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. \S 1292-1298; Dec. Dig. \S 485.]

Appeal from Court of Appeal, Parish of Evangeline; S. D. Ellis, Paul Leche, and Julian Mouton, Judges.

Action by Helaire Vidrine against Robert Dupre and others. A judgment for plaintiff was affirmed by the Court of Appeal, and the case is transmitted to the Supreme Court on application of defendants. Case returned to Court of Appeal.

S. W. Gardiner and Garland & Garland, all of Ville Platte, for plaintiff. Couvillon & Edwards, of Ville Platte, and E. B. Dubuisson, of Opelousas, for defendants.

SOMMERVILLE, J. The judges of the Court of Appeal, First Circuit, state of Louisiana, at the request of the defendants in this cause, and pursuant to section 6 of Act No. 198 of the General Assembly of this state, approved July 11, 1912, p. 392, have entered the following order in the case:

"It is ordered that the entire record, together with the opinion and decree of this court, be immediately transmitted to the Honorable Supreme Court of Louisiana."

The suit was brought by Helaire Vidrine in the Sixteenth judicial district court for the parish of Evangeline, against Robert Dupre and the members of the Democratic Executive Committee of the town of Ville Platte, alleging that he and Dupre were nominees for the office of marshal at a primary election held February 11, 1915; that he was regularly returned as the nominee at said primary; that no contest or protest was filed by any one, and especially by Robert Dupre, but that the Democratic committee of said town had, contrary to law, disregarded the returns of the commissioners of election, and had proceeded to count the ballots, and had arbitrarily declared Dupre to be the nominee at said primary. He further declared that the emoluments of the office under consideration, for the term of said office, was more than one thousand and less than two thousand dollars. He asked that the action of the committee be declared ultra vires, and without effect.

There was judgment in favor of plaintiff, and defendants appealed to the Court of Appeal. The judgment of the district court was there affirmed. And that court has, on the application of defendants, transmitted the entire record, together with the opinion and decree of the court, to this court.

The Court of Appeal in sending the record to this court refers, as its authority for so doing, to that portion of section 6 of Act 198 of 1912, at page 392, which reads as follows:

"Whenever either party shall so desire and request, after judgment, the Court of Appeal shall immediately transmit the entire record to the Supreme Court which court shall immediately proceed to hear and review such case as if it had been regularly ordered up for review, and to pronounce thereon without delay."

[1] The jurisdiction of the Supreme Court of Louisiana is fixed in the Constitution of the state, as is the jurisdiction of the courts of appeal throughout the state. Article 85 of the Constitution declares that the Supreme Court, except as hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases where the matter in dispute, or the fund to be distributed, whatever may be the amount claimed, shall exceed two thousand dollars, exclusive of interest. And article 98 of the Constitution provides that Courts of Appeal, except as otherwise provided in the Constitution, shall have appellate jurisdiction where the matter in dispute or the fund to be distributed shall not exceed two thousand dollars exclusive of interest.

Both courts are given appellate jurisdiction in certain causes regardless of the amounts involved, and the Supreme Court is given appellate jurisdiction in certain criminal cases, and original jurisdiction in some other cases.

In this case, the Court of Appeal had appellate jurisdiction, and it finally disposed of the case. This court was and is without appellate jurisdiction therein.

In addition to their appellate jurisdiction,

the Supreme Court have full control and supervision over all inferior courts. Article 94. And the court, or any member thereof, has the power to issue writs of certiorari, prohibition, mandamus, quo warranto, and other remedial writs in aid of such control and supervisory power. But inferior courts cannot invoke this supervisory power or demand those remedial writs; such must be applied for by litigants to the Supreme Court or to any member thereof.

By the terms of article 101, the judges of the Courts of Appeal may certify any question or proposition of law arising in a cause pending before them to the Supreme Court, asking for instructions with reference thereto; and the Supreme Court may give instructions on the questions or propositions certified to them, or they may require that the whole record be sent up for their consideration.

Article 101 also provides that:

"It shall be competent for the Supreme Court to require by certiorari, or otherwise, any case to be certified from the Courts of Appeal to it for its review and determination, with the same power and authority in the case, as if it had been carried directly by appeal to the said court; provided, that the Supreme Court shall in no case exercise the power conferred on it by this article, unless the application be made to the court, or to one of the justices thereof, not later than thirty days after the decision of the Court of Appeal has been rendered and entered."

It is seen under the paragraph last quoted, that the Supreme Court is prohibited from reviewing a final judgment of a Court of Appeal, by certiorari or otherwise, unless application be made to the court, or to one of the justices thereof, to do so. It is not only without power to review and determine a cause finally decided by a Court of Appeal, but it is prohibited from doing so, except on the application of one of the parties to the suit. The judges of said Courts of Appeal have no constitutional authority, after final judgments in the cases in such courts, to voluntarily send up or to transfer decided cases to the Supreme Court, to be there reviewed. They may only certify questions of law before judgment.

The right to issue writs of certiorari or review, or other writs, directed to the Courts of Appeal is reserved to the Supreme Court alone.

[2] And the attempt of the Legislature, in section 6, p. 392, of the Acts of 1912, to confer the right upon the Courts of Appeal to transfer decided cases, whether they be election cases or others, involving two thousand dollars or less, to the Supreme Court, is violative of the constitutional provisions before quoted, and the act, to that extent, is null and void.

The Constitution fixes the jurisdiction of the courts of the state, including the Supreme Court, and as the Legislature cannot change the Constitution, it cannot confer jurisdiction where the Constitution has not given it.

It is therefore ordered that the record,

with the opinion and decree of the Court of Appeal of the First Circuit of the state of Louisiana in this case be returned to said Court of Appeal.

(136 La. 824)

No. 20357.

ANDRUS et al. v. ANDRUS.

(Supreme Court of Louisiana. Feb. 23, 1915.)

(*Syllabus by the Court.*)

INSANE PERSONS \Leftrightarrow 30—SENILE DEMENTIA—INTERDICTION.

One who is afflicted with senile dementia so as to be incapable of taking care of his person or of administering his estate is subject to interdiction.

[Ed. Note.—For other cases, see Insane Persons, Cent. Dig. §§ 43, 45, 61; Dec. Dig. \Leftrightarrow 30.]

Appeal from Fifteenth Judicial District Court, Parish of Jefferson Davis; Winston Overton, Judge.

Petition by Isaac E. Andrus and others to have David D. Andrus adjudged insane. From a judgment of interdiction, defendant appeals. Affirmed.

McCoy & Moss, of Lake Charles, and Robert L. Knox, of New Orleans, for appellant. Smith & Carmouche, of Crowley, for appellees.

O'NIELL, J. On the petition of three of his sons, the defendant was adjudged insane, and he has appealed from the judgment of interdiction.

The interdict is nearly 82 years of age, and is afflicted with senile dementia. This infirmity rendered him incapable of managing his estate and his business affairs during the 2 years preceding the filing of this suit. He owns about 2,500 acres of land which is devoted principally to cattle ranges and partly to farming. His entire estate amounts to about \$100,000. In 1912 he gave a very general power of attorney to one of his sons to manage his business. Although the evidence does not establish that the unfavorable criticism of the agent's management is entirely well founded, there is great dissatisfaction among the other members of the family, who are demanding an accounting; and there is no one to whom this agent can legally account or be made to account, except a curator.

The defendant's counsel contended in the district court, and are still urging with great earnestness, that senile dementia is not insanity. The various authorities on medical jurisprudence define "senile dementia" as one of the forms of insanity. It is characterized by a mental weakness and inability to reason, a state of enfeeblement of the brain, which comes to those whose other vital organs have served them to a very old age. It may be regarded as a venerable form of insanity, but it is insanity nevertheless.

Article 389 of the Civil Code provides that

no person above the age of majority who is subject to an habitual state of imbecility, insanity, or madness shall be allowed to take care of his own person and administer his estate. And article 422 provides that not only lunatics and idiots are liable to be interdicted, but likewise all persons who, owing to any infirmity, are incapable of taking care of their persons and administering their estates.

The defendant is incapable of taking care of his person or of administering his estate, and there is good cause for his interdiction.

The judgment appealed from is affirmed.

(136 La. 825)

No. 20180.

F. W. HEITMANN CO. v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Louisiana. Feb. 23, 1915. Rehearing Denied March 22, 1915.)

(*Syllabus by Editorial Staff.*)

1. CONTRACTS \Leftrightarrow 238—BILL OF LADING—ORAL MODIFICATION—VALIDITY.

A bill of lading may be modified by subsequent oral agreement whereby the consignor, entitled to receive the goods, directed delivery to a third person.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. \Leftrightarrow 238.]

2. GUARANTY \Leftrightarrow 7—WRITTEN GUARANTY—CONSTRUCTION.

Where a consignor notified the carrier of his intention to hold it liable under the bill of lading for a delivery of the goods to a third person, instead of the consignor, to whom the goods were consigned, a reply by the carrier, wherein it advised that the consignor should proceed against the person receiving the goods for the amount due thereon, and that it guaranteed costs and attorney's fees, was an unqualified authorization to the consignor to bring the action, and a promise to pay the costs and attorney's fees, and notice by the consignor of acceptance was unnecessary.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 9; Dec. Dig. \Leftrightarrow 7.]

Monroe, J., dissenting in part.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Action by the F. W. Heitmann Company against the Kansas City Southern Railway Company. From a judgment granting insufficient relief plaintiff appeals. Affirmed.

Herndon & Herndon, of Shreveport, for appellant. Alexander & Wilkinson, of Shreveport, for appellee.

PROVOSTY, J. On August 17, 1911, the plaintiff company, a business concern of Houston, Tex., but also doing business in Shreveport, La., through an agent named Walker Ellis, sold, at Shreveport, through this agent, to the Wylie Drilling Company, a business concern in Shreveport, two car loads of piping, to be delivered at Oil City. It consigned the two car loads, over the defendant's road, to itself at Oil City. The agent of the Wylie

Drilling Company at Oil City, on receiving advice from his principal of the shipment having been made, applied to the defendant railroad company for delivery of the consignment, although not having the bill of lading. Delivery was refused him, in the absence of the bill of lading. He then communicated by phone with Mr. Walker Ellis, the agent of plaintiff, and, he says, was authorized by Ellis to obtain delivery of the goods, and was informed that the bill of lading had been mailed to him. On his communicating to the agent of the defendant company the result of this phone conversation the goods were delivered to him. The bill of lading had not been mailed, but at the filing of this suit was still in the possession of plaintiff. Walker Ellis admits the conversation over the phone, but denies that he gave authority for the delivery of the goods. The trial court found that he had, and we have experienced no difficulty in reaching the same conclusion. At that time he was the Shreveport agent of both companies, and the only possible reason there could have been for his not consenting to give this authority would have been if the goods had had to be paid for on delivery; and this was not the case, for they were charged to open account, and thereafter several payments were made on this open account without any question whatever being raised in connection with the said delivery. This question began to be agitated only some three months later, after the Wylie Drilling Company had failed in business; repeated efforts having in the meantime been made to collect from that company the balance due on its said open account.

Plaintiff now sues the defendant railroad company on the bill of lading. We think the trial court properly rejected the demand.

[1] Plaintiff's learned counsel argue that the bill of lading is a written contract, the terms of which cannot be varied or contradicted by parol evidence, and that therefore this giving of authority to receive the goods could not be proved by parol. This is a non sequitur. While a written contract cannot be varied or contradicted by parol, there is nothing to prevent its being modified by a subsequent contract or agreement. 17 Cyc. 734. And that is, practically, what takes place when the person entitled under the bill of lading to receive delivery of the goods directs them to be delivered to some one else. A bill of lading may be controlled by subsequent communications. *Mitchell v. Chesapeake & O. R. Co.*, 17 Ill. App. 231; *Forrester v. Dodge*, 12 Mass. 565. And inasmuch as no law requires the transactions between the consignor or the consignee of goods and the carrier to be in writing, there is nothing to prevent

these subsequent communications from being verbal.

[2] The goods were bought by the Wylie Drilling Company for the use of the Irish Oil Company, and were turned over to and used by the latter company. When plaintiff notified the defendant company of the intention to hold it liable under the bill of lading, the defendant company, through its attorneys, with full reservation of its rights and defenses, wrote to the plaintiff company, as follows:

"We therefore advise and recommend that your company immediately take proceedings in the courts of Texas against the Irish Oil Company for the amount of said indebtedness, and we guarantee on behalf of the Kansas City Southern Railway Company to see that the costs and attorney's fees of such proceeding are paid by said railway company."

This suit, thus recommended, was brought, and resulted unsuccessfully; and plaintiff has included in the instant suit a demand for these costs.

Defendant, as reason for resisting the demand, says that this suggestion and recommendation that a suit be brought was a mere offer on its part to pay the costs of such a suit, and that no notification of the acceptance of this offer was ever given; that the first it knew of the acceptance was when, after the termination of the suit, it was called upon by plaintiff to pay these costs; that it then withdrew the offer, on the ground that, if it had known of said suit having been brought, it could have furnished plaintiff with information which would have enabled plaintiff to succeed in it.

The above transcribed letter was not a mere offer to enter into an agreement but, was a positive and unqualified authorization to plaintiff to bring the suit in question immediately, and a promise to pay the costs thereof. The suit was brought for the benefit of the railway company. If viewed at all in the light of a guaranty, it was an absolute guaranty, not requiring notice. 20 Cyc. 1407; *Civil Code*, art. 1802. The doctrine of *Lachman & Jacobi v. Block*, 47 La. Ann. 505, 17 South. 153, 28 L. R. A. 255, has no application to such a case. We agree with the trial court in holding defendant liable for said costs. It is unfortunate that the plaintiff did not know of defendant's being possessed of information by which the result of the suit might have been different; but defendant made no mention in its said letter of its having such information, and plaintiff could not be expected to divine that it had.

Judgment affirmed.

MONROE, J., dissents, in so far as plaintiffs are awarded the costs and attorney's fees claimed by them: otherwise, he concurs.

(109 Miss. 101)

MISSISSIPPI CENT. R. CO. v. HATTIESBURG TRACTION CO. (No. 16456.)

(Supreme Court of Mississippi. March 29, 1915.)

EMINENT DOMAIN §85—RAILROAD TRACKS IN STREETS—PROPERTY RIGHTS.

Though the right of way of a railroad company is its private property, and cannot, under Const. 1890, § 17, be taken for public use, except on compensation being made, it does not own city streets along or across which its tracks are laid, and cannot acquire, under Code 1906, § 3322, any exclusive right to the use of the streets, but can only acquire in the streets the right to locate its tracks, subject to the right of the public to continue the free use of the streets for travel, and to the right of the municipal authorities to grant similar easements; and a street railway company, receiving a permit from a city to lay its tracks in the streets, may extend its tracks across a railroad company's tracks in a street without first instituting condemnation proceedings and paying damages.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 221-226; Dec. Dig. §85.]

Appeal from Chancery Court, Forrest County; J. M. Arnold, Special Chancellor.

Suit by the Mississippi Central Railroad Company against the Hattiesburg Traction Company. From a decree dissolving a temporary injunction, complainant appeals. Affirmed and remanded.

Truly, Ratliff & Truly, of Natchez, for appellant. Stevens & Cook, of Hattiesburg, for appellee.

SMITH, C. J. The Mississippi Central Railroad Company owns and operates a railroad which extends through the city of Hattiesburg, crossing a number of the streets of the city, one of them being Main street. The Hattiesburg Traction Company is a street railway company, and has received from the city of Hattiesburg permission to lay its tracks in the city streets. In extending its track along Main street it became necessary to cross the track of the railroad company, and negotiations were entered into by it with the railroad company for that purpose; the traction company agreeing to install and maintain the crossing at its own expense. The two companies failed to reach an agreement in the matter, not by reason of any objection of the railroad company to the character of crossing proposed to be installed by the traction company, but mainly because that company would not agree to operate its road at the crossing in accordance with certain requirements of the railroad company.

Failing to obtain the consent of the railroad company to cross its track, the traction company proceeded one night to install the crossing without the knowledge of the railroad company. This fact was discovered by the railroad company the next morning before the installation was complete, and it thereupon filed its bill in the court below, praying that the traction company be enjoined—

“from attempting to install or use a crossing over the line and roadbed of complainant at Main street crossing in the city of Hattiesburg, until eminent domain proceedings have been instituted, and the right to condemn a crossing has been judicially and finally determined.”

Upon the filing of this bill a temporary injunction was issued and served upon the traction company, and this appeal is from a decree sustaining a motion to dissolve this injunction, and is for the purpose of settling the principles of the case. After the granting of this injunction, an agreement was entered into between the two companies by which the traction company was permitted, without prejudice to the rights of the railroad company in so far as this litigation is concerned, to complete the installation of this crossing and to use the same.

The reason assigned by the traction company for attempting to install this crossing during the night is that to do so would not then interfere with the movement of trains over the railroad track; it not having commenced the installation until the last train due to cross the street that night had passed. With the truth of this explanation, however, we are not here concerned. The sole question presented to us for decision is this: Has a street railway company, operating under municipal authority, the right to construct its track across that of a steam railroad at a point where it crosses a street of the municipality, without first instituting condemnation proceedings and paying the railroad company the damages therein awarded it?

It is true that a railroad company's right of way, when owned by it, is its private property, and cannot, under section 17 of our Constitution, “be taken or damaged for public use, except on due compensation being first made”; but it is equally true that a railroad company does not own the streets of a municipality along or across which its tracks are laid, neither can it acquire, under section 3322 of the Code, any exclusive right to the use of the streets of the municipality. The only right it can acquire in the streets of a municipality is the right to locate its tracks along or across them, subject to the right of the public to continue the free use thereof for traveling, and to the right of the municipal authorities to grant similar easements therein. In *Pennsylvania Co. v. Lake Erie, etc., Ry. Co.* (C. O.) 146 Fed. 446, a case wherein, as in the case at bar, the complainant was a railroad company and the defendant a street railway company, it was said that:

“Complainant's bill assumes the possession by complainant of a right in the street which in law it cannot possess. The bill alleges that the defendant is about to enter upon complainant's ‘right of way.’ In the sense in which this term is used in the bill, the complainant has no right of way in the street; that is, it has no tangible property therein. True, it has in strictness a right of way across the street; but this right

is of an intangible nature. It has no more substance than the right of way over a street possessed by a pedestrian. So that to say that the defendant is about to enter upon complainant's 'right of way,' meaning the right of way it possesses across the street, is to say that the defendant is about to do what any and every body has a right to do at all times, subject only to the movement of complainant's trains. What the defendant proposes to do is to introduce in the public highway, at the point where complainant's tracks cross it, another public use thereof, under authority of the municipal legislation necessary in such cases. The complainant has no property in the street, and none on it except a few ties and rails. The disturbance of these for the purpose of suiting them to the new use to be made of the public highway is necessary, and results in no invasion of complainant's rights."

The rule here announced is in accord with all of the authorities dealing with this precise question that have come under our observation, most, if not all, of which will be found set forth in the notes to 36 Cyc. 1420, to Chicago, etc., R. R. Co. v. West Chicago Street R. R. Co., 29 L. R. A. 485, and to Southeast, etc., R. R. Co. v. Evansville, etc., Ry. Co., 13 L. R. A. (N. S.) 916.

A number of cases have been cited by counsel for appellant to the point that a railroad company's right of way is private property, and cannot be taken or damaged for public use except on due compensation being first made, in none of which, however, was the right of the street railway to cross the track of a railroad in a public street involved, except in the case of Central Ry. Co. v. Philadelphia, etc., R. R. Co., 95 Md. 428, 52 Atl. 752. In that case the street railway company undertook to cross the track of the railroad company in a public street, whereupon the railroad company filed a bill in the proper court, "praying for an injunction to restrain the street railway company from crossing its track until it, the street railway company," would enter into an agreement to pay, not only the cost of making the crossing, but the subsequent cost of keeping the crossing in repair, which repairs, it was insisted, should be made under the supervision and according to the direction of the engineer of the railroad company. While the litigation was pending, "the street railway company, under an agreement with the steam railroad company, made the crossing at its own expense, and the question as to the relative rights of the two companies was reserved for the future determination of the court." It was held that the street railway company, before it crossed the track of the railroad company, must execute an agreement for the maintenance of the crossing. This was the only question decided in that case; and, if

it is in point here, it is only authority for the proposition that, when a street railway company desires to cross the track of a railroad company in a public street, it must pay the expense of installing and maintaining the crossing. Neither of these questions, however, are here involved, for the reason that the street railway company has paid the expense of installing the crossing and proposed to bear the expense of maintaining it.

In the case of Birmingham Traction Co. v. Birmingham Ry. & Elec. Co., 119 Ala. 129, 24 South. 368, so much relied upon by counsel for appellant, no question of the right of one railroad company to cross the tracks of another in a public street was involved. That case was decided by the Supreme Court of Alabama on August 15, 1898, and on October 29, 1898, another phase of the matter in dispute between the parties thereto came again before that court for consideration in the case of Birmingham Traction Co. v. Birmingham Ry. & Electric Co., 119 Ala. 137, 24 South. 502, 43 L. R. A. 233. An examination of the reports of the two cases discloses that the Birmingham Railway & Electric Company had granted to the town of Woodlawn, "for the use of the citizens and the public generally, an easement over that part of its right of way which is within the corporate limits of the town of Woodlawn, and which is not absolutely essential for the operation of its road, this amount being about 25 feet for double track, and such room as is necessary to erect poles and proper waiting stations."

In the first case the Birmingham Traction Company attempted, not only to lay its track across that portion of the Birmingham Railway & Electric Company's right of way which had been granted to the town of Woodlawn for a public street, but also across the 25-foot strip actually occupied by the electric company, and not included in the street. This, the court held, could not be done without the consent of the electric company, in the absence of condemnation proceedings. In the second case the traction company was seeking to locate its track along that portion of the electric company's right of way which had been granted to the town for a street, and this the court held it could do without paying the electric company any compensation therefor, the court pointing out (119 Ala. 137, 24 South. 503) that the former case involved, not the use by the traction company of that portion of the right of way over which the city had been granted an easement, but of the 25-foot strip reserved and actually occupied by the electric company.

Affirmed and remanded.

(109 Miss. 114)

RHODES v. ROBINSON, Tax Collector.
(No. 17997.)

(Supreme Court of Mississippi. March 29, 1915.)

TAXATION \Leftrightarrow 608—RESCISSION OF LEVY—INJUNCTION AGAINST COLLECTION.

Where a tax levy was made to secure money with which to pay certain road bonds, and the bonds could not be sold, the order levying the taxes was properly rescinded, and injunction would lie at the suit of a taxpayer to restrain the collection of such levy.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. \Leftrightarrow 608.]

Appeal from Chancery Court, Rankin County; Sam Whitman, Jr., Chancellor.

Action for injunction by S. S. Rhodes against G. O. Robinson, as Tax Collector. Demurrer to complaint sustained, and complainant appeals. Reversed and remanded.

Stingily & McIntyre, of Brandon, for appellant. S. L. McLaurin, of Brandon, for appellee.

COOK, J. This action was begun in the chancery court by a bill of complaint filed by a taxpayer of supervisors' district No. 4, Rankin county, praying for an injunction to restrain the tax collector from collecting taxes levied against his property to acquire funds with which to pay certain alleged road bonds authorized by order of the board of supervisors. A preliminary injunction was granted, and at the hearing a demurrer to the bill of complaint was sustained, and the injunction dissolved. Complainant below prosecutes this appeal.

The bill alleges that by proceedings under chapter 145, Laws 1912, a road district was created embracing all of supervisors' district No. 4; that by further proceedings the board of supervisors authorized the issuance and sale of the bonds of said district for the purpose of constructing roads in the district; that subsequently the board of supervisors levied a tax on the property embraced in the district for the purpose of liquidating the said bonds. The bill of complaint further says that after the levy of taxes in July, 1914, the board of supervisors, being unable to sell the bonds, in December, 1914, entered an order setting aside its order levying the taxes.

It is contended here that the order setting aside the levy was entirely proper, and for this reason the demurrer should have been overruled. The bill prayed that the tax collector be restrained from collecting the taxes, and the demurrer having admitted that the board of supervisors, for the reasons above mentioned, had repealed its order levying the taxes, it is claimed that the demurrer should have been overruled, and injunction should have been made perpetual.

The tax levy was made to secure money with which to pay the bonds, and, the bonds

not being sold, there was no longer any necessity for collecting the taxes levied for this purpose. We think, therefore, that the board of supervisors properly rescinded the order levying the taxes for this purpose, and the demurrer should have been overruled.

Reversed and remanded.

(100 Miss. 107)

ALLEN v. ROBY et al. (No. 16864.)

(Supreme Court of Mississippi. March 29, 1915.)

1. RELIGIOUS SOCIETIES \Leftrightarrow 27—PASTOR—SELECTION.

Where the manual of the Baptist church on the general subject of obtaining pastors declared that they shall be chosen by election as the free choice of the people in each individual church, and it appeared that each Baptist church was independent, a statement in the manual that in giving a call the church usually appointed a committee, notice being given for several Sundays, and that a three-fourths vote of all present at the meeting should be deemed essential to the call, coupled with the remark that no prudent man would accept a call on anything less, cannot be considered as prescribing the method of calling pastors, and a bare majority is sufficient.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 180-193; Dec. Dig. \Leftrightarrow 27.]

2. RELIGIOUS SOCIETIES \Leftrightarrow 27 — PASTORS — DISMISSAL.

When a pastor has been selected by a church, the relation cannot be dissolved by external authority, civil or ecclesiastical, but must be dissolved by appropriate action by the membership.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 180-193; Dec. Dig. \Leftrightarrow 27.]

3. RELIGIOUS SOCIETIES \Leftrightarrow 14—DOCTRINES—COURTS.

The courts will not interfere to determine questions or doctrines of a Baptist church, which operates under the congregation system.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 100-102; Dec. Dig. \Leftrightarrow 14.]

Appeal from Chancery Court, Attala County; J. F. McCool, Chancellor.

Suit by Calvin Roby and another against T. H. Allen. From a decree granting a perpetual injunction, defendant appeals. Reversed, and bill dismissed.

S. L. Dodd, of Kosciusko, and R. H. & J. H. Thompson, of Jackson, for appellant. Thomas Land, of Kosciusko, for appellees.

REED, J. This is a suit in chancery by appellees, two of the trustees of the Kosciusko Colored Baptist Church, against appellant, pastor of that church, for injunction restraining appellant from entering the church and preaching to the members. A temporary injunction was granted, and upon final hearing on bill, answer, and evidence was made perpetual.

Appellees charged in their bill that appellant had preached unsound doctrine, fomented strife, and was immoral and un-

worthy to be pastor, and that he did not have legal contract with the church as pastor, but held the position unlawfully and forcibly. We do not find that appellant was ever arraigned or proceeded against by the congregation on the charges that he was guilty of wrong conduct and was unworthy. On the other hand, there is considerable testimony from members and leading officials of the church exonerating him therefrom. It is in proof that there are seven deacons, who had charge of such temporal affairs of the church as need attention, and appellees were two of these. The province of trustees is quite restricted in the church government, hardly extending to the bringing of suit such as this, and it may be that appellees intended to proceed in this case as deacons rather than trustees. They do not show, however, any action by the members of the church authorizing or directing the institution of this suit.

The proof clearly shows that appellant was properly chosen pastor of the church. The minutes of October 24, 1909, contain the following:

"On motion that Rev. T. H. Allen, of Pickens, Miss., be pastor for 1910. Carried unanimously."

The salary to be paid him was then properly fixed. It is in testimony that he continued for 1911 as pastor without question. The minutes of a meeting held October 22, 1911, contain the following:

"By majority of votes it was declared that Rev. T. H. Allen be pastor for 1912."

The government of the Baptist church is with its members. Its form of government is congregational and democratic. Each church is a distinct organization, independent of others. The members of the church have full power to call a pastor and make all necessary agreements with him. We learn from Hiscox's New Directory, introduced and used in the evidence and brought up with the record, being a manual outlining the polity, faith, and practice of the Baptist denomination, that an essential part of the independence of the churches is the right to choose their pastors and teachers, and that no individual or combination of men can appoint pastors over them; that no man is to be a pastor until "he has been chosen by a majority vote" of the church calling him.

[1] It is argued by appellees that the appellant was not legally chosen pastor, because it is not shown that his election was by a three-quarters vote of the members. They rely to sustain their position, upon the

following quotation from Hiscox's New Directory, page 108, note 4:

"In giving a call, the church usually appoints a meeting for that express purpose, notice being publicly given two Sundays in succession, the purpose of the meeting being distinctly stated in the notice, and a *three-quarters vote* of all present at such a meeting should be deemed essential to a call. Certainly no prudent or self-respecting man would accept a call on anything less than that."

This text is taken from a note under the general subject of church officers, and we do not see that it is a mandatory provision. It seems to us to be in the nature of a recommendation. We notice that it is said that the church "usually" proceeds in this manner. Then the statement that a prudent man would not accept a call on a smaller vote indicates that all of this is a matter of advice only.

This view is confirmed when we note the provision above referred to in the main text of Hiscox's Directory, pages 98 and 99, on the general subject of how pastors are obtained, that they are chosen "by election, as the free choice of the people, in each individual church," and that the members "may ask or accept advice; but no man is a pastor to any people until he has been chosen by a majority vote of that church."

[2] We take the following provision, relative to the termination of the pastorate, from page 101 of the Directory:

"There is no power that can compel a church to accept a pastor or a pastor to accept a church. The relation is formed by mutual agreement between them. And, when once formed, the relation can be dissolved by no external authority, civil or ecclesiastical, but by mutual consent of the parties themselves."

There is abundant evidence from witnesses testifying that the Kosciusko Church is governed by majority rule. It is in testimony that only a few members were in accord with appellees in their opposition to appellant, and that the majority were favorable to him. We do not find in the proof that the relation of pastor and congregation was dissolved by any proper action of the membership. This was necessary to terminate the pastorate.

[3] The courts will not interfere to determine questions involving doctrines or government of a Baptist church. *Baptist Church v. Jones*, 79 Miss. 488, 30 South. 714; *Windham v. Ulmer*, 102 Miss. 491, 59 South. 810; *Smith v. Charles*, 24 South. 968. The chancellor erred in making the injunction perpetual.

Reversed, injunction dissolved, and bill dismissed.

(109 Miss. 119)

FOOTE v. GRAND LODGE OF COLORED KNIGHTS OF PYTHIAS. (No. 16919.)

(Supreme Court of Mississippi. March 29, 1915.)

INSURANCE ⇨793—**LIFE INSURANCE—RIGHT OF ACTION.**

Where defendant issued a policy of life insurance, which named the insured's mother as beneficiary, and complainant thereafter married the insured, but the beneficiary was never changed, complainant cannot maintain a suit against defendant for its payment of the proceeds of the policy to the mother; complainant being given no interest therein.

[Ed. Note.—For other cases, see Insurance, Cent.Dig. §§ 1967-1972, 1980; Dec.Dig. ⇨793.]

Appeal from Chancery Court, Warren County; E. N. Thomas, Chancellor.

Bill by Marguerite Foote against the Grand Lodge of Colored Knights of Pythias. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

J. H. Short, of Vicksburg, for appellant. Powell & Thompson and W. J. Latham, all of Jackson, for appellee.

REED, J. On March 30, 1909, appellee, a fraternal and benevolent insurance order, issued to M. D. Foote, then an unmarried man, a policy of insurance on his life for the sum of \$600, payable to his mother, Laura Foote. Thereafter he was married to appellant. The beneficiary in the policy was never changed. When Foote died, it was still payable to his mother. Appellee paid her the full amount of the policy.

Appellant, the widow of Foote, brought this suit in chancery to recover from appellee the amount of insurance on her husband's life, which appellee paid, in accordance with the policy, to the beneficiary named therein, Laura Foote, the mother of the insured. A demurrer to the bill was sustained, from which this appeal was prosecuted.

Appellant claims that the amount should not have been paid to the mother, who was named as beneficiary in the policy, because she was not within the class for whose benefit a member might insure himself in the order, but should be paid her as widow. We do not see how appellant has any standing to claim from appellee the amount of the insurance. She was not named as beneficiary in the policy, and she was not given such right by any law of the land or law of the order. The court did not err in sustaining the demurrer.

Affirmed.

(108 Miss. 550)

CHRISMAN v. MAGEE. (No. 16804.)

(Supreme Court of Mississippi. March 22, 1915.)

WILLS ⇨106—**LAND DEVISED—DESCRIPTION.**

Where testator devised to his son the "S. W. ¼ of the N. E. ¼ sec. 31," township 22, range 5 W., in B. county, in which section he owned only the S. W. ¼ of the N. W. ¼, so

that the description contained in the will was erroneous, enough remained after discarding the erroneous part of the description to identify the land so that it passed by the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 244; Dec. Dig. ⇨106.]

On suggestion of error. Sustained.

For former opinion, see 67 South. 49.

Thos. S. Owen, of Cleveland, for appellant. Somerville & Somerville, of Cleveland, and E. O. Sykes, of Aberdeen, for appellee.

REED, J. Appellant, in his suggestion of error, says that the decision of this court rendered on a former day (see Chrisman v. Magee, 67 So. 49) is correct, except as to the holding therein relative to the land in section 31, township 22, range 5, in Bolivar county. It will be seen by reference to the statement of the facts in the opinion that the testator, the late Judge J. B. Chrisman, in his will, devised to his son, J. J. Chrisman, the appellant, the "S. W. ¼ of the N. E. ¼, Sec. 31," in township 22, range 5, W. The testator did not own the S. W. ¼ of the N. E. ¼ in the section 31, but did own the S. W. ¼ of the N. W. ¼ in that section, and that was the only land he owned or ever owned therein.

We held in our former opinion that the description of the land as contained in the will was accurate, and that oral testimony would not be admitted to show that the testator did not intend to devise the land described, but another parcel of land, citing Ehrman v. Hoskins, 67 Miss. 192. We note that in that case the testator owned the lot which was described in the will by accurate description, while here he did not own the S. W. ¼ of the N. E. ¼ described in the will. So there is a difference in the facts. The general rule which we applied in this case in our former opinion is not, however, without exceptions. There is another rule of law applicable here which we in our former consideration overlooked and which is that where there is a misdescription of the property devised, if, after striking out the erroneous part of the description, enough remains, when considered in the light of the circumstances surrounding the testator, to identify the property he intended to convey, the remaining part of the description may be taken to give effect to the testator's purpose. 40 Cyc. 1559. It is stated in Page on Wills, p. 573, that:

"The greater weight of modern authority probably is that where the will is so worded as to show testator's intention to pass his lands in the given plat or section and the like, the description of the particular lot, quarter section, and the like may be rejected, if erroneous."

Mr. Page further says (see page 571) that all the courts practically agree that if—

"after the false description, or part of a description, is discarded, there remains in the devise language sufficiently full and accurate to identify the subject of the gift with sufficient certainty, the property thus indicated will pass."

In the case of *Pate v. Bushong*, 161 Ind. 533, 69 N. E. 291, 63 L. R. A. 593, 100 Am. St. Rep. 287, it was held that if there were errors in a will in the description of the subject of a devise, it will not void the gift if after rejecting the errors enough remains to show with reasonable certainty what was intended when considered from the position of the testator, and that where a devise of lands by description partly fails, as where the wrong section number is given, if what remains after rejecting the erroneous reasonably corresponds with the real estate indicated by extrinsic evidence, such devise will be effective. It is stated in the monographic note on the subject of Extrinsic Evidence to Explain Wills, to the case of *Chappell v. Missionary Society*, 50 Am. St. Rep. 279, that:

"While words cannot be added to a will, yet, in arriving at the intention of the testator, so much as is false in the description of the land devised may be stricken out, provided enough remains to identify the premises intended to be devised."

It is contended by the appellant in his suggestion of error that if the part of description which is shown by the agreed statement of facts to be erroneous, to wit, "S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$," is stricken from the will, there will remain a sufficient description to identify the land devised. After striking out the part mentioned, the will then will show that the testator devised to his son land in section 31, township 22, range 5 W., in Bolivar county, Miss. The agreed statement of facts contains the information that testator only owned one quarter of a quarter, or 40 acres, in that section, and that that parcel was the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of that section. It is also clear from the agreed statement of facts that the "S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ " in the description is erroneous. After discarding the erroneous part of the description, it appears to us that sufficient remains to identify the land so as to enable it to pass by the will. It is also apparent to us, after a careful reconsideration of this case, and in the light of all the circumstances surrounding the testator at the time he made his will, that it was his intention that this 40 acres of land should go to his son, the appellant.

We, therefore, conclude that we were in error in holding that the chancellor was correct in deciding that the land was not devised to appellant, and we now withdraw all that part of our opinion in which we so decided. The suggestion of error is sustained, and we now hold that the land owned by the testator in section 31, township 22, range 5 W., in Bolivar county, which is the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of the section, and the only land owned by the testator when he made his will, in that section, was devised in the will to the appellant, and is now his property.

Suggestion of error sustained.

(109 Miss. 125)

STATE v. LONGINO et al. (No. 17810.)

(Supreme Court of Mississippi. March 22, 1915.)

1. COURTS \Leftrightarrow 100 — ACTS PROHIBITED BY STATUTE — JUDICIAL INTERPRETATION — CHANGE OF DECISION—EX POST FACTO LAW.

Code 1906, § 1169, provides that it shall be a criminal offense for the president, cashier, teller, etc., conducting the business of receiving on deposit money, etc., to receive any deposit while knowing the institution is insolvent. The statute was judicially declared not to apply to certain acts, but subsequently the ruling of the court was reversed and such acts held a criminal offense under the statute. Between the two decisions defendants committed such acts. *Held*, that a holding by the court whether a criminal statute is, or is not, applicable to a particular state of facts is within the spirit of the constitutional prohibition against the passage of ex post facto laws, the decision of a court in construing a statute being as much a part of the law of the land as a legislative enactment, unlike their decisions relating to the common law, which are mere evidence of the law, and that no conviction may be had under the statute in question for violation committed between the first and second decisions of the court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 341-343; Dec. Dig. \Leftrightarrow 100.]

2. CRIMINAL LAW \Leftrightarrow 1213—CHANGE OF JUDICIAL DECISION—CRUEL AND UNUSUAL PUNISHMENT.

Held, the rule announced being confined strictly to a criminal case, that to convict a defendant for an offense committed after a decision of the court holding a criminal statute not applicable to the facts, and before its reversal in a subsequent decision, would be to violate the constitutional provisions against the infliction of cruel and unusual punishments.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. \Leftrightarrow 1213.]

Appeal from Circuit Court, Lawrence County; J. C. Ward, Special Judge.

A. T. Longino and others were indicted for crime. A demurrer to the indictment was sustained, and the State appeals. Affirmed, and defendants discharged.

Appellees were indicted under section 1169 of the Mississippi Code of 1906, the indictment charging that appellees were officers, agents, and employes, to wit, president, cashier and directors of a banking institution, and that—

"being then and there engaged in conducting the business of receiving on deposit the money and other valuable things of other persons for the said Merchants' & Planters' Bank, which said bank was then and there wholly insolvent, and the said [appellees] agents, officers, and employes aforesaid then and there having good reason to believe that said bank was then and there insolvent, did then and there unlawfully and feloniously receive a deposit in said bank consisting of money, etc. * * * which was then and there received for deposit in the said bank from * * * a depositor, * * * and that said agents, officers, and employes did not then and there, or at any time prior thereto, inform said depositor that said bank was then and there insolvent."

Section 1169 of the Code of 1906 is as follows:

"If the president, manager, cashier, teller, assistant, clerk, or other employe or agent of any bank or broker's office or establishment conducting the business of receiving on deposit the money or other valuable things of such persons, shall remove or secrete or conceal the assets or effects of such establishment for the purpose of defrauding any of the creditors of the establishment, or shall receive any deposit knowing, or having a good reason to believe, the establishment to be insolvent, without informing the depositor of such condition, on conviction, he shall be imprisoned in the penitentiary not longer than five years."

Appellees demurred to the indictment, and the demurrer was sustained, and the state appealed.

Ross A. Collins, Atty. Gen., and Geo. H. Ethridge, Asst. Atty. Gen., for the State. G. Wood Magee, of Monticello, and Longino & Ricketts, of Jackson, for appellees.

COOK, J. This court, in Traylor's Case, 100 Miss. 544, 56 South. 521, decided that the act charged in the present case *was not* a violation of section 1169, Code 1906. Subsequently, this court, in State v. Rawles, 103 Miss. 807, 60 South. 782, overruled Traylor's Case, holding that the act which the indictment in the present case charges *was* a violation of the code section mentioned above. In the interim, the indictment charges that defendants in the present case did the acts which this court in the Traylor Case had decided did not come within the condemnation of the statute. The trial court sustained defendants' demurrer to the indictment, doubtless upon the theory that he was bound by the decision in Traylor's Case. So we have the question as to whether the decision in the Rawles Case is to have a prospective or a retroactive effect. In other words, after the decision of this court in the Rawles Case, will we consider Traylor's Case at all in the construction of the statute, in so far as the rights of the present defendants may be concerned?

[1, 2] We do not wish to be understood as announcing a general rule. We confine the rule herein announced strictly within the limits of this case. We are considering a change of decisions interpreting criminal statutes, and that alone.

The Supreme Court of Iowa, in State v. O'Neil, 147 Iowa, 518, 126 N. W. 454, 33 L. R. A. (N. S.) 788, Ann. Cas. 1913B, 691, discussed the precise question here presented. This case brought forth four opinions, all of which held that the defendant was not guilty; that he was protected by the decision which was in force at the time it was alleged he did the act charged against him, and that a subsequent decision, overruling the former decision, would not destroy his defense. The several judges writing opinions in the case referred to gave different reasons for their conclusions, but all agreed that to hold otherwise would be unjust. Quoting from the majority opinion, written by Judge McClain, it is said:

"In criminal cases, where the life or liberty of an individual is involved on one side, and the enforcement of law in the interest of the public welfare on the other, no private right of contract or property being imperiled by liberality of construction, the courts go further than in civil cases to recognize the common judgment of humanity as to what is right and just, and they allow many exceptions to statutory definitions of what shall constitute a crime."

This seems to express the dominant thought running through all the opinions, but the reasons given for the exceptions to the general rule were widely different.

The concurring opinion of Chief Justice Deemer, quoted this observation of the Supreme Court of the United States, in Douglas v. Pike County, 101 U. S. 677, 25 L. Ed. 968:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive."

The learned judge, referring to this quotation from the Supreme Court of the United States, said:

"If this be the rule with reference to the interpretation of statutes in actions involving property or contract rights, and such seems to be the doctrine established by the weight of judicial decisions, there is the more reason for holding it applicable to criminal cases, particularly where the court has once held the criminal statute void and of no effect because contrary to some provision of the fundamental law."

We again quote from the opinion of the Chief Justice, as follows:

"I see no good reason for not holding that this case comes within the provision of section 21, of article 1, of the Bill of Rights, which prohibits the passage of *ex post facto* laws. An *ex post facto* law is one which makes an act innocent when done a crime. State v. Squires, 26 Iowa, 340. Strictly speaking, perhaps, this refers only to laws passed by the Legislature, but there is every reason for holding that it also applies to a change of judicial decisions. Decisions of courts construing statutes or declaring them unconstitutional are as much a part of the law of the land as legislative enactments. They become a part of the body of the law itself, and are not merely the evidences thereof, as are decisions relating to the unwritten or common law."

This reasoning appeals to us as sound, and in entire accord with the judicial decisions touching this question. Another reason given by Chief Justice Deemer for his concurrence in the conclusion of the court was thus expressed:

"I am very clearly of the opinion that no other basis is needed for the conclusion, which every one desires to reach in this case, than the constitutional provision against cruel and unusual punishment."

It occurs to us that the punishment of an act declared by the highest court of the state to be innocent, because the same court had seen fit to reverse its interpretation of a statute, would be the very refinement of cruelty; it is certainly unusual because no precedent can be found for its infliction; that it is unjust is perfectly obvious.

We think that a change of decisions in-

volving the interpretation of criminal statutes should have a prospective effect. This rule seems to be the just and the most reasonable rule. This rule applies the same principle as the constitutional prohibition of *ex post facto* legislation. It will prevent injustice and also prevent cruel and unusual punishment of individuals entirely innocent of any intention to violate the laws of the state.

The Supreme Court of North Carolina, in *State v. Bell*, 136 N. C. 674, 49 S. E. 163, reviewed its former decision interpreting a criminal statute, and reached the conclusion that the former decision was wrong in holding that the act in question did not violate the statute. In the case under review, the defendant was held to be not guilty because the act done by him was innocent under the former decision. The reason for its conclusion was stated this way:

"While we hold the law to be as stated, we are embarrassed in applying this ruling to this case. It may be that these defendants have acted upon the advice of counsel based upon the decision of this court in *State v. Neal* [129 N. C. 692, 40 S. E. 205] *supra*. If so, to try them by the law as herein announced would be an injustice. While it is true that no man has a vested right in a decision of the court, it is equally well settled that where, in the construction of a contract or in declaring the law respecting its validity, the court thereafter reverses its decision, contractual rights acquired by virtue of the law as declared in the first opinion will not be disturbed. We have diligently searched for authority by which courts have been governed in cases such as the one before us. We find nothing very satisfactory. In view of the peculiar conditions with which we are dealing, we have deemed it but just to the defendants, and not at variance with any authority in this court, to order a new trial, with the direction that the testimony offered in this case, in so far as it is made admissible by the ruling of this court in *State v. Neal*, be admitted. If the defendants shall be able to establish their defense in accordance with the ruling in *Neal's* Case they are entitled to do so, but the construction now put upon the statute will be applied to all future cases. While, as we have said, we find no authority directly in point, we think this course is sustained by what is said in *Wells on Stare Decisis*, 566. See also, *Township v. State*, 150 Ind. 168, 49 N. E. 961, 26 A. & E. Ency. 179; [in *re Dunham*] 8 Fed. Cas. No. 4, 146, p. 37."

Ingersoll v. State, 11 Ind. 404, and *Endlich on Interpretation of Statutes*, § 363, are authority for this holding.

The Supreme Court of the United States has uniformly held that a change of decision does not have the effect to impair contractual rights obtained while the changed decision was in force.

Our attention has not been directed to any judicial decision in conflict with our conclusions, and after much diligence in searching the books, we think it may be said that no such decision can be found.

The argument on behalf of the state is that when a decision is overruled, in legal contemplation, the decision never existed. This argument has been met and satisfactorily an-

swered in the adjudicated cases. It is also said that every man is presumed to know the law, and no one can take shelter under an erroneous decision of the highest court. This argument is, in our opinion, manifestly faulty. If the legal maxim has any application to a case like this, and is controlling, the maxim must be amended to read thus: "Ignorance of the law excuses no man, except members of the Supreme Judicial Tribunal of the state."

The judgment of the trial court sustaining the demurrer to the indictment is affirmed and defendants are discharged.

(109 Miss. 126)

GALLASPY v. INTERNATIONAL HARVESTER CO. OF AMERICA. (No. 16894.)

(Supreme Court of Mississippi. March 29, 1915.)

1. PRINCIPAL AND AGENT — 143 — UNDISCLOSED PRINCIPAL — RIGHTS AND LIABILITIES.

Code 1906, § 4784, declares that if any person shall transact business as a trader, with the addition of the words "Agent," "factor," "and company," or like words, and fail to disclose the name of the principals or partner by a sign placed conspicuously at the house where the business is transacted, or if any person shall transact business in his own name without such addition, all property used in such business shall, as to the creditors of the trader, be liable for his debts. A hardware company whose place of business bore no sign showing that it was an agent for the manufacturer of gas engines had possession, as agent, of an engine which it was demonstrating in the hopes of making a sale. Held, that as against the manufacturer, creditors were entitled to treat the engine as the property of the hardware company.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 502-512; Dec. Dig. 143.]

2. BANKRUPTCY — 140 — TRUSTEE — RIGHTS OF.

Under Bankr. Act July 1, 1898, c. 541, § 70, 30 Stat. 565 (U. S. Comp. St. 1913, § 9654), which passes to the trustee all property which prior to the filing of the petition could have been levied upon or sold under judicial process against the bankrupt, the trustee of a bankrupt company may recover a gas engine of which the company had possession as agent, where its creditors could, under Code 1906, § 4784, have treated the engine as belonging to the company.

[Ed. Note.—For other cases, see *Bankruptcy*, Cent. Dig. §§ 198, 199, 219, 225; Dec. Dig. 140.]

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action by J. W. Gallaspy, trustee in bankruptcy of the Decatur Hardware Company, against the International Harvester Company of America. From a judgment for defendant, plaintiff appeals. Reversed, and judgment entered for plaintiff.

Appellant was plaintiff in the court below, and appellee was defendant. From a judgment for defendant, plaintiff appeals.

Section 4784, referred to in the opinion, is as follows:

"If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

J. R. Rowzee, of Newton, and Baskin & Wilbourn, of Meridian, for appellant. M. B. Potter, of Decatur, and G. C. Tann, of Hickory, for appellee.

COOK, J. It appears from the record that the Decatur Hardware Company was doing a mercantile business at Decatur in this state. The business conducted by this company was, generally speaking, a retail hardware business. In this connection, the International Harvester Company, manufacturer of agricultural implements and oil engines, had constituted the Decatur Hardware Company its local agent, and in the regular course of business the harvester company had shipped its products to the hardware company to be sold under the terms of its agency contract. It appears that the hardware company conceived the idea that it could build up a trade in 45 horse power traction engines manufactured by the harvester company. After considerable correspondence between the hardware company and the harvester company, one of these high power engines was shipped to the hardware company. We gather from the correspondence that the harvester company agreed to send an expert to Decatur to assist in demonstrating the engine; that the hardware company had a prospective purchaser in view, and believed that a trade in this class of engines could be built up in Decatur. However, there was some doubt about this, and it was agreed that if no sale was made, the hardware company would pay the freight on the engine, and ship it to some other point to be designated by the harvester company. When the engine reached Decatur it was taken in charge by the hardware company. Several loads of ice were hauled from the depot, a house was moved, and a long string of wagons were drawn about the streets by the engine. This was done to demonstrate the fitness of the engine to perform the work for which it was designed, and, as we understand, this was done to advertise the machine for the purpose of selling same. Because of the inexperience of the demonstrator, or for some other cause, the engine broke down, and was left in the street. This all occurred before the arrival of the expert from the factory, and while the engine was in the possession of a representative of the hardware company. A few days after the arrival of the engine, the hardware company, upon the petition of its creditors,

was declared a bankrupt. The trustee in bankruptcy instituted a replevin suit for the engine, claiming that same was a part of the assets of the bankrupt.

[1, 2] It is contended by the harvester company that the engine in question was never the property of the hardware company; that it was shipped solely for the purposes of demonstration. It is contended by the trustee that the engine was "used or acquired" in the business of the hardware company, and, as to its creditors, it became liable for the debts of the bankrupt. In other words, the trustee claims that the ownership of the engine, so far as creditors are concerned, is fixed by section 4784, Code 1906. The hardware company had a place of business, a house, and had a sign over its doors which read, "Decatur Hardware Company." The engine in question was not, and could not have been, put inside the storehouse, but it is claimed that it was acquired by the hardware company in "such business" as it was then conducting, and therefore and thereby it was liable to be taken by the trustee on behalf of the creditors of the hardware company. There can be no doubt that the engine was shipped to the hardware company for the purpose of selling the same, if that could be done. It is also true that the harvester company was in doubt about the sale, but nevertheless the machine was acquired by the hardware company for the purpose of selling same. As between the parties to this contract, it may be admitted that the harvester company remained the owner of the machine, but it seems clear that by our statute the engine could have been levied upon and sold by the general creditors of the hardware company. When a trader acquires or uses property in his business, the property so acquired or used, as to creditors, will be treated as the property of the trader, no matter what may be the undisclosed contract of the trader and the party from whom the property is acquired. The property in question was not only acquired in the business, but we think it was also used in the business. There can be no reason to question the authority of the hardware company to sell the engine, either before or after its demonstration. Persons dealing with traders are not burdened with the necessity of inquiring about the ownership of property offered for sale or used in the trader's business. The law fixes the ownership so far as the legal rights of creditors may be affected thereby. The bankrupt act passes to the trustee of the bankrupt all "property which prior to the filing of the petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

Collier on Bankruptcy (10th Ed.) p. 1005, analyzing the provision of the bankrupt act above referred to, has this to say:

"The test is simple and easily applied. Could the property in question have been (1) transfer

ed by, or (2) levied on and sold under judicial process against the bankrupt? If so, it passes to the trustee; if not, it does not. * * * Whether or not the property prior to the filing of the petition, could have been levied upon and sold under judicial process against the bankrupt must be determined by the local law."

Under our statute this engine could have been "levied upon and sold under judicial process" against the hardware company.

Norris v. Trenholm, 209 Fed. 827, 126 C. C. A. 551, is cited against this view of the law. This was a case arising in this state, and was controlled by our laws. It will be noted, however, that section 4784, Code 1906, was not mentioned or considered by the court in its opinion. We feel sure that this statute was not invoked in that case. If it has been invoked, it is inconceivable that the court would have decided the case without making any reference to the statute.

Reversed and judgment here for appellant.

BERRY v. BROWN. (No. 18005.)
(Supreme Court of Mississippi. March 29, 1915.)

Appeal from Chancery Court, Simpson County; D. M. Russell, Chancellor.

Action between Mrs. B. D. Berry and Mrs. F. J. Brown. From the judgment, Mrs. Berry appeals. On motion to dismiss. Appeal dismissed.

See, also, 67 South. 662.

W. M. Lofton, of Mendenhall, for the motion.
J. B. Sullivan, of Mendenhall, opposed.

PER CURIAM. Motion to dismiss appeal sustained.

(69 Fla. 165)

STATE ex rel. RAILROAD COM'RS v. FLORIDA EAST COAST RY. CO.

(Supreme Court of Florida. Feb. 16, 1915.)

(Syllabus by the Court.)

1. MANDAMUS ¶10—RIGHT.

Mandamus will issue only where a clear right to the writ is shown.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 37; Dec. Dig. ¶10.]

2. RAILROADS ¶58 — ESTABLISHMENT OF STATIONS—ORDERS OF RAILROAD COMMISSIONERS—VALIDITY.

The orders of the Railroad Commissioners directing the establishment of stations by railroad companies and common carriers in the state will be accorded the force and weight required by the statute, but, if it appears that such orders were made indisputably contrary to the evidence, or without any evidence, the character of prima facie reasonableness will be destroyed thereby, and the order will be deemed to be arbitrary, and therefore made without the consideration the statute requires to be given such matters by the Railroad Commissioners.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

3. CONSTITUTIONAL LAW ¶70—RAILROADS ¶9—LEGISLATIVE AND JUDICIAL POWERS—ORDERS OF RAILROAD COMMISSIONERS—VIEW BY COURTS.

Whether a legislative exercise of the police powers, including the regulation of railroads, is reasonable, is a judicial question, and, even

though the law gives to administrative action the effect of prima facie reasonableness, the courts may inquire into the reasonableness of the action, and, if it clearly appears that the administrative action complained of is an abuse of discretion, and is not, in fact, reasonable, such action will not be enforced.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. ¶70; Railroads, Cent. Dig. §§ 12-19; Dec. Dig. ¶9.]

4. RAILROADS ¶9 — ORDERS OF RAILROAD COMMISSIONERS—RIGHT TO ENFORCE.

Unreasonable regulations are not within the authority conferred by law upon the Railroad Commissioners, and, when it appears by the pleadings or the evidence in a case that an order or regulation is unreasonable or unjust with reference to all the substantial interests affected by it or violative of constitutional provisions for the protection of private property rights, such regulations will not be enforced by the courts.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. ¶9.]

5. RAILROADS ¶58 — STATIONS — ORDER OF RAILROAD COMMISSIONERS—DETERMINATION OF REASONABLENESS.

The duty of a railroad corporation to provide fit and suitable roadbeds and tracks and rolling stock may be distinguished from the duty to provide station and depot agencies along its line of road. The one is an essentially higher and more important duty than the other. In the latter case the fact that the performance of the duty will be unremunerative may be considered in determining the reasonableness of the order requiring it to be performed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

6. RAILROADS ¶58 — STATIONS — ORDER OF RAILROAD COMMISSIONERS — REASONABLENESS.

Where, in an application by the Railroad Commissioners for a writ of mandamus to compel a railroad corporation to establish and maintain an agency station at a certain point on the line of its railroad, it appears in the return of the respondent which was demurred to by the relators that the railroad is operated at a loss, that its stockholders receive no dividends, that there is no sinking fund, that its income is not sufficient to pay the interest which it is obligated to pay on its bonds, that the present value of the railroad properties is greater than its bonded indebtedness and par value of its capital stock, and that to establish the agency would entail further financial loss on the company, and that the amplest accommodation for the business the road receives exists at the point where the order directs the station to be established and maintained, the order of the Railroad Commissioners will be deemed to be unreasonable, and the demurrer to the return will be overruled.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130, 131, 133, 135, 136; Dec. Dig. ¶58.]

7. RAILROADS ¶9 — STATIONS — ORDER OF RAILROAD COMMISSIONERS—VALIDITY—MANDAMUS.

Where, in an application by the Railroad Commissioners for a writ of mandamus to compel a railroad corporation to establish and maintain an agency station at a certain point on its line of railroad, it appears in the return of the respondent which was demurred to by the relators that no testimony was taken by the Railroad Commissioners to show any necessity for the establishment of such agency, that no witnesses were examined, that there was no evidence before the Commissioners of any delay

on the part of the respondent in handling, receiving, or delivering freight at the said point, and that the order was made without evidence as to the necessity for establishing such an agency, it will be deemed that such an order was not made in due course of law and is subject to be set aside.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. ¶ 9.]

Shackelford and Cockrell, JJ., dissenting.

Original mandamus by the State, on the relation of the Railroad Commissioners, against the Florida East Coast Railway Company, a corporation. Motion to strike return and demurrer to the return overruled.

F. M. Hudson, of Tallahassee, for relators. Alex. St. Clair-Abrams, of Jacksonville, for respondent.

ELLIS, J. This is an original application to this court for a writ of mandamus requiring the respondent, the Florida East Coast Railway Company, to conform to an order of the Railroad Commissioners requiring and directing the said respondent to establish and maintain an agency station at Mims, Fla.

The order of the Railroad Commissioners is as follows:

"Order No. 415.

"File No. 3402.

"Before the Railroad Commissioners of the State of Florida.

"In the Matter of the Application for an Order Requiring the Florida East Coast Railway Company to Establish and Maintain an Agency Station at Mims, Fla.

"After due and lawful notice this matter came on for consideration before the Railroad Commissioners of the state of Florida at their office in the city of Tallahassee on the 18th day of March, 1913, at 10 o'clock in the morning, the Florida East Coast Railway Company then and there appearing by its counsel, Hon. Alexander St. Clair-Abrams, who was fully heard. And thereupon the said matter was taken under advisement.

"And now on this day, the said matter coming on for further consideration, the Railroad Commissioners of the state of Florida do find that the freight and passenger business done by the Florida East Coast Railway Company at Mims, a flag station on its line of railway, is sufficient to warrant and necessitate the maintenance of an agency at said point.

"Wherefore it is ordered and adjudged by the Railroad Commissioners of the state of Florida that the Florida East Coast Railway Company be and it is hereby required and directed to establish and maintain an agency station at Mims aforesaid, the said agency station to be maintained from and after the 1st day of November, 1913.

"Done and ordered by the Railroad Commissioners of the state of Florida, in session at their Office in the city of Tallahassee, this 29th day of September, A. D. 1913.

"R. Hudson Burr, Chairman."

An alternative writ of mandamus was issued commanding the respondent to establish and maintain an agency station at Mims, a station on the line of its railway between Titusville and Enterprise Junction, or to show cause before the Justices of this court on the day named in the writ why it refuses so to do.

The alternative writ alleges that the respondent, Florida East Coast Railway Company, is a railroad corporation doing business as a common carrier in this state; that it operates a line of road lying wholly within the state and extending from Jacksonville to Key West, and in connection therewith a branch line, extending from Titusville, on the main line, to Enterprise Junction, on the line of the Atlantic Coast Line Railroad Company; that the corporation transports persons and property over its line of railroad as a common carrier, and holds itself out as such; that Mims is a nonagency station between Titusville and Enterprise Junction at which local passenger trains have been accustomed to stop on flag, and at which freight has been received and delivered in car load and less than car load quantities; that on the 12th day of February, 1913, the Railroad Commissioners notified the railroad company that the Commissioners would be in session at their office in Tallahassee on the 11th day of March, 1913, for the purpose of hearing and considering whether or not they ought to require the railroad company to establish and maintain an agency station at Mims; that, on application of the attorney for the railroad company, the hearing was postponed to the 18th of March, and on that date, the Railroad Commissioners being in session, and the railroad company appearing by its attorney, and after hearing all who desired to be heard, the matter was taken under advisement; that on the 29th day of September, 1913, the Railroad Commissioners made and entered the order above copied; that the railroad company has disregarded and failed and refused to obey the order, and has not at any time since the entry of the order maintained an agency at Mims.

The return of the railway company to the alternative writ admits the foregoing allegations, and avers that it filed an answer to the notice served upon it, which answer set forth in detail and in full all grounds of defense against the establishment of a regular agency at Mims, and, beginning at paragraph 7, avers that the order was unjust and unreasonable, for the reasons set forth in the written defense submitted to the Commission, and for the further reasons:

That the total business at Mims does not warrant or require the establishment of an agency there; that to establish the agency it would be necessary for the company to spend approximately \$3,170 in the construction of a freight and passenger station with the necessary supplies and equipment, and the annual cost of the agency would not be less than \$1,388; that the freight and passenger earnings of the station of the calendar years ending December 31, 1910, 1911, and 1912, were as follows:

"For the year ending December 31, 1910, the freight forwarded aggregated \$5,594.27, of which there were forwarded in car load lots \$4,507.19, leaving only \$1,087.08 of revenue from less than car load lots. Of the total revenue of freight forwarded, \$4,612.94 were forwarded during the months of January, February, November, and December, leaving only \$981.23 revenue derived from this source during the remaining eight months.

"The total amount of freight received during the entire year brought only a revenue of \$2,606.02.

"The total number of passengers out during the same year was 891, with a total revenue of only \$294.05. The total number of passengers in during the same year was 672, with a total revenue of \$214.80.

"In 1911 the total revenue from freight forwarded was \$3,449.65, of which \$2,153 was from freight shipped in car load lots, leaving only \$1,196.65 of revenue from less than car load lots. Of the aggregate amount of freight received for the year ending December 31, 1911, \$3,120.60 were received during the months of October, November, and December, leaving only \$329.05 for the remaining nine months of the year. During the same year the total amount from freight received was \$2,320.88. The court will perceive that there was a heavy decrease of revenue during 1911 as compared with 1910.

"The number of passengers out during the same year was 875, producing a revenue of \$238.45. The number of passengers in during the same year was 747, producing a revenue of only \$200.30.

"During the year ending December 31, 1912, the business of the station increased and slightly exceeded the business of 1911. It was as follows:

"Total revenue from freight forwarded, \$6,057.44, of which \$4,713.19 was from freight shipped in car load lots, leaving only \$1,344.25 from freight shipped in less than car load lots. Of the total freight forwarded \$4,716.27 were during the months of October, November, and December, leaving only \$1,341.17 during the remaining nine months. During the same year the total amount of revenue derived from freight received was \$2,811.44. I call the attention of the court to the fact that the total revenue from freights shows but a very small increase over 1910.

"During the same year the number of passengers out was 1,345, producing a revenue of \$372.95. The total number of passengers in was 1,219, producing a revenue of only \$382.73. During the year 1912 there were only an average of 4 passengers per day outbound and only 3.4 per day inbound."

That the number of passengers in and out during the fiscal years ending June 30, 1911, 1912, and 1913 were 1,598 for the year 1911, 2,054 for 1912, and 3,413 for 1913; that the total revenue from car loads of freight forwarded from Mims for the three years above named were \$3,981.15 for 1911, of which \$3,444.22 were derived during the months of October, November, and December, \$2,803.79 for 1912, of which \$2,164.17 were received during the same three months of that year, and \$6,421.88 for 1913, of which \$5,635.95 were received during five months, September, October, November, December, and January; that the freight earnings of the station fluctuate very much each year, and afford no reliable basis for revenue; that the entire gross earnings from all sources at Mims for the three years above named were as fol-

lows: \$6,943.76 for the year ending June 30, 1911; \$7,156.45 for 1912; and \$10,717.54 for 1913. Statements and tables showing the foregoing figures fully and in detail were attached to the return, and made a part of it.

It was further averred that the company would be compelled to borrow the money with which to construct the freight and passenger station, and that would involve an additional charge of \$500 annually, making a total of not less than \$1,850 per year, or nearly 20 per cent. of the gross earnings at the station; that the amount of revenue depends entirely upon the volume of fruit and vegetables shipped from that point, and that is uncertain and fluctuating; that nearly 80 per cent. of the gross revenue at Mims is earned in from three to four months of each year, and that during the balance of the year the business is exceedingly small, and does not call for an agent there; that Mims is located only four miles from Titusville, a main line station and junction of the company's road; that there has never been to the knowledge of respondent any complaint from Mims as to the handling of freight promptly at that point; that respondent's conductors act as its agents in the receipt and delivery of freight, and that there is at Mims at this time the amplest accommodations for all the business it receives, and that there is an 18-car commodity side track there which is more than sufficient for the present business at that point; that to compel respondent to establish a regular agency at Mims would be to deprive it of a reasonable compensation for the services rendered by imposing upon it additional and unnecessary expenses; that its road is already being overcrowded with regular agency stations at short distances from each other, most of which have been established by order of the Railroad Commissioners over the protests and objections of the respondent, thereby impeding and delaying the movement of all its trains; that where a regular agency station is established the respondent is compelled to stop nearly all its passenger and freight trains at such stations; that frequently there are neither passengers nor freight to be delivered or received at Mims, which would impose a further delay in running its trains and additional expense in the consumption of fuel and the operation of its trains; that the respondent is not now earning, nor ever has earned, a reasonable profit on its investment; that the annual increase of the gross business on its line of road is comparatively small, and, while its increase has been good in passenger traffic, that the increase of expenditures rendered necessary by the enhanced value of practically all articles entering into the use and operation of railroads, and the great increase of the cost of labor has resulted in necessary expenditure largely exceeding the increase of its business.

That the total earnings and expenditures of the respondent's road for the year ending June 30, 1911, was as follows:

Gross earnings	\$4,181,277 80
Expenses, including taxes, interest, and other charges	4,114,147 97

Surplus	\$ 67,129 97
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—of which \$25,000 was interest received on deposits. That of the interest paid \$1,295,000 was paid on the first and second mortgage bonds at 4½ per cent. and per cent. respectively.

For the year ending June 30, 1912:

Gross earnings	\$4,426,335 45
Expenses, not including interest, taxes, and other charges	3,117,081 06

Net earnings	\$1,309,254 39
Taxes	\$186,560 00
Hire of equipment	134,283 09
Rentals	15,748 73
	<u>\$ 336,591 42</u>

Net earnings applicable to interest on bonds and dividend	\$ 973,262 97
Interest on first mortgage bonds	\$468,875
Interest on second mortgage bonds	500,000
	<u>\$ 963,875 00</u>

Surplus	\$ 4,387 97
To which add interest on deposit	46,832 12

Balance to profit and loss	\$ 51,220 09
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That for the year ending June 30, 1912, there was an increase of gross earnings amounting to \$245,657.60; that the increase of the road's expenditure, exclusive of interest, taxes, hire of equipment for that year, was \$513,370.87; that the increase for taxes, hire or equipment, and rentals was \$76,023.81, thus showing an aggregate increase of expenses over the increase in receipts of \$304,651.92, leaving net earnings to be applied to interest and dividends of \$973,262.97, to which could be added \$46,832.12 received from interest on deposits, making a total of \$1,020,095.09, or less than 3 per cent. net earnings on the investment in the property, and not exceeding 2½ per cent. on the present value of the property; that the property of the company represents an investment of over \$40,000,000, and the present value of the property is "greater than this sum over \$40,000,000"; that it has outstanding in first mortgage bonds \$11,000,000, second mortgage bonds \$20,000,000, and \$5,000,000 common stock, all of which purchased and paid for at par, and that no dividends are paid on the stock; that it was compelled to reduce the interest on its second mortgage or income bonds to 2½ per cent., although the interest had been previously fixed at 4 per cent., and the holders of said bonds were entitled to receive 4 per cent.

That while there has been a small increase in the freight and passenger traffic since June 30, 1913, to December, 1913, and the passenger traffic has continued to fairly maintain itself, its freight business since December 31, 1913, appears to have fallen off, but respondent cannot state the exact

figures, that while the aggregate business for the six months ending December 31st shows a small increase, the aggregate expenses for the same six months shows an increase of over \$50,000, above the increase of business, and that, unless the balance of the fiscal year shall show a larger increase of freight and passenger business than now seems probable, respondent will not be able to pay 2½ per cent. of interest on its second mortgage bonds, and may not be able to pay exceeding 1½ per cent. on said bonds; that the small surplus existing at the end of the fiscal year ending June 30, 1913, was insufficient to meet extraordinary contingencies; that it has no sinking fund of any kind; that it is compelled to keep up its railroad and equipment to the highest standard of condition; that it is threatened with further reduction of its revenue by orders of the Interstate Commerce Commission, and the Railroad Commissioners of Florida affecting rates on fruit and vegetables, charges across the bridges at Jacksonville and Palatka, amendments to the rules of the Florida Railroad Commissioners numbered 15 and 19, and reductions of its freights on class P, aggregating \$300,154.70; that, in addition, it is required to make large increases of expenditures under the law and orders of the Railroad Commissioners and the Interstate Commerce Commission; that the freight produced on its line of road consists principally of fruit and vegetables, which fluctuate greatly in volume and cannot be depended upon for any regular or steady income; that there is no cotton, phosphate, or kaolin produced on its line, its lumber business is local, and its naval stores business is very small; that the tonnage per mile of the other two principal railroads in Florida is much greater than that of the respondent's road; that it cannot establish an agency at Mims without making constructions to cost \$3,170; that it may also be compelled to construct a place of residence for its agent; that the financial condition of the road does not warrant it increasing its expenditures at Mims in view of the gross business done; that, while its business in the past has increased, it is not now increasing; that its holding the passenger business is due almost entirely to the increase on its Key West extension; that its net earnings are steadily decreasing; that it has been compelled to reduce the interest on its second mortgage bonds from 4 per cent. to 2½ per cent.; that it has not been able to pay any dividends on the \$5,000,000 of stock which was sold by respondent at par; that during the fiscal year ending June 30, 1914, its expenses will further increase approximately over \$120,000, as it was compelled to increase the salaries and wages of its employes, including conductors, trainmen, operators, etc., aggregating approximately over \$120,000, beginning July, 1913; that this increase of expenses has not been followed by an increase in the aggregate business of

the respondent; that the actual investment of money in the Florida East Coast Railway approximates over \$40,000,000, and that the present value of the Florida East Coast Railway is considerably over \$40,000,000; that there are \$5,000,000 of stock purchased and paid for at par on which no dividends have been paid for years; that, in addition, a large amount has been invested in the construction, betterment, and improvement of the road on which no dividends have been paid, and the road has not earned in the past two years as much as 2½ per cent. on the actual investment made by it on its property; that it operates its road as economically as possible; that it pays no higher wages to its employes than it is compelled to pay for the services of competent and experienced men; that it purchases supplies and equipment at the lowest possible prices commensurate with the kind and quality it is compelled to use; that it has never earned a reasonable compensation for the many millions of dollars invested, and that during the past fiscal year it has suffered a loss of about \$130,000 reduction of rates on fruits and vegetables.

An amendment of the return granted December 22, 1914, avers that the respondent, in compliance with the citation of the Railroad Commissioners, dated February 12, 1913, appeared before the Railroad Commissioners and filed a written answer showing why the said regular agency should not be established; that no testimony was taken by the Railroad Commissioners at said meeting to show any complaint from any of the patrons at Mims, or to show any necessity for the establishment of such agency station there; that no witnesses were examined; that if any witnesses were examined respondent was never notified of the examination of such witnesses, and was never allowed an opportunity to confront or cross-examine them; that there was no evidence before the Commissioners of any delay on the part of the respondent in handling, receiving, or delivering freight promptly at Mims; that the order was made without any evidence as to the necessity for the establishment of an agency there; and that the order was made without due process of law, and in violation of respondent's constitutional right.

To this return the relators filed their motion to strike certain averments, and at the same time filed their demurrer as follows:

"(1) Beginning with the paragraph numbered 7 of said return, to and including the first paragraph on page 6.

"(2) The second paragraph on page 6.

"(3) Beginning with the first paragraph on page 7, through the last paragraph of the said return.

"And for cause of demurrer the relators show:

"(1) The said return does not present a valid defense to the alternative writ.

"(2) The order of the Railroad Commissioners set out in the alternative writ is *prima facie* reasonable and just, and the return does not set up facts sufficient to show an abuse of discre-

tion, so as to render the administrative discretion of the Commissioners subject to review.

"(3) The order in question undertakes to enforce an absolute duty of the respondent carrier, which must be performed regardless of pecuniary loss thereby incurred.

"(4) It is not made to appear from the return that enforcement of the order will invade respondent's property rights.

"(5) It is not made to appear that compliance with the order will result in a pecuniary loss to respondent.

"(6) The facts alleged on pages 2, 3, 4, 5, and 6 only raise a question as to the necessity for an agency at Mims. This being an administrative question, the court's power of review does not extend to a determination of that question.

"(7) Whether the business done at a particular station warrants the establishment of an agency, or the installation of certain facilities, is an administrative, not a judicial, question.

"(8) It is not made to appear that the expense incident to installing and maintaining an agency at Mims, in obedience to the orders of the Commissioners, is so out of proportion to the business done there that compliance therewith will invade the constitutional rights of the respondent.

"(9) In alleging the facts found on pages 7, 8, 9, 10, 11, 11½, 12, 13, and 14, respondent is manifestly relying on the rule laid down in the case of *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819, which rule is not applicable to this case.

"(10) In this case no question of rate reduction or depletion of revenue is involved. The test is found in the necessities of the public, rather than the effect on the carrier.

"(11) The fact that respondent is not now earning, and never has earned, a reasonable profit upon its entire investment, does not relieve it of its primary duty to provide adequate facilities.

"(12) The matter alleged does not show, nor is it shown elsewhere in the return, that the regulation complained of will reduce the revenues of respondent.

"(13) The power of the Railroad Commissioners to make regulations does not cease merely because the carrier's revenues are not sufficient to enable it to pay dividends. The power of regulation is not to be measured by the prosperity of the carrier."

As the motion to strike is addressed practically to the entire return as recited herein from the seventh paragraph, and reaches the same matter to which the demurrer is addressed, we will treat them both as a demurrer to the return.

[1] A mandamus issues only where a clear right to the writ is shown.

[2] It is the duty of the Railroad Commissioners to require railroad companies and common carriers doing business in this state to establish stations, at which trains may be required to stop, to require the erection of such freight and passenger depots, houses, platforms, and wharves, with all necessary conveniences, as the safety, convenience, and comfort of passengers and the proper handling, care, protection, and prompt delivery and transportation of freight may require, and to require a sufficient force of employes to be maintained thereat to conduct in a proper manner the business of the carriers. Chapter 6527, Laws of Florida 1913. The orders of the Railroad Commissioners direct-

ing the establishment of stations by railroad companies and common carriers will be accorded the force and weight required by the statute, and to which the judgments and conclusions of such a governmental agency are entitled; but, if it appears that such an order was made indisputably contrary to the evidence, or without any evidence, the character of *prima facie* reasonableness is destroyed, it must be deemed to be arbitrary, and therefore made without the considerations which the statute requires to be given such matters by the Railroad Commissioners. The Railroad Commission Act of this state, and the amendments thereto, contemplate that the Commissioners shall inquire into the necessities which seemingly demand their attention and base their determination upon the evidence before them. If it is made to appear that these requirements of the statute were not observed, that the order was made without any evidence before the Commissioners in support of the necessity or propriety of it, or clearly contrary to the evidence, the order will be deemed to have been made without authority of law, and therefore not possessing the status of *prima facie* reasonableness. *Louisville & N. R. Co. v. Railroad Commission of Kentucky*, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. —, February 1, 1915; *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, 32 Sup. Ct. 108, 56 L. Ed. 308.

[3] Whether a legislative exercise of the police power, including the regulation and control of railroads, is reasonable, is a judicial question. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, 11 Ann. Cas. 398; *Interstate Commerce Commission v. Illinois Cent. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. In the case of *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 62 Fla. 315, 57 South. 175, this court said:

"But action taken by an administrative officer or board must not only be in accordance with organic law, but it must conform to applicable valid statutes and must be reasonable in its operation. Such administrative action is also subject to judicial review as to matters that are not concluded by the exercise of administrative discretion and action. Even though the law gives to administrative action the effect of *prima facie* reasonableness, the courts may inquire into the reasonableness of the action. If in appropriate judicial proceedings it clearly appears that the administrative action complained of is an abuse of discretion and is not, in fact, reasonable, it will not be enforced, and it may be annulled or checked."

See, also, *State ex rel. R. R. Com'rs v. Atlantic Coast Line R. Co.*, 67 Fla. 441, 63 South. 729; *State ex rel. Railroad Com'rs v. Florida East Coast Ry. Co.*, 67 Fla. 83, 64 South. 443; *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 63 Fla. 274, 57 South. 673; *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 65 Fla. 424, 62 South. 591; *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 58 Fla. 524, 50 South.

425; *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 64 Fla. 112, 59 South. 385.

[4] The doctrine has been approved by this court many times that unreasonable regulations are not within the authority conferred by law upon the Railroad Commissioners, and, when it appears from the pleading or the evidence in a case that an order or regulation is unreasonable, or unjust with reference to all the substantial interests affected by it, or violative of constitutional provisions for the protection of private property rights, such regulations will not be enforced by the courts. *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 62 Fla. 315, 57 South. 175; *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 64 Fla. 112, 59 South. 385.

[5] There is a distinction in character and importance between the duties which a railroad company owes to the public. The duty to provide fit and suitable roadbeds and tracks and rolling stock may be distinguished from the duty to provide stations and depots along its line of road. The former may be classed as a duty vitally necessary to the public, and its performance absolutely essential, while the latter may be a useful, but non-essential, duty. One makes for the security of the lives and property of all its patrons; the other for the convenience and comfort of some of its patrons. The one is an essentially higher and more important duty than the other. In the one case the fact that the performance of the particular duty will be unremunerative will not, in view of the nature of the duty to the public, excuse nonperformance; while in the other the fact that the particular service may incur a loss to the railroad company does not excuse nonperformance; the loss occasioned by its performance may be considered in determining the reasonableness of the order requiring it to be performed. See *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 62 Fla. 315, text 358, 57 South. 175; *State ex rel. Railroad Com'rs v. Florida East Coast Ry. Co.*, 67 Fla. 83, 64 South. 443.

[6, 7] The return of the respondent to the alternative writ in this case may be unnecessarily full as to the details of its business and financial condition, but the averments that the railroad is being operated at a loss, that its stockholders receive no dividends on the stock owned and held by them, that the railroad company has no sinking fund of any kind, that its income is not sufficient to enable it to pay the interest which it is obligated to pay on its second mortgage bonds, that its business is not increasing, that it has never earned a reasonable compensation on the money invested in its property, that the actual investment of money in the Florida East Coast Railway is approximately over \$40,000,000, and that the present value of the Florida East Coast Railway is considerably more than that sum, to wit, "over \$40,-

000,000," that to establish and maintain an agency at Mims such as is required in the order would entail a further financial loss upon the company as distinguished from a mere reduction of profit, that there has never been to the knowledge of the company any complaint from Mims as to the handling of freight promptly at that point, that respondent's conductors act as its agents in the receipt and delivery of freight, that there are at Mims the amplest accommodations for all the business it receives, that the total business at Mims does not warrant or require the establishment of an agency there, were averments of such facts as the Railroad Commissioners were bound to consider in determining the reasonableness and justness of the order. If these allegations of fact are true, and the demurrer admits them to be true, the unreasonableness of the order is made to appear, and it is the duty of this court to overrule the demurrer. *State ex rel. Railroad Com'rs v. Louisville & N. R. Co.*, 62 Fla. 315, 57 South. 175; *State ex rel. Railroad Com'rs v. Florida E. C. R. Co.*, 64 Fla. 112, 59 South. 385.

The amendment to the return filed December 22, 1914, also avers that the respondent, in compliance with the citation of the Railroad Commissioners dated February 12, 1913, appeared before the Railroad Commissioners and filed a written answer showing why the regular agency should not be established at Mims; that "no testimony was taken by the Railroad Commissioners at said meeting to show any complaint from any of the patrons at Mims, or to show any necessity for the establishment of such agency station there, that no witnesses were examined;" "that there was no evidence before the Commissioners of any delay on the part of the respondent in handling, receiving, or delivering freight promptly at Mims; that the order was made without any evidence as to the necessity for the establishing of an agency there." These averments were admitted by the demurrer; they show that the order was made without any evidence to support it. The order was therefore not made in due course of law, and is subject to be set aside. See *Louisville & N. R. Co. v. Finn*, 235 U. S. 601, 35 Sup. Ct. 146, 59 L. Ed. —; *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 64 Fla. 112, 59 South. 385; *Florida East Coast Ry. Co. v. Interstate Commerce Commission*, 234 U. S. 167, 34 Sup. Ct. 867, 58 L. Ed. 1267.

The fact that the respondent's business has increased at Mims does not neutralize the legal effect of the admissions that the enforcement of the order will increase the admitted deficit of the respondent in compensatory revenues; that the total business does not require the establishment of an agency there; that respondent's entire business is done at a loss to it; that no testimony was taken, and the order made without any evidence to show any necessity for the estab-

lishment of such an agency there; and that the accommodations already provided are ample. These admissions show that the order was not just and reasonable, as the statute requires, but arbitrary and illegal, so that its enforcement would violate property rights secured by the state and federal Constitutions. See *State ex rel. Railroad Com'rs v. Florida East Coast R. Co.*, 65 Fla. 424, 62 South. 591.

The motion to strike and the demurrer are overruled, with leave to the relators to join issue upon the averments of the return, as they may be advised.

Upon issue joined, testimony may be taken upon commission issued by the clerk of this court, or before a justice of the peace in accordance with the statutes of the state and the rules governing circuit courts in the matter of depositions, and the clerk of this court is directed to issue commissions for the taking of such depositions as may be applied for by either party in accordance with such statutes and rules; or the parties may by agreement take testimony before some one authorized to administer oaths.

TAYLOR, C. J., and WHITFIELD, J., concur.

COCKRELL, J. I am unable to concur with the order of the court just pronounced.

The Commission had evidence, out of the mouth of the respondent, that at this non-agency station the business was considerable, and was growing rapidly, increasing in the number of passengers from a daily average of four daily in 1911 to nine daily in 1913, or more than 100 per cent., while its gross earnings from passengers and freight traffic was increasing from \$6,943.76 in 1911, to \$10,717.54 in 1913, say 50 per cent., and this despite the fact that upon the whole system the receipts from passengers remained stationary, and the freight business showed some decrease.

This showing by the respondent indicates a steady growth of the business at this non-agency station not only in the aggregate for the year, but a decided improvement in the distribution of the business throughout the year.

The Railroad Commission acts, if it sees fit, upon its own initiative in these regulations, and, being a quasi legislative body, it is not necessary that it disclose to the railway company the name or names of dissatisfied shippers. It has a right to make physical examination of the conditions surrounding the station, the probabilities as to future growth in that vicinity, and to take into account the reports filed with it by the railway company of the business done there.

I read the statement in the return as to the accommodations already provided being ample to be merely the conclusion of the pleader from the facts pleaded in connection with such statement.

I do not find that any facts set up in the return overcome the prima facies of the Commission's order, and therefore I think the demurrer should be sustained.

SHACKLEFORD, J., concurs in this dissent.

(69 Fla. 188)

ANTHONY FARMS CO. v. SEABOARD AIR LINE RY.

(Supreme Court of Florida. Feb. 18, 1915.)

(Syllabus by the Court.)

1. NEW TRIAL ⇐70—RIGHT TO GRANT—DIRECTION OF VERDICT.

The principles that govern in directing verdicts and in granting new trials after verdict are not the same.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. ⇐70.]

2. NEW TRIAL ⇐70—RIGHT TO GRANT—DIRECTION OF VERDICT.

There may be no inconsistency in granting new trials in a case in which a request for a directed verdict was denied. An order granting a new trial may be sustained by the appellate court when a directed verdict would not be approved.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 142, 143; Dec. Dig. ⇐70.]

3. NEW TRIAL ⇐72—TRIAL ⇐168—GROUNDS—DIRECTION OF VERDICT—EVIDENCE.

A verdict on the evidence should be directed for one party only when the evidence would not be legally sufficient to sustain a verdict for the opposite party. A new trial may be granted on the evidence when, in the opinion of the court, the verdict is contrary to the manifest probative force of the evidence and the justice of the cause.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. ⇐72; *Trial*, Cent. Dig. §§ 341, 376-380; Dec. Dig. ⇐168.]

4. NEW TRIAL ⇐72—TRIAL ⇐139—GROUNDS—DIRECTION OF VERDICT—EVIDENCE.

After verdict rendered, the trial court may, for good cause, set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial should not be confounded with the more limited authority to direct a verdict for one party only when a finding for the opposite party should be unlawful.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 146-148; Dec. Dig. ⇐72; *Trial*, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. ⇐139.]

5. APPEAL AND ERROR ⇐977—NEW TRIAL ⇐6—DISCRETIONARY RULING.

A motion for a new trial is addressed to the sound judicial discretion of the court; and, where a trial court grants such a motion, the action in doing so is presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ⇐977; *New Trial*, Cent. Dig. §§ 9, 10; Dec. Dig. ⇐6.]

6. APPEAL AND ERROR ⇐977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

An order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the

record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ⇐977.]

7. APPEAL AND ERROR ⇐977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

There are so many matters occurring in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause, to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice, or that the law has been violated.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ⇐977.]

8. APPEAL AND ERROR ⇐977—DISCRETIONARY RULING—GRANTING NEW TRIAL.

A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3860-3865; Dec. Dig. ⇐977.]

9. APPEAL AND ERROR ⇐854—DISCRETIONARY RULING—GRANTING NEW TRIAL—PRESUMPTION.

Where the trial court grants a new trial, containing several grounds, without stating any ground upon which the ruling was based, the order will be affirmed, if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the court based the order on the ground that warrants it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3403, 3404, 3408-3424, 3427-3430; Dec. Dig. ⇐854.]

10. APPEAL AND ERROR ⇐979—DISCRETIONARY RULING—GRANTING NEW TRIAL.

Where the evidence on a material issue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3871-3873, 3877; Dec. Dig. ⇐979.]

Error to Circuit Court, Marion County; W. S. Bullock, Judge.

Action by the Anthony Farms Company, a corporation, against the Seaboard Air Line Railway. New trial granted, and plaintiff brings error. Affirmed.

H. M. Hampton, of Ocala, for plaintiff in error. L. N. Green, of Ocala, for defendant in error.

WHITFIELD, J. In an action for damages the Anthony Farms Company obtained a verdict for \$6,000 against the railroad company for the alleged burning of property caused by sparks from a passing locomotive. A motion for new trial was made upon grounds that the court erred in refusing to

direct a verdict for the defendant, and in giving and in refusing specified instructions to the jury, and that the verdict is contrary to the evidence, to the charge of the court and to the law. The motion for new trial was granted, but the court did not indicate the ground upon which it was granted. A writ of error was, under the statute (section 1695, General Statutes), taken to the order granting the new trial. On such a writ of error, only the order and the motion on which it is predicated can be considered.

[1] The principles that govern in directing verdicts and in granting new trials after verdict are not the same.

[2] There may be no inconsistency in granting new trials in a case in which a request for a directed verdict was denied. An order granting a new trial may be sustained by the appellate court when a directed verdict would not be approved.

[3] A verdict on the evidence should be directed for one party only when the evidence would not be legally sufficient to sustain a verdict for the opposite party. A new trial may be granted on the evidence when, in the opinion of the court, the verdict is contrary to the manifest probative force of the evidence and the justice of the cause.

[4] After verdict rendered, the trial court may, for good cause, set it aside and grant a new trial in appropriate proceedings; but this judicial power and discretion to grant a new trial should not be confounded with the more limited authority to direct a verdict for one party only when a finding for the opposite party should be unlawful.

[5] A motion for a new trial is addressed to the sound judicial discretion of the court; and, where a trial court grants such a motion, the action in doing so is presumed to be in accordance with the justice and merits of the case, unless the contrary appears by the record.

[6] An order of the trial court granting a new trial should not be disturbed by an appellate court, unless it appears affirmatively from the record that there has been an abuse of a sound judicial discretion, or that some settled principle of law has been violated.

[7] There are so many matters occurring

in the course and progress of a judicial trial that, in the opinion of the judge who tried the case, may affect the merits and justice of the cause, to the substantial injury of one of the parties, that of necessity a large discretion should be accorded to the trial court in granting a new trial, to the end that the administration of justice may be facilitated; and the appellate court will not reverse an order granting a new trial, unless it clearly appears that a judicial discretion has been abused in its exercise, resulting in injustice, or that the law has been violated.

[8] A stronger showing is required to reverse an order allowing a new trial than to reverse one denying it.

[9] Where the trial court grants a new trial, containing several grounds, without stating any ground upon which the ruling was based, the order will be affirmed, if any ground of the motion is sufficient to authorize the granting of the new trial. And it must be assumed that the court based the order on the ground that warrants it.

[10] Where the evidence on a material issue in a cause is conflicting, and it does not so preponderate in favor of the verdict as to show an abuse of discretion or the violation of any provision or settled principle of law in granting a new trial, the action of the trial court will not be disturbed on writ of error. *Aberson v. Atlantic Coast Line R. Co.*, 67 South. 44; *Ruff v. Georgia Southern & Florida Ry. Co.*, 67 Fla. 224, 64 South. 782.

As the evidence on the material issue whether the defendant's passing locomotive did set fire to the property is conflicting, the court did not abuse a sound judicial discretion in granting a new trial. *Zackary v. Georgia, F. & A. R. Co.*, 62 Fla. 419, 56 South. 686; *Orchard v. Charlotte Harbor & N. R. Co.*, 66 Fla. 353, 63 South. 717. The evidence does not require a verdict for the plaintiff as in *Cotton States Belting & Supply Co. v. Florida Railway Company*, 67 South. 568 (decided at this term), and in other cases therein, where orders granting new trials were reversed.

The order is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 277)

HEMPEL v. CONSOLIDATED LAND CO.
et al.

(Supreme Court of Florida. March 2, 1915.)

*(Syllabus by the Court.)***1. TAXATION** \S 750—**TAX TITLE—PRESUMPTION OF VALIDITY—DEFECTIVE NOTICE.**

Where the notice of the application for a tax deed is not mailed to the owner of the land, or to the person last paying the taxes, but to the supposed agents of such owner, and the evidence as to the agency wholly fails, the prima facies of the tax title fail.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. \S 1497; Dec. Dig. \S 750.]

2. ADVERSE POSSESSION \S 14—**TAX TITLE—LIMITATIONS—POSSESSION.**

Where the holder of a tax title does not maintain actual possession of the land for the full period, the short statute of limitations in favor of tax titles does not apply.

[Ed. Note.—For other cases, see *Adverse Possession*, Cent. Dig. \S 77-81; Dec. Dig. \S 14.]

Appeal from Circuit Court, Polk County; F. A. Whitney, Judge.

Bill by J. H. Hempel against the Consolidated Land Company and others. From decree of dismissal, complainant appeals. Affirmed.

E. Tucker, Sr., of Lakeland, for appellant. Wilson & Boswell, of Bartow, and E. J. L'Engle, of Jacksonville, for appellees.

COCKRELL, J. A bill was filed by Hempel against various defendants to quiet title. Upon final hearing his bill was dismissed, and he appeals from this decree.

[1] The bill is uncertain in its allegation as to present ownership and as to possession, but we may assume the sufficiency of these allegations, saying only that the evidence shows that the land was wild and unoccupied. The complainant's title rests upon a tax deed, issued to him in 1898, for the 1895 taxes. These lands were assessed to "Fla. So. R. R. C. H. D.," and the proof is that they belonged to the Florida Southern Railroad Company; the initials "C. H. D." presumably standing for the Charlotte Harbor Division of that railroad company. Assuming, further, that this assessment was valid, in the absence of any showing that this division was a separate entity, and that the owner was known by these abbreviations, there was a fatal defect in the proceedings, in the failure to comply with section 61, chapter 4322, Acts of 1895, which reads:

"Thirty days prior to the issuing of any tax deed, the clerk of the circuit court shall give notice of the application for such deed, describing the lands therein and in whose name the same was assessed, by posting said notice at the court house door and mailing a copy of the same to the owner of said land or the person to whom the same was assessed in case his address is known to the clerk."

This notice was not mailed to the Florida Southern Railroad Company, nor to the

Charlotte Harbor Division of that company, though either was easy of access to the clerk; but a copy of notice was mailed to L. N. Wilkie and George Fox. There is nothing to connect George Fox with the tax matters of this railroad company, and, as to Wilkie, other than the fact that he was the sales agent for those lands, and that during years, not definitely fixed, he paid the taxes under the authority of his principal. There is nothing to show that he received this notice, or that he ever reached the owner of the land, or the one to whom the land was assessed. In fact, there is nothing to show that the Florida Southern Railroad Company, whose sales agent Wilkie was in 1898, then owned or claimed to own these lands. See *Starks v. Sawyer*, 56 Fla. 596, 47 South. 513; *Clark-Ray-Johnson Co. v. Williford*, 62 Fla. 453, 56 South. 938.

[2] As we have before stated, there was no possession of the land, and the short limitation upon the title has no applicability. *Fla. Finance Co. v. Sheffield*, 56 Fla. 285, 48 South. 42, 23 L. R. A. (N. S.) 1102, 16 Ann. Cas. 1142.

Decree affirmed.

TAYLOR, C. J., and SHACKLEFORD, WHITEFIELD, and ELLIS, JJ., concur.

(69 Fla. 258)

STATE BANK OF KISSIMMEE et al. v. PARKER.

(Supreme Court of Florida. Feb. 24, 1915.)

*(Syllabus by the Court.)***ESCROWS** \S 15 — **RIGHTS OF DEPOSITOR — EQUITABLE RELIEF—ADEQUATE REMEDY AT LAW.**

A party who deposits money in escrow with a bank, pending the delivery of a conveyance of property, has no equity to require the deposit to be repaid to him, on the ground that the contract of conveyance has been abandoned by both parties; the remedy at law being adequate, even though the escrow holder refuses to deliver on the ground that the other party claims a right in the deposit.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. \S 21; Dec. Dig. \S 15.]

Appeal from Circuit Court, Osceola County; Jas. W. Perkins, Judge.

Bill by W. Reese Parker against the State Bank of Kissimmee and another. From an order overruling demurrer to bill, defendants appeal. Reversed.

Vans Agnew & Crawford and Johnston & Garrett, all of Kissimmee, for appellants. C. B. Robinson, of Orlando, for appellee.

WHITEFIELD, J. This appeal is from an order overruling a demurrer to a bill of complaint. It is in effect alleged that Parker and Makinson agreed upon a sale of lands and personal property, Parker to deposit \$1,000 in escrow with the bank pending the de-

livery by Makinson of a conveyance of the property; that Makinson failed to make the conveyance, and the contract has been abandoned by both parties; but the bank refuses to return the \$1,000 to Parker without an order of court, upon the ground that Makinson had given notice to the bank not to deliver the deposit to Parker, as he claimed a right to it. The prayer is that Makinson's claim be barred, and that the bank be required to pay the \$1,000 to Parker, and for general relief.

Under certain circumstances the bank as a mere stakeholder may have relief in equity; but, on the facts alleged by the complainant Parker, he had an adequate remedy at law, if his deposit of money is unlawfully withheld from him, and the demurrer to the bill of complaint should have been sustained.

Order reversed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

(69 Fla. 153)

FLORIDA EAST COAST RY. CO. v. CARTER et al.

(Supreme Court of Florida. Feb. 16, 1915.)

(Syllabus by the Court.)

APPEAL AND ERROR ⇐1006—SECOND VERDICT—EVIDENCE.

A judgment upon a second verdict for the plaintiff will not be reversed, where the evidence is sufficient in law to sustain the verdict, and technical errors, if any, in the proceedings do not appear to have been harmful to the defendant, even though the second verdict exceeds the first in amount, where the award is not so palpably excessive as to justify interference by an appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3951-3954; Dec. Dig. ⇐1006.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by Dartha Carter and her husband against the Florida East Coast Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Alex. St. Clair-Abrams, of Jacksonville, for plaintiff in error. A. H. King, Roswell King, and Bisbee & Bedell, all of Jacksonville, for defendants in error.

PER CURIAM. This writ of error is to a judgment for \$15,000 damages for personal injuries. A previous judgment for \$12,500 was reversed, because of an erroneous and apparently harmful charge given to the jury. *Florida East Coast Ry. Co. v. Carter*, 67 Fla. 335, 65 South. 254. A new trial was awarded to determine the liability of the defendant, as well as the recoverable damages, if any; there being evidence tending to show negligence on the part of the plaintiff, which, under the statute, the jury might regard, if found to exist, as affecting the liability of the defendant, or as affecting merely the amount of the damages. Otherwise the new trial granted might, under chapter 6467, Acts of 1913 (Comp. Laws 1914, § 1707a), have been limited to the issues relative to the recoverable damages. See *Garzo v. J. H. Brophy Const. Co.*, 66 Fla. 607, 64 South. 234.

The issues relating to liability, contributory negligence, and recoverable damages were fully and fairly submitted to the jury, and determined in favor of the plaintiff. There was evidence upon which liability could lawfully be predicated; and upon a consideration of all the facts and circumstances in evidence, contributory negligence does not appear as matter of law. The conflicts in the testimony and the credibility of the witnesses have been determined by the jury, and there is nothing in the record to show the verdict to be contrary to law, or to indicate that the jury were not governed by the evidence in finding the verdict that has been approved by the trial court; the evidence as to the circumstances of the injury being more full this time. Technical errors, if any, in giving or refusing charges, or in rulings upon proffered evidence, do not appear to have been harmful to the defendant railroad company. While the amount awarded is greater than that of the former verdict, it is not so palpably excessive as to justify an appellate court in setting aside a second verdict for the plaintiff in a case like this, where substantial damages may be allowed upon a finding of liability. See *Georgia Southern & Florida Ry. Co. v. Ruff*, 67 South. 575, decided at this term.

The judgment is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, WHITFIELD, and ELLIS, JJ., concur.

⇐For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(69 Fla. 162)

PHIFER v. ABBOTT.

(Supreme Court of Florida. Feb. 16, 1915.)

*(Syllabus by the Court.)*PLEADING ~~§~~248—COMPLAINT—AMENDMENT—NEW CAUSE OF ACTION.

An amendment stating that a complainant sues technically in a representative capacity, and not individually, in the same cause of action, does not make a new suit or cause of action, particularly when the complainant is the sole party in interest, and the suit is brought for her sole benefit.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 686, 687, 689-706, 708½, 709; Dec. Dig. ~~§~~248.]

Appeal from Circuit Court, Alachua County; J. T. Wills, Judge.

Bill by Lucy B. Abbott, as administratrix with will annexed, against W. B. Phifer. From an order granting leave to file an amended bill, defendant appeals. Affirmed.

Hampton & Hampton, of Gainesville, for appellant. E. N. Calhoun and David R. Dunham, both of St. Augustine, for appellee.

WHITFIELD, J. Lucy B. Abbott, in her own right as the sole heir of Margaret S. Abbott, brought proceedings against W. B. Phifer and others to enforce a mortgage lien upon land executed to Margaret S. Abbott by Martha P. Perry in her lifetime. An order overruling a demurrer to the bill of complaint was reversed here, because the right of the complainant to maintain the suit did not appear; the allegation as to the complainant's right to sue being that she was sole heir of her mother, Martha S. Abbott, "who immediately went into possession of all the property left by her mother." *Phifer v. Abbott*, 63 Fla. —, 65 South. 899.

Subsequently the trial court granted leave to file an amended bill in the cause upon the payment of costs, and the defendant Phifer appealed.

It is contended that the amended bill of complaint should not have been filed, because it makes a new suit setting up matters that occurred after the filing of the original bill and after the Supreme Court had reversed an order overruling a demurrer to the original bill of complaint.

In the amended bill Lucy B. Abbott, as administratrix cum testamento annexo of the estate of Margaret E. L. Abbott, deceased, is complainant, and the bill alleges that Margaret E. L. Abbott and Margaret S. Abbott were one and the same person; that Margaret E. L. Abbott died, leaving a will, wherein

Lucy B. Abbott "was named and is the sole heir, legatee of said Margaret E. L. Abbott"; that the said Lucy B. Abbott immediately upon the death of said Margaret E. L. Abbott went into the possession of all the property left by her mother, the said Margaret E. L. Abbott, deceased, and became the owner of the note and mortgage described in this bill; that, at the time of the death of the said Margaret E. L. Abbott, her estate "was not indebted, and that said estate has not since and is not now indebted"; that John Starke was named executor of the will, but never qualified and is now deceased; "that no other person or persons have managed or controlled any of the estate of said Margaret E. L. Abbott, except your oratrix, Lucy B. Abbott, the sole heir and legatee named therein; that recently, to wit, on the 1st day of July, A. D. 1914, the will of the said Margaret E. L. Abbott was duly proven and probated, and your oratrix, upon proper application, was appointed administratrix cum testamento annexo to administer upon the estate and effects of the said Margaret E. L. Abbott." An amendment of the bill was in order after the former appeal, since the court held the demurrer well taken.

It clearly appears that Lucy B. Abbott, the complainant in the original bill, is the sole heir of the mortgagee; that she is the holder and owner of the evidences of indebtedness in question; that there is no indebtedness against her mother's estate; and that she has duly qualified to administer on the estate that belongs entirely to her. She is the same person who instituted the original suit, and the only change in her asserted capacity to sue is that she has qualified as the legal representative of an estate that is wholly her own. Such amendment as this does not make a new suit; and the form of the amended bill is such that it may, if necessary to justice in the cause, be treated as a supplemental bill. An amendment stating that a complainant sues technically in a representative capacity, and not individually, in the same cause of action, does not make a new suit or cause of action, particularly when the complainant is the sole party in interest, and the suit is brought for her sole benefit. See, *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134.

The order is affirmed.

TAYLOR, C. J., and SHACKLEFORD, COCKRELL, and ELLIS, JJ., concur.

~~§~~For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(69 Fla. 246)

COONEY-ECKSTEIN CO. v. KING.

(Supreme Court of Florida. Feb. 24, 1915.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR ⇨1078 — REVIEW — GROUNDS OF DEMURRER.**

In passing upon an assignment based upon the overruling of a demurrer to a declaration, or other pleading, an appellate court will consider only such grounds of the demurrer as are argued, treating the other grounds as having been abandoned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. ⇨1078.]

2. WHARVES ⇨21—DEFECTIVE CONDITION—PERSONAL INJURIES—LIABILITY—PLEADING.

A declaration in an action at law, wherein it is sought to recover damages for personal injuries alleged to have been sustained by reason of the defective condition of a wharf, is not subject to demurrer on the ground that it fails to allege that the defendant was the owner or occupant of the wharf at the time the alleged injury was sustained by the plaintiff by reason of the defective condition of such wharf, when it is positively alleged therein that the defendant "had exclusive control and management" of the wharf at such time. If the defendant had the exclusive control and management of the wharf, that is sufficient to make it liable for injuries occasioned by reason of its defective condition.

[Ed. Note.—For other cases, see Wharves, Cent. Dig. §§ 44-49; Dec. Dig. ⇨21.]

3. LANDLORD AND TENANT ⇨167 — DEFECTIVE PREMISES—LIABILITY OF TENANT.

The common-law rule of liability of lessees who have control or occupancy of premises, for injuries caused by the defective or dangerous condition of the premises, where such defective or dangerous condition reasonably should have been known to and remedied by the occupying tenant, is in force in this state.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. ⇨167.]

4. APPEAL AND ERROR ⇨1195—LAW OF THE CASE—PRIOR APPEAL.

All the points adjudicated by an appellate court upon a writ of error or an appeal become the law of the case, and are no longer open for discussion or consideration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. ⇨1195.]

5. PLEADING ⇨367—DECLARATION—DUTY TO REQUEST AMENDMENT.

In an action at law, wherein it is sought to recover damages for personal injuries alleged to have been sustained by reason of the defective condition of a wharf, if the defendant conceives that the description of such wharf is insufficient to enable it to plead with certainty to the declaration, it should apply to the court to have the declaration amended in such particular.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 1173-1193; Dec. Dig. ⇨367.]

6. PLEADING ⇨187, 352, 367—OBJECTIONS—MOTION TO STRIKE — COMPULSORY AMENDMENT—DEMURRER.

There is a clear distinction in the functions performed by a motion to strike out or for the compulsory reformation of a pleading and a demurrer thereto, and this distinction should be observed. They cannot be used interchangeably

and indiscriminately employed, as they are governed by essentially different rules of procedure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 64, 400, 1078-1091, 1125, 1173-1193; Dec. Dig. ⇨187, 352, 367.]

7. NEGLIGENCE ⇨113—CONTRIBUTORY NEGLIGENCE—DECLARATION.

Contributory negligence is an affirmative defense and need not be negated in the declaration.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 186-193; Dec. Dig. ⇨113.]

8. APPEAL AND ERROR ⇨737—ASSIGNMENTS OF ERROR—SUSTAINING DEMURRER TO PLEAS.

Where a single assignment of error attacks the ruling of the trial court in sustaining a demurrer to four separate pleas, an appellate court, in passing thereon, need go no further than to ascertain that the demurrer was properly sustained to any one of such pleas, as the assignment, being single, must fail, unless all of the pleas are good.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3030-3032; Dec. Dig. ⇨737.]

9. LANDLORD AND TENANT ⇨167 — DEFECTIVE PREMISES—FAILURE TO REPAIR—LIABILITY OF TENANT.

At common law the tenant and occupier of premises is bound, as between himself and the public, to keep the premises in such condition that they will be reasonably safe for persons who go lawfully upon the premises, by express or implied invitation; and such tenant or occupier is prima facie liable for damages caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by the tenant or occupier. This is the law, even though the lessor covenanted to keep the premises in repair.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. ⇨167.]

10. MASTER AND SERVANT ⇨203—ASSUMPTION OF RISK—APPLICATION OF DOCTRINE.

As a general rule, the doctrine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. ⇨203.]

11. MASTER AND SERVANT ⇨203—PERSONAL INJURIES—ASSUMPTION OF RISK.

As a general rule, assumption of risk rests upon contract, and is only available as a defense by reason of the contract.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 538-543; Dec. Dig. ⇨203.]

Error to Circuit Court, Duval County; D. A. Simmons, Judge.

Action by Ed King against the Cooney-Eckstein Company, a corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

J. E. & Julian Hartridge, of Jacksonville, for plaintiff in error. J. M. Carson, of Jacksonville, for defendant in error.

SHACKLEFORD, J. This case has been here once before. For the former opinion, see 66 Fla. 246, 63 South. 659. As we stated therein:

"In an action to recover compensatory damages for personal injuries alleged to have been

caused by the negligence of the defendant corporation, the court directed a verdict for the defendant; and, to a judgment rendered on the verdict, the plaintiff took writ of error."

This judgment we reversed, for the reasons stated in the opinion. Upon the going down of the mandate, the case came on again for trial upon the same pleadings and the issues thereby made. By stipulation of counsel for the respective parties, the case was submitted to the circuit judge for trial and determination without a jury. Such stipulation further provided that the testimony, as contained in the transcript upon the former writ of error, should be used, and, as a matter of fact, no other testimony was adduced by either party, except as to the measure of damages. The trial court found, as a matter of law, that the plaintiff was entitled to recover, and assessed his damages at the sum of \$2,000, for which amount judgment was rendered, which judgment the defendant has brought here for review.

[1-4] The first assignment is based upon the overruling of the demurrer interposed to the declaration. The demurrer contains eight grounds or "substantial matters of law intended to be argued," but we shall discuss only such of the grounds as are insisted upon here, treating the other grounds as having been abandoned. Jacksonville Electric Co. v. Schmetzer, 53 Fla. 370, 43 South. 85. It is contended that the declaration is defective because it fails to allege that the defendant was the owner or occupant of the wharf at the time the alleged injury was sustained by the plaintiff by reason of the defective condition of such wharf. We are of the opinion that the contention is without merit, since the declaration positively alleges that the defendant "had exclusive control and management" of the wharf, which was in bad repair and had been for a long space of time prior to the injury; that the defendant knew, or should have known, of such defective condition, and negligently and carelessly failed to repair the same; and that the plaintiff was lawfully upon such wharf at the time the injury occurred by the permission and invitation of the defendant. Ownership of the wharf by the defendant was not necessary in order to render the defendant liable for the injury. This point was decided adversely to the defendant in the former opinion, which has become the law of this case. See Paul v. Commercial Bank, 68 South. 68 (decided here at the present term). If the defendant had the exclusive control and management of the wharf, that is sufficient to make it liable for injuries occasioned by its defective condition. It is sufficient to refer to the reasoning and the authorities cited in our former opinion. As we held therein:

"The common-law rule of liability of lessees who have control or occupancy of premises, for injuries caused by the defective or dangerous condition of the premises, where such defective or dangerous condition reasonably should have

been known to and remedied by the occupying tenant, is in force in this state."

[5, 6] It is further contended that the declaration is defective in that the wharf upon which the accident is alleged to have occurred is not particularly or sufficiently described, so as to put the defendant "upon sufficient notice to make it possible for it to plead with certainty." Even so, this would not constitute a ground for a demurrer. Different functions are performed by a demurrer, a motion to strike out, and a motion for the compulsory amendment of a pleading, as we held in Southern Home Insurance Co. v. Putnal, 57 Fla. 199, 49 South. 922. If the defendant conceived that the description of the wharf was insufficient to enable it to plead with certainty to the declaration, it should have applied to the court to have the declaration amended in such particular. City of Orlando v. Heard, 29 Fla. 581, 11 South. 182.

[7] It is still further contended that the allegations of the declaration are so framed that the plaintiff was shown to have been guilty of contributory negligence. This contention has not been sustained. As we have several times held, contributory negligence need not be negatived in the declaration. City of Orlando v. Heard, supra; Morris v. Florida Cent. & P. R. Co., 43 Fla. 10, 29 South. 541; Hainlin v. Budge, 56 Fla. 342, 47 South. 825. See, also, note and authorities cited therein on page 1201 et seq. of 33 L. R. A. (N. S.) This disposes of all the grounds of the demurrer which are urged before us; consequently this first assignment must be held to have failed.

[8, 9] The second assignment is based upon the sustaining of the demurrer interposed to the second, third, fourth, and fifth pleas. In Daniel & Finley v. Siegel-Cooper Co., 54 Fla. 265, 44 South. 949, we held as follows:

"Where a single assignment of error attacks the ruling of the circuit judge striking four separate pleas, and this court finds that the circuit judge acted properly in striking one of those pleas, it will not go further in considering the single assignment of error."

See, also, the discussion in Williams v. State, 58 Fla. 138, 50 South. 749, as to the necessity for particularity in the assignments of error.

It logically follows from our holding in Daniel & Finley v. Siegel-Cooper Co., supra, that, if we should find that the circuit judge acted properly in sustaining the demurrer to any one of the pleas in question, we need not go further in considering this assignment, as the assignment being single, unless all of such pleas are good, it must fail. See, also, Western Ry. of Alabama v. Arnett, 137 Ala. 414, 34 South. 997, and Alabama Great Southern R. R. Co. v. Clarke, 145 Ala. 459, 39 South. 816. The discussion in the opinion rendered by Mr. Justice McClellan on rehearing in Cahaba Coal Co. v. Elliott, 183 Ala. 298, 62 South. 808, will also prove of

service. The fourth plea in question is as follows:

"And for a fourth plea to the declaration the defendant says that E. O. Painter Fertilizer Company, a corporation, is the lessor and owner of said wharf in the declaration mentioned, and that said defendant lessee thereof, as a licensee to use said wharf in common with others, and that the said lessor and owner of said wharf is and was, at the time of the sustaining of the injuries alleged in the declaration, responsible for the care and repair of said wharf, and not this defendant."

As we expressly held in the former opinion, and as we have also stated above, the fact that the defendant was not the owner of the wharf does not affect its liability. There is no occasion to say more. This assignment has not been sustained.

The third assignment is as follows:

"The court erred in sustaining the plaintiff's demurrer to the first and second additional pleas filed by leave of the court October 6, 1914."

[10, 11] Such first and second additional pleas, which were filed by leave of the trial court after the former judgment had been reversed by this court, are as follows:

"For a first additional plea the defendant says that the plaintiff was employed by the Atlantic Coast Forwarding Company to load certain lumber located on a dock leased by defendant, into a vessel moored at said dock, in the capacity of foreman of a stevedore's gang and as a stevedore, and was in charge and control of the men doing the work, and had been engaged in the work of loading said lumber from said dock into said vessel for a long period immediately before the happening of the accident complained of, and that there was during this period the same opportunity offered and open to the plaintiff to ascertain the dangerous condition of the dock as was open to the defendant.

"And for a second additional plea the defendant says that the plaintiff was engaged under employment of the Atlantic Coast Forwarding Company in work upon a dock leased by defendant, for a long period of time immediately before the happening of the accident complained of, and was well acquainted with the character and nature of the work in which he was engaged and the danger and risk incident thereto, and that said danger and risk were as patent and obvious to the plaintiff as they were to the defendant."

The defendant has placed an erroneous construction upon our former opinion, especially upon the following paragraph:

"The plaintiff did not assume the risks incident to the negligence of the lessee in not having the dock in safe condition, when the danger was not obvious and was unknown to the plaintiff. Assumption of risk and contributory negligence, when available, are affirmative defenses; and neither appears in the evidence."

It will be observed, not only did we not hold that assumption of risk and contributory negligence were available as defenses in the instant action, but that "neither appears

in the evidence." We would again call attention to the fact that, by agreement of counsel, the same evidence was used at this second trial. For a discussion concerning the doctrine of assumption of risk and when the same is available as a defense, see *Southern Turpentine Co. v. Douglass*, 61 Fla. 424, 54 South. 385. We would also refer to *Tinkle v. St. Louis & San Francisco R. R. Co.*, 212 Mo. 445, 110 S. W. 1086, from which we copy the following excerpt:

"As a general rule, the doctrine of assumption of risk pertains to controversies between masters and servants, though circumstances may arise between parties other than masters and servants when the doctrine may apply; but such defense is never available, unless it rests upon contract, or, if not exclusively on contract, then on an act done so spontaneously by the party against whom the defense is invoked that he was a volunteer, and any bad result of the act must be attributed to an exercise of his free volition, instead of to the conduct of his adversary. * * * The word "assumption" imports a contract, or some kindred act of an unconstrained will. Whenever a man does anything dangerous, he encounters the risk, but it by no means follows that, legally speaking, he assumes the risk." *Fillingham v. Railroad*, 102 Mo. App. loc. cit. 580 [77 S. W. 314]. There is nothing disclosed by the record in this case which removes it from the operation of the general rule, or which would justify the conclusion that the plaintiff assumed the risk. Moreover, the doctrine does not apply when the injury is occasioned by the negligence of the defendant."

The demurrer to these pleas was properly sustained.

The fourth assignment is based upon the denial of the defendant's motion for a finding in its favor. No error is made to appear here. Upon the same evidence we held, in our former opinion, that the trial court erred in directing a verdict for the defendant. There is also a clear intimation therein that upon that evidence the verdict might well have been for the plaintiff.

The fifth assignment is based upon the overruling of the motion for a new trial. The sixth assignment is that "the court erred in finding, as a matter of law, that the plaintiff was entitled to recover in this case," while the seventh and eighth assignments question the correctness of the finding upon the facts and in rendering judgment in favor of the plaintiff. We see no occasion for a discussion of these assignments, but would again refer to our former opinion. No contention is made that the testimony did not support the amount of damages to which the court found that the plaintiff was entitled.

The judgment must be affirmed.

TAYLOR, C. J., and COCKRELL, WHITEFIELD, and ELLIS, JJ., concur.

(136 La. 329)

No. 20176.

ROBERTS LUMBER CO. v. MORGAN et al.
(Supreme Court of Louisiana. March 8, 1915.)

(Syllabus by the Court.)

1. BOUNDARIES \Leftrightarrow 39—REOPENING CASE—OBJECTIONS TO SURVEYOR'S REPORT—TIME FOR MAKING.

When, in an action of boundary, a surveyor appointed by the court has filed his procès verbal and plat of survey, and the same have been introduced in evidence, and the surveyor has appeared as a witness, and has been examined and cross-examined, and the appellant, who was present when the survey was made, has taken the stand and given his testimony, and the case has been continued for argument, all without objection, the objection that the report of the surveyor had not sufficiently detailed the work done by him, made for the first time when the case is again called, came too late, and the trial court, in refusing to reopen the case, did not abuse the discretion vested in it.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. § 195; Dec. Dig. \Leftrightarrow 39.]

2. BOUNDARIES \Leftrightarrow 44 — JUDGMENT FIXING BOUNDARY—AFFIRMANCE.

Where the procès verbal and plat of the surveyor appointed by the trial court in an action of boundary are sufficiently definite to enable the trial court so to do, and it renders judgment fixing the boundary, and no error therein is shown, the judgment will be affirmed.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 209-211; Dec. Dig. \Leftrightarrow 44.]

Appeal from Twelfth Judicial District Court, Parish of Vernon; J. G. Palmer, Judge.

Petitory action by the Roberts Lumber Company against J. W. Morgan and others. From judgment for plaintiff, defendants appeal. Affirmed.

S. I. Foster, of Shreveport, for appellants.
W. W. Thompson, of Shreveport, for appellee.

Statement of the Case.

MONROE, C. J. This was begun as a petitory action for the recovery of the W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 22, township 1 S., range 9 W., Louisiana meridian; but, defendants having disclaimed title to the property so described, and set up title to, and possession of, the adjoining E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 21, in the same township and range, the case resolved itself, without objection from either litigant, into an action of boundary, and thereupon, on June 20th, plaintiff moved that a surveyor be appointed to make a survey and establish the boundary, and the court appointed "W. A. Wintle, a legally authorized surveyor," who, on the same day, issued a notice; service of which was at once accepted by defendants' counsel, that he would begin the survey on June 27th at 10 o'clock a. m., which he did, in the presence of J. W. Morgan, one of the defendants, who remained with him until the survey was completed, on June 28th; after which, on June 30th, the case being called for trial, and both parties being present and ready for trial,

the surveyor's procès verbal and plat of survey were offered and introduced in evidence without objection. The surveyor was called to the stand as a witness and examined by plaintiff's counsel concerning the same, cross-examined by defendants' counsel, re-examined in chief, and recross-examined; the whole occupying 13 typewritten pages of the transcript. J. B. Stern, another surveyor, was then called to the stand and examined and cross-examined concerning a survey that he had previously made of the line in dispute, and also as an expert, and in 7 typewritten pages corroborated the testimony, procès verbal, and plat of Mr. Wintle. J. W. Morgan, one of the defendants, then took the stand in his own behalf, and, an admission having been made that he "owns the land lying immediately west of the section line here in dispute and adjoining the land claimed by plaintiff," gave some 4 pages of testimony, and was followed by Mr. Wintle, in rebuttal, which closed the evidence; and, the case having been (quoting from the minutes) "continued to the afternoon session for argument, the court then took a recess until 3:30 p. m. At 3:30 p. m. court met, and the following proceedings were resumed: Counsel for defendant then offers and files a motion to reopen the case, which motion was disallowed by the court. Counsel for defendant excepts to the ruling of the court and reserves a bill. The case was then submitted without argument. For reasons orally assigned by the court, judgment for plaintiff. See decree. Judgment read, signed, and filed. Counsel for the defendant moved for an order of appeal, * * * which * * * the court granted. * * *"

The motion to reopen the case reads as follows:

"Into court now comes the defendant, and moves that the court open the matter for further evidence, before pronouncing judgment, for the following reasons, to wit:

"(1) Article 833 of the Rev. C. C. provides for a full written procès verbal of every act and detail performed by the surveyor in running the disputed line. This report was not made according to the provisions of the Code.

"(2) The evidence of the surveyor and the map filed by him should have embraced every act and the running of every line, whether it be a trial line, a corrective line, or what not, and what results he obtained from the running of said various lines. Said evidence and the map does not embrace more than half, if as many, of the lines, offsets, and measurements actually run by the surveyor, and the results, discrepancies, etc., obtained; that the map attached hereto and made part of the motion shows the various lines, meanderings, and offsets run by the said surveyor; that the defendant, the maker of the map hereto attached, was with the said surveyor on both days of his labor, and made a note of every line and the results obtained, and would show that the map hereto attached is true and correct as to direction and distance.

"(3) That the old government survey was plain, the posts were there, and the section line north and south between secs. 21 and 22 perfectly plain, but the surveyor refused to follow it, saying the degrees of his compass would not

follow it; that the said surveyor, after a day's work, abandoned the compass and took up the use of the transit, saying it was more accurate.

"(4) He [defendant] did not have the opportunity of discussing this matter, the work of the surveyor, with his counsel before this case was called for trial, and that his counsel was not furnished with this information until after the evidence had been closed and the reasons [recess] ordered; that he made an attempt to cross-examine the surveyor, but his counsel objected, and dismissed the witness.

"Wherefore he prays that the case be reopened, and the evidence resumed, going to complete the procès verbal of the surveyor, in order that your honor might have before you all the facts, acts, and deeds of the surveyor leading up to the results which he (the surveyor) has placed upon the map this day filed. He attaches hereto, and makes part hereof, a true map or drawing showing the lines run by said surveyor."

Opinion.

[1, 2] We find in the refusal of the trial court to reopen the case, under the circumstances disclosed by the record, no abuse of the discretion with which that tribunal is vested. If the defendant was not ready to go to trial when his case was called, he should have applied for a continuance. If he had any objections to make to the procès verbal and plat of the surveyor, he should have made them when those documents were offered in evidence. If, during the two days—June 27th and 28th—when, in his presence, the surveyor was engaged in making the survey, or thereafter, up to the moment when, on June 30th, the surveyor completed his testimony, he (defendant) could find no opportunity to discuss the matter with his counsel, he might even then have asked for some delay for such discussion, and the request would, no doubt, have been granted. But, as he himself took the stand, and was afforded ample opportunity to explain to the court, and to his counsel at the same time, why he differed in opinion with the two surveyors, we are at a loss to understand what further opportunity he needed. Dealing with a somewhat similar situation in another case, this court, through Eustis, C. J., said:

"In the present case the report or procès verbal with a map was prepared by a surveyor on a survey by him made under an appointment which was not formally authorized by the court; nor has the procès verbal the requisite number of witnesses. But the report was admitted in evidence without objection, and the surveyor examined as a witness, and testimony was received pro and con on the trial of the cause. It appears that the appellant was present at the survey and gave directions to the surveyor in relation to his work. He has thus had the full benefit of the evidence to which he now objects. We think the objection came too late. As the survey and procès verbal were sufficiently definite to enable the court of the first instance to fix the boundaries, and as no error has been shown in its judgment, the same must be affirmed." *Tucker v. Lefebvre*, 5 La. Ann. 123.

And so it may be said here. The judgment appealed from is accordingly affirmed.

(136 La. 833)

No. 19963.

LOUISIANA RY. & NAV. CO. v. BATON ROUGE BRICKYARD.

(Supreme Court of Louisiana. Feb. 8, 1915. Rehearing Denied March 22, 1915.)

(Syllabus by the Court.)

EMINENT DOMAIN \Leftrightarrow 124—EXPROPRIATION—VALUATION.

In expropriating property in a portion of a city which is not built up, and through which streets have not been opened or dedicated, the valuation will be based upon the value of the property at the time of taking, and not upon a purely speculative valuation, based upon the prospective value of town lots for residential purposes. If the property expropriated was in a residential section, or in close proximity to one, a different rule would be applied, although the property itself was not actually improved.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 332-344; Dec. Dig. \Leftrightarrow 124.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Action by the Louisiana Railway & Navigation Company against the Baton Rouge Brickyard. From judgment for plaintiff, plaintiff appeals. Modified and affirmed.

Wise, Randolph, Rendall & Freyer, of Shreveport, and Laycock & Beale, of Baton Rouge, for appellant. Taylor & Porter, of Baton Rouge, for appellee.

On Motion to Dismiss.

SOMMERVILLE, J. Plaintiff appeals from a judgment in its favor, and complains of the appraisal fixed by the jury on certain land sought to be expropriated by it in this proceeding.

Defendant moves to dismiss the appeal, as it was not made returnable to, and was not filed in, this court within 15 days, as is directed shall be done in section 1490, R. S.

The trial judge erroneously made the appeal returnable under Act 106 of 1908, p. 163, which is the general statute with reference to appeals to the Supreme Court. That act does not repeal special statutes, or statutes fixing return days with reference to special matters. *Kerlin v. Bryceland*, 134 La. 463, 64 South. 289. But appellant does not appear to have been responsible for the error, and the appeal will not therefore be dismissed.

In the case of *Ross v. Naff*, 130 La. 590, 58 South. 348, this court says:

"The facts that the appellant made his application, and that the court made the order for the appeal, under a misapprehension of the law governing the matter, cannot operate to deprive the appellant of a right conferred on him by the Constitution and regulated by other statutes than that contemplated by him and the court." *Chaffe v. Heyner*, 31 La. Ann. 594; *Elder v. City of New Orleans*, 31 La. Ann. 500; *State v. Dellwood*, 33 La. Ann. 1229;

State v. Balize, 38 La. Ann. 542; State v. Phelps, 132 La. 399, 61 South. 415.

Motion to dismiss appeal is denied.

This proceeding, brought by the Louisiana Railway & Navigation Company against the Baton Rouge Brickyard, is for the purpose of acquiring a strip of ground twenty-five feet wide through the property of defendant, to be used by it as a part of its branch or belt line of railroad through and around the city of Baton Rouge. The property sought to be expropriated runs across the northeastern portion of defendant's property situated in the city of Baton Rouge, and comprises $\frac{21}{100}$ of an acre in superficial area.

Defendant acquiesces in the demand for expropriation, but claims from the plaintiff, for the value of the property taken and for damages, \$13,300. Defendant alleges that the chief value of the property sought to be expropriated is for residence purposes; that the twenty-five foot strip of land herein sought to be taken from the defendant cuts or crosses the equivalent of eight city lots; that in the construction of the proposed branch line of railroad plaintiff proposes to and will make a 4-foot cut across defendant's said lots; that said lots are well and truly worth the sum and price of \$1,200 each, or \$9,600, for which damage petitioner is responsible; that in order to be reasonably safe from fire and to secure a reasonable rate on fire insurance, defendant's brick sheds will have to be cut off to a point twenty-five feet from the south line of plaintiff's proposed branch road, and they will have to be covered with fireproof roofing, all at a cost of \$2,000; that the building of said proposed branch road, and the making of said 4-foot cut, will inclose, cut off, and shut in a triangular piece of land belonging to defendant, and comprising three full city lots, two of which are worth \$1,200 each, and one of which is worth \$1,000; and that it will be damaged to the extent of \$1,700.

There was judgment in favor of plaintiff condemning the property, and condemning plaintiff to pay \$6,000 for the property expropriated.

Plaintiff company obtained from the city council of Baton Rouge a franchise for a belt line in that city; and, in furtherance of the exercise of that franchise, it seeks to expropriate $\frac{21}{100}$ of an acre of land belonging to defendant, upon which to lay its tracks. It is proposed to extend these tracks through defendant's property, which would virtually destroy three squares, if the plot of ground was divided into squares. The tracks would cut off small triangular corners of four other supposed squares, which damage would be more than compensated by the triangular pieces remaining of the three squares first mentioned. The triangular piece of land which defendant says equals three city lots, and for which it claims \$1,700, is small, and it is located on a drainage ca-

nal. It hardly contains one lot; and it is of very little value if segregated from the other portions of ground belonging to defendant.

The court is uniformly guided by the finding of the jury of freeholders of the vicinage where the property is located which is to be expropriated in fixing the value of expropriated property and the damages resulting to the property holder from the improvement. But, when the verdict is manifestly excessive, as it is in this case, it becomes necessary to amend it. The jury has here condemned plaintiff to pay about \$6,000 for less than one-third of an acre located in the southwestern limits of the city of Baton Rouge, according to a city survey made in 1910. This is at the rate of \$18,000 an acre, which is an impossible price.

The evidence shows that the property is high, and if streets were cut through it, it would be suitable for small and unpretentious dwellings, but that it is now used for a mercantile purpose, a brickyard, and that it lies between a drainage canal and the tracks of the Yazoo & Mississippi Valley Railroad. Streets of the city have not been extended through the property, or even dedicated; and it may be long before the property so shut in may be used for any other purpose than the one it is now used for.

In the case of *Y. & M. V. R. R. Co. v. Longview Sugar Co.*, 135 La. 542, 65 South. 638, we quote from 2 Dillon on Municipal Corporations, p. 617, as follows:

"In an expropriation suit for railroad purposes, the market value of property taken, viewed both with reference to its use at the time and with reference to the usage to which it is plainly adaptable, will be considered in fixing the value of the land."

And in the case of *Y. & M. V. R. R. Co. v. Teissler*, 134 La. 958, 64 South. 866, we quote from *United States v. Chandler-Dunbar*, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063, as follows:

"A 'strategic value' might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. But in a condemnation proceeding the value of the property to the government for its particular use is not a criterion. The owner must be compensated for what has been taken from him, but this is done when he is paid its fair market value for all available uses and purposes."

To the same effect are decisions in *Orleans & Jackson Ry. Co. v. Jefferson & L. P. Ry. Co.*, 51 La. Ann. 1605, 26 South. 278; *Opelousas, G. & N. E. Ry. Co. v. Bradford*, 118 La. 503, 43 South. 79. See, also, *Lewis on Eminent Domain*, paragraphs 478 and 479.

The testimony as to the value of lots in the section of the city where defendant's property is located is as contradictory as is usual in such cases.

And this testimony is of little assistance to the court for the reason that the proposition submitted in the cause is the value of a strip of ground running through fourteen acres of

land belonging to defendant, which is not subdivided into lots or squares, and where there are no streets laid out or dedicated. The paper sketch submitted by defendant will doubtless not be followed if it should dedicate streets through its grounds, in view of the railroad tracks which will have been located by plaintiff at that time. And should defendant abandon its brick-making business and offer city lots for sale, it will not offer them according to its present paper sketch.

It has been held by this court that:

"The criterion of value is the market value of the property at the date of the institution of the expropriation suit, in view of any use to which it may be applied and of all the uses to which it is adapted, exclusive of any increase in value given by the construction of plaintiff's railway thereon. The question before the jury was, What price would have been obtained for the property as a whole by a prudent seller in the usual course of business? The market value means the fair value of the property between one who wants to purchase and one who wants to sell, under usual and ordinary circumstances. Market value does not mean speculative value. *Railroad Co. v. Railroad Co.*, 51 La. Ann. 1616, 26 South. 278; *Louisiana Ry. & Nav. Co. v. Xavier Realty Co.*, 115 La. 323, 39 South. 1.

"At the time of the institution of this suit the tract in question had not been subdivided, and the question before the jury was as to the market value as a whole, considering all the uses to which it was adapted. The value of the tract for 'town lot' purposes was one of the factors to be considered, but what the owner or purchaser might realize by a subsequent subdivision of the property and sale of lots partakes too much of the character of speculation to serve as a basis of valuation at the date of the institution of the present suit."

"So it is proper to show that property possesses a peculiar value for railroad purposes, for dock purposes, for mill site, for a ferry, for market gardening, for raising cranberries, for warehouse purposes, or for a bridge site. It is proper to show that the property is suitable for division into village lots, and that it is valuable for that purpose, but it is not proper to show the number and value of such lots." *Lewis, Eminent Domain*, vol. 2 (2d Ed.) pp. 1054, 1055.

"In a case in Wisconsin it was held proper to show that property was suitable for division into village lots and the probable value of such lots. But this is clearly going a step too far. The probable value of village lots which do not exist is too speculative." *Lewis, Eminent Domain*, vol. 2 (2d Ed.) p. 1058.

It is evident that the jury based their verdict on defendant's lot scheme, as nearly every witness fixed the value of these supposed lots by comparison with lots in the long established part of town.

The testimony relative to the number of supposed lots and their value was objected to by counsel for plaintiff, on the ground that it had been shown and was an admitted fact that the land had not been laid off into squares and lots, and that there were no streets, etc.

The objections should have been sustained. The testimony for defendant is not as to the value of the land, or of the strip to be taken by plaintiff for its tracks, but is as to the value of city lots, a purely speculative or

supposed value of something not in existence.

Under somewhat similar circumstances concerning certain squares in the city of New Orleans, which were laid out and divided into lots, but through which all the streets were not actually open, and which were outside of the built-up parts of the city, we say:

"This is a fair synopsis of the testimony. It shows that the land in question, though within the corporate limits and divided into squares and lots, yet lies outside of the built-up part of the city, and is available as yet only for cultivation or for holding for speculation. The lots are such only on paper, and are building lots only prospectively—when the growth of the city shall have reached them. As building lots they have as yet only a speculative value." *City of New Orleans v. Manfre*, 111 La. 927, 35 South. 981.

The case must be decided upon competent evidence going to show the value of the property taken by plaintiff, without regard to speculation, or to the possible abandonment by defendant of its present business enterprise, or to improvements in the way of dedication of streets, etc., which the owner may possibly make in the future.

In the volume of testimony in the record, much of it being most contradictory, we find that that of Capt. O. B. Steele, a witness for plaintiff, who was engaged in the real estate business, is based upon a clear appreciation and understanding of the exigencies and conditions of expropriating a right of way for a railroad through a plot of ground, and his valuation of the property will be adopted as the basis for the judgment of the court. He says, on cross-examination:

"Instead of merely paying for the area, or the superficial feet equivalent to a lot, or the number of lots taken, it [the railroad] should pay a good deal more. My answer is this that the area being equal to two lots and the lots being worth \$400 or \$500, then I think they should pay \$1,200 or \$1,500 for this piece of property. Q. Then you consider that these lots are worth \$400 or \$500 each? A. No, sir; I do not say that. I said this: If they were laid off before this railroad came there, that they might sell for \$400 or \$500."

The witness further testified that the property was not and would not be desirable for residential purposes, but with the railroad there it would be good for commercial purposes.

As to the cost of removing and rebuilding parts of the brick sheds on defendant's property, the testimony is equally conflicting. It ranges from \$509 to \$2,100.

O. B. Stewart, a contractor, and witness for plaintiff, testified that he would do all the work necessary, giving it in detail, for \$1,000, with bond, which figure will be adopted as a liberal estimate, as it embraces even more work than is deemed by the court to be necessary to be done.

It is therefore ordered, adjudged, and decreed that there be judgment amending the judgment appealed from by reducing it to

\$2,500 for the right of way sought by plaintiff in this suit, and, as thus amended, it is affirmed, at the cost of plaintiff in both courts.

(136 La. 841)

No. 20338.

FRANZ v. SCHIRO.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by the Court.)

1. **BILLS AND NOTES** \Leftrightarrow 370, 453—**WANT OF CONSIDERATION.**

"Absence or failure of consideration is a matter of defense against any person not the holder of a promissory note in due course.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 963, 1344-1351; Dec. Dig. \Leftrightarrow 370, 453.]

2. **SET-OFF AND COUNTERCLAIM** \Leftrightarrow 35—**COMPENSATION.**

"Compensation takes place only between two debts, having equally for their objects a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable."

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 58-64; Dec. Dig. \Leftrightarrow 35.]

Appeal from Civil District Court, Parish of Orleans; E. K. Skinner, Judge.

Action by Fred Franz against Anthony P. Schiro. From judgment for plaintiff, defendant appeals. Affirmed.

Breaux & Roehl, McCloskey & Benedict, and John Wagner, all of New Orleans, for appellant. A. D. Danziger, of New Orleans, for appellee.

SOMMERVILLE, J. Plaintiff sues upon a negotiable promissory note, acquired for value and before maturity, and the defense is that the plaintiff is not the real owner, but that he holds for his wife, and that the wife, by certain tortious acts, with the consent and approval of her husband, has damaged defendant in an unnamed amount, and that defendant therefore owes nothing on said note.

There was judgment for plaintiff, and defendant has appealed.

[2] After plaintiff had introduced evidence going to show that he was the bona fide owner of the note for value, and that he had acquired it before maturity, defendant offered to prove certain allegations in his answer made with reference to certain alleged tortious acts of the wife of plaintiff; plaintiff objected to the introduction of such evidence "on the ground that this suit is brought by Mr. Fred. Franz, that he has testified that the money, \$5,000, one-half of which is the subject of the controversy here, was paid out by him, and that any action of his wife, if such there was, cannot be a set-off to debts which are due to Mr. Franz." And a further objection was made "to any evidence tending to establish a compensation or set-off of any

kind, due to merchandise alleged to have been taken away from the place; that defendant seeks to set off (an unliquidated claim) against a note, and a notarial act (and that this cannot be done), on the ground that the two debts are not of equal rank; that this other claim has not been liquidated, and cannot, under the law, and particularly under article 2209 of the Civil Code, be compensated one against the other."

The court ordered: "Let the objection go to the effect." The objection should have been sustained.

Plaintiff being a holder of the note sued on in due course, his claim thereunder could not be compensated, or set off, by an unliquidated claim which defendant might have against him. C. C. art. 2209.

[1] An exception was filed during the course of the trial, pleading want of consideration; but, as plaintiff was a "holder in due course" of the note sued on, this defense could not be entertained. Sections 28 and 52 of the negotiable instrument law, Act No. 64, 1904, p. 147.

Judgment affirmed.

(136 La. 843)

No. 20984.

STATE v. FULCO.

In re MABRY, Dist. Atty.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by the Court.)

CRIMINAL LAW \Leftrightarrow 982—**SUSPENSION OF SENTENCE—POWER OF JUDGE.**

Under Act No. 74 of 1914, authorizing the judge to suspend a sentence for the commission of a misdemeanor by a person who has never before been convicted of a felony or misdemeanor, the judge may suspend the sentence of a person who was convicted of a misdemeanor before the passage of the act.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2500, 2501; Dec. Dig. \Leftrightarrow 982.]

Sam Fulco was convicted of retailing intoxicating liquors without a license, and, an order having been made suspending sentence and paroling defendant, W. A. Mabry, District Attorney, applies for writs of certiorari, prohibition, and mandamus. Relator's proceedings dismissed.

See, also, 67 So. 521.

R. G. Pleasant, Atty. Gen., W. A. Mabry, Dist. Atty., and C. B. Prothro, Asst. Dist. Atty., both of Shreveport, and G. A. Gondran, Asst. Atty. Gen., for relator. L. C. Blanchard, of Shreveport, City Judge, pro se.

O'NIELL, J. The defendant was convicted of retailing intoxicating liquors without a license, and, on the 2d of March, 1914, was sentenced by the judge of the city court of Shreveport to pay a fine of \$500 and costs and be imprisoned for six months, and, in

default of the payment of the fine and costs, to be imprisoned for an additional term of six months.

On the 13th of September, 1914, the judge of the city court, after hearing evidence, and under authority of Act No. 74 of 1914, suspended the sentence and ordered the defendant paroled.

The district attorney has applied to this court for writs of prohibition and mandamus, to compel the judge of the city court to revoke his order suspending sentence and paroling the defendant.

Section 7 of Act No. 74 of 1914 provides:

"That when there is a conviction of a misdemeanor in any court in this state, the judge may suspend sentence if he shall find that the defendant has never before been convicted of any felony or misdemeanor. The court shall permit testimony as to the general reputation of the defendant and as to whether the defendant has been convicted of a misdemeanor or felony, but such testimony shall be submitted only upon the request of the defendant."

The judge shows in his return that the defendant is more than 65 years of age, had never before been convicted of a felony or misdemeanor, and the evidence heard warranted the suspension of the sentence.

The only reason urged why the judge should not have suspended the sentence is that the statute authorizing it was enacted after the conviction. We find no merit in this contention. The statute was not given a retroactive effect. The section conferring the authority to suspend a sentence imposed for a misdemeanor does not relate to the conviction or sentence, but to the suspension of the sentence.

The relator's proceedings are therefore dismissed.

(136 La. 844)

No. 20959.

STATE v. ATKINS et al.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by Editorial Staff.)

1. CRIMINAL LAW §1144—APPEAL—PRESUMPTIONS—QUASHING INDICTMENT—CONSTITUTION OF GRAND JURY.

A refusal to quash an indictment because the jury commissioners drawing the venire were not in office at the time will not be disturbed where an order appointing other commissioners was made by the judge in another parish on the day on which the venire was drawn, in the absence of any showing that the order was made before the drawing of the venire; for the court must presume that the order was made after the drawing.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2736-2764, 2766-2771, 2774-2781, 2901, 3016-3037; Dec. Dig. §1144.]

2. CRIMINAL LAW §338—ACTS OF PROSECUTING WITNESS—SUPPRESSION OF EVIDENCE.

The act of the prosecuting witness, brother of decedent, in driving from his premises, where the killing of decedent occurred, one of accused's attorneys who had gone there to make measurements for purposes of the trial disclosed his

animosity toward accused and a lack of confidence in the ability of the prosecution to convict on a fair trial, but did not show that the testimony of the prosecution was manufactured, though all of the state's witnesses were employees of the prosecuting witness, and proof of the act for that purpose was properly excluded.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 752, 753, 756, 756, 787, 788, 801, 855; Dec. Dig. §338.]

3. HOMICIDE §122—BY WIFE IN DEFENSE OF HUSBAND.

To justify a wife in killing in defense of her husband, the husband must have been entitled to slay decedent in self-defense.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 177-181; Dec. Dig. §122.]

4. HOMICIDE §158—EVIDENCE—DELIBERATION—MALICE.

On the trial of a wife for murdering decedent, who attacked her husband, evidence that, on the evening of the homicide, accused had asked her husband to go and get decedent and bring him over and she would kill him was admissible to show deliberation and malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. §158.]

5. HOMICIDE §109—SELF-DEFENSE—ACCIDENTAL KILLING.

The defense of self-defense and the defense that accused intended only to disable decedent, and that accused aimed at decedent's arm when the fatal shot was fired, are not inconsistent, and the court must submit both defenses.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 138, 139; Dec. Dig. §109.]

6. CRIMINAL LAW §815—INSTRUCTIONS—EVIDENCE.

The court may not refuse a requested charge sustained by the testimony of accused, on the ground that it does not believe the testimony, for that question is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1922, 1986; Dec. Dig. §815.]

7. HOMICIDE §340—INSTRUCTIONS—HARMLESS ERROR.

Where accused was convicted of manslaughter, error in refusing to charge that, if accused could kill in self-defense, she could rely on the right of self-defense, though she did not actually intend to kill, but only to disable decedent, was not prejudicial; for the charge, if given, could only have reduced the crime from murder to manslaughter by showing absence of malice.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-717, 720; Dec. Dig. §340.]

8. CRIMINAL LAW §778—ARGUMENT OF COUNSEL—INSTRUCTIONS.

Where the district attorney in his closing argument stated that the grand jury had heard all the evidence of the state and had found a bill for murder, the court, on the request of accused, must specifically charge that the finding of the indictment did not create a presumption of guilt, and a general charge of presumption of innocence until proof of guilt beyond a reasonable doubt was insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1852, 1854-1857, 1960, 1967; Dec. Dig. §778.]

9. CRIMINAL LAW §1171—IMPROPER ARGUMENT OF COUNSEL—PREJUDICIAL ERROR.

Where the killing of decedent by accused was proved by direct, positive testimony, improper argument of the district attorney in stating that the grand jury had heard all the

evidence and had found a bill for murder was not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 8126, 8127; Dec. Dig. ☞ 1171.]

Appeal from Twelfth Judicial District Court, Parish of De Soto; John H. Boone, Judge.

Mrs. Charles Atkins was convicted of manslaughter, and she appeals. Affirmed.

Parsons & Craig and Elam & Lee, all of Mansfield, for appellant. R. G. Pleasant, Atty. Gen., and W. M. Lyles, Dist. Atty., of Leesville (G. A. Gondran, of New Orleans, Wm. C. Pegues, and J. M. Foster, of Shreveport, of counsel), for the State.

PROVOSTY, J. The accused, Mrs. Charles Atkins, was tried for murder, was convicted of manslaughter, and sentenced to eight years at hard labor, and has appealed.

[1] She moved to quash the indictment, on the ground that the grand jury which found it had been illegally constituted, for the reason that the jury commissioners who had drawn the venire were no longer in office at the time they performed that function; an order having been made by the judge appointing other commissioners in their place.

The said order was made by the judge at his home in another parish on the day itself on which the venire was drawn; whether before or after the drawing does not appear. Whether its having been made before the drawing would have had the vitiating effect contended for by the accused need not be considered; since, in the absence of any showing of its having been so made, the presumption attaching to the regularity of official acts would require that we assume that it had been made after.

[2] The accused, after having proved that all the state witnesses were employes of the prosecuting witness, brother of the decedent, sought to prove by one of the state witnesses that one of her attorneys had gone to the scene of the homicide, on the premises of the prosecuting witness, and was making measurements for the purposes of the trial, when the prosecuting witness interfered and ordered the attorney off the premises; and this evidence was objected to, as irrelevant. The bill of exception recites that the purpose of making this proof was to show that the case of the state had been manufactured. The argument is that this conduct of the prosecuting witness, when taken in connection with the fact that all the state witnesses were in his employ, and therefore dependent upon his will and caprice for a continuation of their jobs, tended to show that the case of the state had been manufactured by this prosecuting witness.

The said act of the prosecuting witness amounted to a suppression of evidence. It

shows animosity in him towards the accused, and also a lack of confidence on his part in the ability of the prosecution to convict the accused on a fair presentation of all the facts. But neither as an isolated fact nor in conjunction with the said existing relation of employer and employe between him and the witnesses for the state does it show, or even tend to show, that the case of the state was manufactured. Perhaps, if the offer to prove it had been accompanied by the offer to go a step further and show an actual attempt to influence the witnesses, a different legal situation might have been presented. But the animosity of the prosecuting witness towards the prisoner at the bar and his lack of confidence in the ability of the state to secure a conviction on a fair presentation of all the circumstances are facts with reference to which the other witnesses of the state could not be questioned. Of itself, this act of the prosecuting witness, occurring, as it did, many days after the homicide and between other parties, formed no part of the *res gestæ* of the homicide, and was certainly irrelevant.

The suppression of evidence by the prosecuting witness is not exactly on a par with the suppression of evidence by the accused. On the part of the latter it shows a consciousness of guilt, which is admissible as being in the nature of an admission. It shows in the prosecuting witness a lack of confidence in the case of the state, but the prosecuting witness is not the state, nor the prosecution; he is not sufficiently the agent or representative of the state for his acts to be those of the state. His abundance of confidence or lack of it are matters irrelevant to the issue.

It may well be that, if certain particular important facts had been intended to be proved by these measurements, the suppression of them might have been provable in lieu of the measurements themselves, as affording ground for inferring the existence of the facts which the measurements, if not suppressed, would have proved; but such, so far as appears from the bill of exception, was not the purpose of the offer in this case, but merely to prove that the prosecuting witness had manufactured the case of the state—a fact which said suppression did not, we repeat, either prove or tend to prove.

[3] It was while the husband of the accused and the decedent were fighting that the accused fired the fatal shot. She requested the judge to give to the jury a charge embodying the proposition that the right of a wife to slay the adversary of her husband in order to save her husband's life does not depend upon whether the husband himself would be justified in committing the deed, or, to be more specific, does not depend upon the husband's not being at fault, or not having himself brought on the danger, but upon

whether she honestly believes him not to be at fault, but to be himself entitled to slay his adversary in self-defense.

But this is not the law. In such a case, the husband himself must be entitled to slay in self-defense in order that the wife may be justified in doing so for him. 21 Cyc. 827; *State v. Giroux*, 26 La. Ann. 582. The philosophy of it is that another person cannot have a greater right to defend the combatant at fault than he himself has.

[4] On the evening of the homicide the accused was heard to say to her husband: "You go and get him [the decedent] and bring him over here, and I will kill him." This evidence was objected to, on the ground that the purpose of offering it, as declared by the district attorney, was to prove a conspiracy between the two spouses to kill the decedent, and that, for the purpose thus declared, it was inadmissible, because at common law the spouses are considered as being one person, so that it is not possible for them to conspire together.

Perhaps so; but the evidence was clearly admissible to show deliberation and malice; especially that, immediately after the fatal shot, accused was heard to remark, "I guess the s— of a b— will not dispute my word any more," or words to that effect.

[5-7] The accused requested that the following charge be given, and was refused:

"The plea of self-defense does not of necessity admit the intention to kill. If the defendant under the circumstances of the case as they appear to you, and under the law as charged you, had the right to kill in self-defense or in defense of her husband, she is entitled to the plea and right of self-defense, even though she did not actually intend to kill, but only to disable, the deceased."

The line of defense of the accused was that her intention in firing upon the decedent was not to kill him, but only to disable him, and that she aimed at his arm; but that, even if she had aimed to kill him, she would have been acting in defense of the life of her husband, and be therefore guiltless of any crime.

The object of asking this special charge to be given was to let the jury be informed that there was nothing inconsistent between these two defenses.

The learned judge assigns in his per curiam to the bill of exception that the reason of his refusing to give the charge was that he did not believe the accused when she said that she had aimed at the arm of the deceased, seeking only to disable him.

Differently from the judge, the jury might have believed the testimony. The two defenses were not inconsistent; and we think the accused was entitled to have a charge given to the jury on that point. The refusal to give it was error, but the utmost effect the giving of the charge could legally have had would have been to reduce the crime from murder to manslaughter by showing absence of malice, and since the accused, notwithstanding the refusal of the charge, received the benefit of this reduction at the hands of the jury, the situation is that she has not been prejudiced by said error, and hence that it is not ground for reversal.

[8, 9] The district attorney, in his closing address, stated to the jury that the grand jury had heard all the evidence of the state and found a bill for murder. Fearing, very properly, we think, that this calling of attention to the fact of the grand jury having reached the said conclusion after having heard all the evidence of the state might give rise in the minds of the jury to some inference of guilt, the accused requested the court to charge specifically that the finding of a bill of indictment does not create a presumption of guilt against the prisoner. The judge thought that this charge had been sufficiently included in his general charge as to an accused being presumed to be innocent until his guilt has been proven beyond a reasonable doubt. But we do not concur in that view. In the same way that a general statute does not necessarily repeal a special statute, though inconsistent, a general statement in a charge does not necessarily meet and repel some specific statement made in the course of argument. A specific statement should, in order to be fully covered, be met by a counter specific statement. But the case was not one of circumstantial evidence to be decided from inference more or less vague—a case therefore of doubtful aspect, in which the weight of a feather might preponderate the scale—but of direct, positive testimony by eyewitnesses to a killing with a deadly weapon, and we are satisfied that no mere cobweb such as the district attorney thus sought, very improperly, to weave into the plain facts of the matter could possibly have contributed to any appreciable extent in strengthening the case of the prosecution; and hence we conclude that the said error is not of sufficient gravity to justify a setting aside of the verdict.

Judgment affirmed.

(136 La. 852)

No. 21095.

STATE ex rel. BURNETT v. FLOURNOY,
Sheriff.

In re FLOURNOY, Sheriff.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by Editorial Staff.)

1. EXTRADITION \Leftrightarrow 36 — WARRANT — SUFFICIENCY.

Under Rev. St. U. S. § 5278 (U. S. Comp. St. 1913, § 10126), and Rev. St. 1870, §§ 1037, 1038, providing for the production before the Governor of a copy of the indictment, or an affidavit charging with crime the person sought to be extradited, the warrant of the Governor, reciting that it was issued on the requisition of the executive of a sister state on the production of requisite evidence which was on file, is sufficient though not reciting the production of the indictment or affidavit.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. §§ 40-43; Dec. Dig. \Leftrightarrow 36.]

2. HABEAS CORPUS \Leftrightarrow 95—EXTRADITION PROCEEDINGS.

Where one sought to be extradited on a charge of crime in a sister state questions the showing made by the executive of such state, the matter may be tested on habeas corpus.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 82; Dec. Dig. \Leftrightarrow 95.]

3. EXTRADITION \Leftrightarrow 35—ARREST—POWER OF GOVERNOR.

Under Rev. St. §§ 1040, 1041, authorizing the Governor to proceed without the necessity of having recourse to the local courts in extradition cases, the Governor may, on requisition by the executive of a sister state, direct the arrest of one charged with crime without any proceedings in court.

[Ed. Note.—For other cases, see Extradition, Cent. Dig. § 39; Dec. Dig. \Leftrightarrow 35.]

4. HABEAS CORPUS \Leftrightarrow 25—GROUNDS—EXTRADITION PROCEEDINGS.

One arrested on the Governor's warrant in response to the requisition of the executive of a sister state, wherein he was charged with crime, cannot question the proceeding on the ground that he is an infant, and that the sister state, unlike the state of the forum, does not provide for a special method of punishing infant criminals.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. §§ 21, 28, 30, 47; Dec. Dig. \Leftrightarrow 25.]

Habeas corpus by the State, on relation of Willis Burnett, against J. P. Flournoy, Sheriff. Relator was ordered discharged, and respondent brings certiorari. Reversed and application for habeas corpus dismissed.

W. A. Mabry, Dist. Atty., and S. I. Foster, Asst. Dist. Atty., both of Shreveport, for relator. F. T. Bell, in pro. per. Foster, Looney & Wilkinson, of Shreveport, for Willis Burnett.

PROVOSTY, J. Willis Burnett was arrested by the defendant sheriff upon a warrant issued by the Governor upon a requisition by the Governor of Texas. He sued out a writ of habeas corpus before the respondent judge, on the following grounds:

(1) That the warrant upon which he has

been arrested is insufficient, in that, instead of reciting that it has issued upon the production of the copy of an indictment or affidavit, as is required by the act of Congress, it merely recites that it has issued "upon the production of the requisite evidence to justify the same, and which is on file in the office of the Secretary of State."

(2) That sections 1038, 1039, 1040, and 1041 of the Revised Statutes of this state provide the exclusive mode of proceeding for making arrests in cases of extradition, and that therefore the Governor was without authority to issue said warrant, and the same is in consequence null.

(3) That the prisoner is a minor, and therefore entitled to the benefit of the laws of this state for the trial of delinquent children, and that if delivered over to the authorities of the state of Texas, he would be tried as an adult.

[1] The act of Congress in question, which is section 5278, U. S. Rev. Stat. (U. S. Comp. St. § 10126), is reproduced in our Revised Statute of 1870 between sections 1037 and 1038. Said act provides that a copy of an indictment or of an affidavit charging with crime the person sought to be extradited shall be produced before the Governor in order that he may be authorized to cause the arrest to be made, but it does not provide that the Governor shall recite in his warrant the fact of such production having been made. And we are referred to no law requiring such a recital.

Perhaps if, instead of stating as a legal conclusion that the evidence produced was such as is required by the law, and that it was on file in the office of the Secretary of State, the warrant in this case had tracked the statute and recited that an indictment or affidavit had been produced, the situation would have appeared more satisfactory to the legal mind; but the warrant, such as it is, gives sufficient information, we think, to the sheriff and the prisoner, by the recitals it contains, of the cause of its issuance, namely, that it is issued on the requisition of the Governor of Texas, on the production of the requisite evidence to justify the same, which is on file in the office of the Secretary of State, and shows that the prisoner stands charged with the crime of burglary in the county of Tarrant, state of Texas.

[2] Should the prisoner doubt the sufficiency of the said evidence for justifying the issuance of the warrant, the doors of the courts are open to him. In re Waterman, 29 Nev. 288, 89 Pac. 291, 11 L. R. A. (N. S.) 424, 13 Ann. Cas. 928, note.

[3] The second ground can hardly have been urged seriously. The idea that the guilt or innocence of the prisoner is to be inquired into here is in the teeth of the said act of Congress which provides that it shall be the duty of the Governor to cause the

fugitive from justice to be arrested and delivered to the authorities of the requisitioning state on the production of a copy of an indictment and affidavit. The Governor would be entirely without standing for requiring that there should be proceedings in some local court in addition to the production of a copy of an indictment or affidavit. The Governor derives his authority in the premises from the said act of Congress. Moreover, the said sections 1040 and 1041 authorize the Governor to proceed without the necessity of having recourse to a local court; and the said sections 1038 and 1039 evidently come into play only in the absence of a requisition from the Governor of the state where the crime was committed.

[4] The third ground is equally untenable. The prisoner has violated no law of this state, has done nothing in this state of which the courts of this state, juvenile or other, could take cognizance, except for the purpose of delivering him up to the state of Texas; hence, if the juvenile or delinquent children laws of this state were an obstacle to his being surrendered, the consequence would be that he could not be tried at all, but would have to be liberated at once; and the further consequence would be that this state would become an asylum for minors committing crimes in other states. That minors who may have committed crimes in other states cannot avoid trial under the laws of those states by coming here and invoking the benefit of our delinquent children laws is too plain a proposition for argument.

It is therefore ordered, adjudged, and decreed that the judgment of the respondent judge ordering the discharge of the prisoner, Willis E. Burnett, be set aside and annulled, and that the said application for habeas corpus be dismissed at the cost of the said Willis E. Burnett.

(136 La. 355)

No. 21098.

STATE v. WASHINGTON.

(Supreme Court of Louisiana. March 8, 1915.)

(Syllabus by the Court.)

1. CRIMINAL LAW § 600, 720—ARGUMENT OF COUNSEL—IMPEACHMENT—ABSENT WITNESS—CONTINUANCE.

After admitting that an absent witness would, if present, testify as set forth in the defendant's motion for a continuance, the prosecuting attorney may introduce evidence to contradict or impeach the testimony which he admitted the absent witness would give, and the prosecuting officer may therefore argue, from the evidence before the jury, that the testimony which the absent witness would give, if present, would be false. Nevertheless, the prosecuting attorney has no right to withdraw his admission after the evidence is all in, or argue to the jury that the absent witness would not have testi-

fied as the prosecuting officer admitted he would if present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1342-1347, 1604, 1670, 1671; Dec. Dig. § 600, 720.]

2. CRIMINAL LAW § 730 — ARGUMENT OF COUNSEL—CURE OF ERROR.

When the prosecuting attorney, in his argument to the jury in a criminal case, indulges in remarks that are prejudicial to the defendant and improper under any circumstances or facts, the error is not corrected, but perhaps made worse, by the judge's instruction to the jury to disregard such remarks, unless borne out by the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1693; Dec. Dig. § 730.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

William Washington was convicted of assault with intent to commit rape, and appeals. Reversed and remanded.

Thomas M. Bankston, of Amite, and Wm. A. Houghton, of Kentwood, for appellant. R. G. Pleasant, Atty. Gen., and Wm. H. McClendon, Dist. Atty., of Amite (G. A. Goudran, of New Orleans, of counsel), for the State.

O'NIELL, J. The appellant was indicted and tried for the crime of rape, was convicted of an assault with intent to commit rape, and sentenced to imprisonment in the penitentiary for 15 years.

When his case was called for trial, the defendant moved for a continuance on account of the absence of an important witness, who had not been summoned because the clerk of court had made a mistake in writing his name in the subpoena. The district attorney admitted that, if the witness were present, he would testify as alleged in the defendant's motion for a continuance. The defendant then went to trial on this admission, without insisting upon a service of the subpoena.

[1] In his argument to the jury, the district attorney commented upon the absence of the witness, Varnado, thus:

"Gentlemen, while I admitted that, if Mr. Varnado were present, he would swear to the allegations set forth in the motion for a continuance, yet he did not swear before you, nor did he sign this affidavit as to what he would swear to. This affidavit is signed by the defendant, stating that he (Varnado) would swear to this if he were here. But, gentlemen, there is a good reason why he was not here. If he had been here and had sworn to these things as set out in this affidavit, he would have been guilty of a felony, and his evidence would have been sufficient to have convicted him."

The defendant's counsel objected to the foregoing comment upon the absence of the witness; "and," the bill of exception recites, "the judge instructed the jury to disregard any remarks of the district attorney not based on the evidence." Whereupon counsel for defendant reserved a bill of exceptions, which

was later urged as one of the grounds for his motion for a new trial.

In his statement per curiam the trial judge says:

"If the witness had been present and had testified, the district attorney would certainly have had the right to criticize his testimony; and I believe he had the same right to comment upon and criticize what the defendant swore he (the absent witness) would have sworn to had he been present. To affect the credibility of the defendant as a witness, he clearly had the right to show the unreasonableness of the facts sworn to by the defendant."

The district attorney had the same right of impeachment and contradiction of the testimony which he had admitted the absent witness would give as if the witness had given the testimony; and therefore he had the same right to comment upon and criticize, in argument, the testimony which he had admitted the absent witness would give as if the witness had testified at the trial. But we cannot agree with the learned trial judge that the credibility of the defendant as a witness could be affected by arguing the unreasonableness of the facts which he swore the absent witness would testify to, if present. The defendant's affidavit to the motion for a continuance recited merely that the absent witness would, if present, testify to the facts set forth in the motion; and the district attorney admitted what the affidavit recited; that is, that the absent witness would so testify, if present. After making that admission, the district attorney had the right to argue, from the evidence, that what the absent witness would have sworn to if present was not the truth. But he had no right to deny what he had admitted; that is, that the absent witness, if present, would testify to the facts set forth in the motion for a continuance.

[2] This part of the district attorney's argument was not confined to a criticism of the testimony which he had admitted the absent witness would give, if present. The argument was, in effect, that the absent witness would not testify to the facts which the district attorney had admitted he would testify to, if present.

The judge's instructions to the jury "to disregard any remarks of the district attorney not based on the evidence" did not help the situation, because the district attorney had no right to contradict what he had ad-

mitted, no matter what the evidence was; and the judge should have so instructed the jury.

Another bill of exceptions was reserved to the district attorney's reference to the prosecutrix as "a woman having white blood in her veins," and saying, "Gentlemen, do you believe that she would have had intercourse with this black brute?" And another bill was reserved to his turning to the defendant during the argument, and saying to the jury, "Gentlemen, he is a beast and a brute of the lower beastly kind."

In his statement per curiam the judge says that, when the defendant's counsel objected to the above line of argument, he stopped the district attorney, and instructed the jury to "disregard any remarks of the district attorney and other counsel not based upon the testimony." The remarks above quoted were entirely improper, no matter what the testimony disclosed. The judge's instruction, on the contrary, implied that the appeal to the race prejudice and the scathing characterization of the defendant as a black brute of the lower beastly order were legitimate arguments, if based upon the testimony. This court has gone so far as to hold that the effect of an appeal to the race prejudice by a prosecuting officer in his argument before the jury cannot be counteracted by the judge's cautioning the jury to disregard such remarks. *State v. Bessa*, 115 La. 264, 39 South. 985.

Although, as a general rule, the verdict of a jury should not be set aside on account of improper remarks by the prosecuting attorney, when the judge has cautioned the jury to disregard such remarks, our conclusion is that the remarks made by the district attorney and the caution given by the trial judge to the jury in this case were of such a character as to compel our setting aside the verdict. Precedents for this ruling are to be found in *State v. Williams*, 116 La. 65, 40 South. 531, citing *State v. Thompson*, 106 La. 366, 30 South. 895; *State v. Blackman*, 108 La. 124, 32 South. 334, 92 Am. St. Rep. 377; *State v. High*, 122 La. 530, 37 South. 878, citing *State v. Robinson*, 112 La. 939, 36 South. 811.

The verdict and sentence appealed from are annulled and set aside, and the case is remanded to the district court for a new trial.

(136 La. 860)

No. 20166.

**MERCHANTS' & FARMERS' BANK v.
FISCHER LUMBER CO.**(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)*(Syllabus by the Court.)***1. SEQUESTRATION §11 — JURISDICTION —
DOMICILE OF DEFENDANT.**

Under the terms of Act No. 64 of 1876, p. 106, the plaintiff in a suit may sequester property upon which he has a privilege, and cite the defendant in the place where the property is sequestered, though the domicile or residence of the defendant is out of that jurisdiction.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. § 10; Dec. Dig. §11.]

**2. APPEAL AND ERROR §373—DEVOLUTIVE
APPEAL—JUDGMENT DISSOLVING WRIT OF
SEQUESTRATION.**

A plaintiff may appeal devolutively from a judgment dissolving the writ of sequestration in such suit.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2001-2004; Dec. Dig. §373.]

**3. ESTOPPEL §101—"PRIVILEGE"—PLEA OF
ESTOPPEL.**

A plea of estoppel, based upon alleged representations or admissions made by a debtor to sustain a privilege claimed by a plaintiff, is without merit. Privileges are granted by law, and not by covenant or estoppel.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 293; Dec. Dig. §101.]

For other definitions, see Words and Phrases, First and Second Series, Privilege.]

**4. SEQUESTRATION §17 — DISSOLUTION OF
WRIT—GROUNDS.**

A writ of sequestration will be dissolved where the plaintiff in writ fails to show that the money advanced by him was used to deaden, cut, haul, float, or raft the logs or forest timber belonging to another which have been seized under the writ.

[Ed. Note.—For other cases, see Sequestration, Cent. Dig. §§ 35-37; Dec. Dig. §17.]

Appeal from Fourteenth Judicial District Court, Parish of Avoyelles; A. J. Lafargue, Judge.

Action by the Merchants' & Farmers' Bank against the Fischer Lumber Company. From judgment for defendant, plaintiff appeals. Affirmed.

J. W. Joffrion, of Marksville, for appellant. Gustave Lemle, of New Orleans, and Cappel & Cappel, of Marksville, for appellee.

SOMMERVILLE, J. The plaintiff is domiciled in the parish of St. Landry. The defendant is domiciled in the parish of Orleans. And plaintiff, representing that it has a privilege upon certain logs belonging to defendant in Avoyelles parish, for money advanced to defendant for the purpose of cutting and hauling those logs, caused a writ of sequestration to issue from the district court of Avoyelles parish, and certain logs belonging to defendant were seized under said writ by the sheriff of that parish. Plaintiff asked that the defendant company be duly cited to appear and answer, and for judgment de-

claring the property seized to be subject to a privilege in its (plaintiff's) favor, and that the same be ordered advertised and sold to meet and pay the sum of \$2,434.74, with certain protest fees, interest, etc.

Defendant appeared in court and filed:

"The following peremptory exceptions: (1) That of *ratione personarum*. (2) That of *ratione materiae*."

And it prayed for the dismissal of plaintiff's suit. These exceptions were overruled.

Defendant appeared a second time, and petitioned the court for the release of the property on giving a forthcoming bond. In thus appearing to bond the property, defendant declared itself to be the defendant, and only a defendant is given the right to give a forthcoming bond in such case; and in such bond it made itself responsible that it would not send the property out of the jurisdiction of the court, or make any improper use of it, and that it would present it, after the definite judgment, in case it would be decreed to restore the same to the plaintiff. Code of Practice, arts. 279, 280; C. C. 2980. Subsequently defendant appeared and answered, denying the existence of the privilege claimed by plaintiff, and asked for the dissolution of the writ of sequestration, together with damages in the sum of \$1,000.

There was judgment in favor of the defendant, dismissing plaintiff's demand, and in favor of plaintiff, dismissing the reconventional demand of defendant for damages. Plaintiff has appealed devolutively; but defendant has not appealed; and it has not asked for an amendment of the judgment against it.

[1] On motion to dismiss appeal: Defendant moves to dismiss the devolutive appeal taken in this case by plaintiff on the ground that this court is without appellate jurisdiction, for the reasons that the proceeding is one in rem, in which plaintiff has not asked for a personal judgment against defendant, and where plaintiff's suit has been dismissed, the writ of sequestration issued in the suit has been set aside, and the property seized has been released, and because plaintiff has failed to suspend the execution of the judgment by obtaining a suspensive appeal, and furnishing a suspensive appeal bond; and it urges that as there is no property before this court, and as jurisdiction over the person of defendant was not acquired by the district court, this court is without appellate jurisdiction.

Act No. 64, of 1876, p. 106, provides that:

"* * * In all cases of provisional seizure or sequestration the defendant may be cited, whether in the first instance or in appeal, either within the jurisdiction where the property re-venticated, hypothecated or provisionally seized or sequestered is situated or found, though he has his domicile or residence out of that jurisdiction," etc.

The defendant was regularly cited; it regularly appeared in the district court; it

is in court for all purposes of the suit; and it has judgment in its favor, dissolving the writ of sequestration. If the judgment had been in favor of plaintiff, it (the judgment) would have been only "operative up to the value of the property proceeded against, and not binding for any excess over the value of the property in personam against the defendant."

[2] In either event, appeals, suspensive and devolutive, might have been taken to the Supreme Court. Plaintiff has taken a devolutive appeal, and defendant must answer thereto. The motion to dismiss is denied.

[3] Plea of estoppel: Plaintiff has filed a plea of estoppel in this court, claiming that the defendant company is estopped to deny the privilege claimed by it (plaintiff), for the reason that it (the defendant) had admitted on several occasions, and represented to plaintiff, that the claim of plaintiff against it was secured by the privilege claimed on the logs sequestered, and as set forth in the petition filed in the cause. Defendant has moved to strike the plea of estoppel from the record. It is well settled that the law granting privileges is *stricti juris*, and that they cannot be created by contract or consent, or by estoppel. The plea will not therefore be further considered by the court.

[4] On the merits: This suit is on a customer's check or draft of date February 1, 1912, payable February 15, 1912, drawn by D. W. Suiter, to the order of the Merchants' & Farmers' Bank, plaintiff, for \$2,434.74, with interest, and accepted by the defendant, the Fischer Lumber Company. It is alleged by plaintiff that the money was advanced to D. W. Suiter, the agent of defendant, for the purpose of deadening and hauling logs belonging to defendant, the Fischer Lumber Company, and that it has a privilege upon said logs for the advances thus made. Plaintiff caused a writ of sequestration to issue, and certain logs belonging to defendant were seized under said writ.

Defendant answered that the money claimed by plaintiff as advances made to Suiter were not made on logs seized in this suit, and it asked for the dissolution of the writ.

The evidence shows that D. W. Suiter was under contract with defendant, the Fischer Lumber Company, to cut and haul forest timber or logs controlled by the defendant company; that Suiter transacted business with the plaintiff bank, which advanced money to Suiter for the purpose of carrying out his contract with defendant; that defendant was aware that such business relations existed between Suiter and the bank; that Suiter would draw drafts in favor of plaintiff, which were accepted and paid by the defendant lumber company. The evidence also shows that Suiter was operating more than one camp; and that he was ob-

taining money from the plaintiff bank for operating said camps.

Defendant does not deny its liability on the draft accepted by it, which is attached to the petition filed in the case; but it simply denies the existence of the privilege claimed by plaintiff on the logs belonging to the defendant and seized in this suit.

The law is:

"That any person advancing money or furnishing supplies to enable another to deaden, cut, haul, float or raft any logs or forest timber, shall have privilege upon such logs or timber." Act No. 33 of 1882, p. 47.

The only question before the court is whether the money represented by the draft attached to the petition of plaintiff was advanced by it "to enable another to deaden, cut, haul, float or raft" the logs or forest timber sequestered in this case.

The evidence of plaintiff is conflicting as to the origin of the customer's draft which is made the subject of this suit. It (the draft) represents three customers' drafts drawn by Suiter in favor of plaintiff and upon the Fischer Lumber Company, prior to February 1, 1912, for various amounts; yet Dr. Morgan, president of the bank, testified that on the date mentioned, February 1, 1912, he personally made the arrangements with Suiter, by which he placed to the credit of Suiter the sum of \$2,434.74 in the bank, and that Suiter subsequently drew on that amount to meet pay rolls due laborers. Again he says that Suiter had overdrawn his account some \$600, \$700, or \$800 on February 1, 1912, and that part of the money advanced on February 1st went to pay that indebtedness, and that the balance, approximating \$1,800, was placed to Suiter's credit, and that it was subsequently used to pay off the laborers of Suiter. If this testimony is correct, the money was not used on the timber seized in this case, for that timber was hauled prior to December 1, 1911, and plaintiff could have no privilege on it for pay rolls and supplies incurred in 1912. This statement of Dr. Morgan is contradicted in part by Mr. Mangaricina, cashier of the plaintiff bank, who states that the customer's draft of February 1st was to extinguish three drafts issued prior to that date, and that the proceeds of the draft were not credited to Suiter's account, and that no cash was paid out under said draft. He gives the date of the first of the three drafts as December 11, 1911, and December 25th or 26th as the date of the other two, aggregating \$2,434.

He further testified that the several amounts represented in the draft of February 1st were advanced to pay labor rolls and for supplies of Suiter, while engaged in cutting and hauling the timber of defendant. But, when asked on cross-examination whether or not Suiter was building a railroad or tramroad, for defendant, he answered that he was, and that he could not tell whether any of the checks drawn by Suiter, and paid by

the bank, about the time mentioned, went for building that tramroad or not. He insisted: "I am positive that some of it went for the handling of the logs." When shown certain drafts dated in September and October, 1911, he testified that the money represented by them had been used by Suiter for the building of a railroad; that they had passed through the plaintiff bank, and were honored by it. And he admits that the money "might have been used for paying the laborers working on the railroad," referring to the draft sued upon; and that the bank cashed all drafts presented by Suiter as the "business was in such a shape that I did not know what to do."

It is quite clear that the money advanced to Suiter by the plaintiff bank, who, the evidence shows, was operating two or more camps in the same vicinity, was obtained by him from the plaintiff bank for his several enterprises; and it is impossible for the court to say that the money represented by the draft sued upon was used for deadening and hauling the timber of defendant. It would rather appear that the bulk of it was not used for such purpose.

And this condition is made more certain by the testimony offered on behalf of the defendant showing that the timber belonging to it, and seized in this suit, on section 29, was not deadened, cut, and hauled in the month of December, 1911, at the time that Suiter incurred his indebtedness to the plaintiff bank. That testimony also shows that Suiter had contracts with other parties; that no logs whatever were hauled on the right of way of the defendant railroad, on section 29, after December 1, 1911; that all pay rolls and supply bills prior to December 1st were paid; that the loading during the month of December was done with logs at Bayou Jacque; that no work was done on defendant's timber in December; that whatever money was paid by plaintiff on the December pay rolls of Suiter was for railroad work and hauling at Bayou Jacque; and that not one log was hauled and put on the right of way of defendant after December 1, 1911. And the president of the defendant company testified positively:

"That there was no amount of this draft expended on the logs now under seizure on the right of way of the Fischer Lumber Company."

The district judge, who saw and heard the witnesses testify, was of the opinion that plaintiff failed to show that the money claimed in this suit had been advanced by it to enable the log contractor, in the employ of the defendant company, to deaden, cut, and haul the timber seized in this suit, which timber belongs to defendant. Our conclusion is the same as that of the district judge. Judgment affirmed.

(136 La. 867)

No. 21001.

STATE v. WEST.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by Editorial Staff.)

COMMERCE — § 31 — INTERSTATE COMMERCE —
FORBIDDING IMPORTATION OF CITRUS
PLANTS.

An ordinance of the State Board of Agriculture and Immigration, which prohibits the importation into the state of all kinds of citrus plants and parts thereof, is invalid as an interference with interstate commerce.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 24; Dec. Dig. § 31.]

Appeal from Twenty-Fifth Judicial District Court, Parish of Tangipahoa; Robert S. Ellis, Judge.

R. A. West was indicted for violating an ordinance of the State Board of Agriculture and Immigration, and from a judgment quashing the indictment, the State appeals. Affirmed, and accused ordered released without day.

R. G. Pleasant, Atty. Gen., and Wm. H. McClendon, Dist. Atty., of Amite (G. A. Goudran, of New Orleans, of counsel), for the State. Clay Elliott, of Amite, for appellee.

PROVOSTY, J. The state has appealed from a judgment quashing the indictment against the accused, which indictment is under an ordinance or regulation of the State Board of Agriculture and Immigration, reading, as follows:

"In order to prevent the introduction of the dangerous citrus disease known as citrus canker, prevalent in the principal citrus growing states of the United States, but not found to be prevalent in Louisiana, the importation into this state of any and all kinds of citrus plants and parts of citrus plants from all the states of the United States, its territories and possessions and from all foreign countries, is hereby prohibited."

The information against the accused is in strict conformity with this ordinance; that is to say, it does not charge that the citrus plants imported by the accused were diseased, but simply charges that they were imported.

When the state of Missouri sought to prohibit the driving or conveying of any Texas cattle into the state between certain dates, as a protection against Texas fever, the Supreme Court of the United States held the statute to be void as being an interference with interstate commerce. *Railroad Co. v. Husen*, 95 U. S. 465, 24 L. Ed. 527. For the same reason, the ordinance or regulation, involved in this case is null.

The judgment appealed from is therefore affirmed, and the accused is ordered released without day.

(136 La. 868)

No. 20860.

STATE v. HAGEN.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)*(Syllabus by the Court.)*

1. CRIMINAL LAW §1017 — INTOXICATING LIQUORS §10—ORDINANCE OF POLICE JURY—POWER TO ENACT—APPEAL—JURISDICTION.

The provision of the Constitution which extends the appellate jurisdiction of this court to "all cases in which the constitutionality or legality * * * of any fine, forfeiture or penalty, imposed by a municipal corporation, shall be in contestation, whatever may be the amount," applies to cases arising under parish, or police jury, ordinances, as well as to those arising under the ordinances of cities, towns, and villages.

Note.—A majority of the members of the court concur in the decree in this case, on the ground that the ordinance, under which defendant was convicted, was unauthorized; the members in the minority, including the organ of the court, are of opinion that, under the law in force when the ordinance was adopted, it was authorized, but that it was superseded by a statute enacted, pending defendant's appeal to this court, which contained no saving clause, and hence that the sentence appealed from cannot be affirmed, and that no sentence can be imposed under the later statute, which is *ex post facto*.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2572-2576, 2589; Dec. Dig. §1017: Intoxicating Liquors, Cent. Dig. §§ 7-12; Dec. Dig. §10.]

(Additional Syllabus by Editorial Staff.)

2. CRIMINAL LAW §1017—APPEAL—JURISDICTION—"MUNICIPAL CORPORATION."

A "municipal corporation" is a body corporate and politic, established by law to share in the civil government of the country, but chiefly to regulate and administer the local and internal affairs of the city, town, or district incorporated. As used in Const. art. 85, extending the appellate jurisdiction of the Supreme Court to all cases in which the constitutionality or legality of any fine, forfeiture, or penalty imposed by a municipal corporation shall be in contestation, the term "municipal corporation" includes "parish" (citing Words and Phrases, Municipal Corporation).

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2572-2576, 2589; Dec. Dig. §1017.]

O'Niell, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Emmet Hagen was convicted of unlawfully maintaining a public nuisance, and appeals. Reversed, and defendant discharged.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

On Motion to Dismiss Appeal.

MONROE, C. J. Defendant was prosecuted under an ordinance of the police jury of the parish of Caddo, entitled "An ordinance for the suppression of the blind tiger and the

enforcement of the prohibition law of the parish of Caddo." After excepting to the jurisdiction of the district court, he moved to quash the bill of information, on the ground that the ordinance is illegal and unconstitutional, for various reasons, which are fully set forth, and, his motion having been overruled, he took his bill of exception, after which he was convicted and sentenced, and he took his appeal. The state moves to dismiss the appeal, on the grounds that the offense with which the defendant is charged is not punishable by death or imprisonment at hard labor, and no fine exceeding \$300 or imprisonment exceeding six months has actually been imposed upon him, that the ordinance under which he was convicted and sentenced has not been declared unconstitutional, and that all other matters brought up by the appeal involve questions of fact, and hence that this court is without jurisdiction of the appeal.

[1] It will be observed, however, that defendant, by his motion to quash, has put in contestation the constitutionality and legality of the ordinance under which he has been convicted, and article 85 of the Constitution declares that the appellate jurisdiction of this court shall extend—

"to all cases in which the constitutionality or legality of any tax, toll or impost whatever, or of any fine, forfeiture, or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof, and to all cases wherein an ordinance of a municipal corporation or a law of this state has been declared unconstitutional, and in such cases the appeal, on the law and the facts, shall be directly from the court in which the case originated to the Supreme Court, and to criminal cases on questions of law alone."

And then follows a specification of the particular class of criminal cases, to which alone the jurisdiction is extended, and which does not include the case here presented.

It is clear, from the foregoing, that if the fine and penalty, the constitutionality and legality of which defendant has put in contestation, have been imposed by a municipal corporation, this court is vested with jurisdiction of the appeal; but the contention of the prosecution is that a parish is not a municipal corporation, within the meaning of the language above italicized, which language, it is said, must be confined in its application to cities, towns, and villages.

[2] Chancellor Kent defined a "municipal corporation" to be:

"A public corporation, created by government for political purposes, and having subordinate and local powers of legislation; e. g., a county, town, city," etc. 2 Kent, Com. 275.

In Bouvier's Law Dictionary (Ed. 1865) we find:

"Municipal. Strictly, this word applies only to what belongs to a city. Among the Romans, cities were called municipia; those cities voluntarily joined the Roman republic, in relation to their sovereignty only, retaining their laws, their liberties, and their magistrates, who were

thence called municipal magistrates. With us, this word has a more extensive meaning; for example, we call municipal laws, not the law of a city only, but the law of the state. 1 Bl. Com. 'Municipal' is used in contradistinction to 'international'; thus, we say an offense against the law of nations is an international offense, but one committed against a particular state or separate community is a municipal offense."

In the same work (Ed. 1897) we find:

"Municipal Corporation. A public corporation, created by government for political purposes, and having subordinate and local powers of legislation; e. g., a county, town, city, etc. 2 Kent. 275; Ang. & A. Corp. 9, 29; Bald. 222. An incorporation of persons, inhabitants of a particular place, or connected with a particular district, enabling them to conduct its local civil government. Glover, Mun. Corp. 1. * * * There are territorial subdivisions, not incorporated, but which are, like municipal corporations, instrumentalities of local government for certain definite purposes. Such are, in some states, the counties, or towns, or school districts, where they are not incorporated. They are termed quasi corporations, which title see. They are not included in the phrase 'counties or municipal corporations' in a statute. [Eaton v. Supervisors of Manitowoc County] 44 Wis. 489."

Then follows a dissertation upon the powers of public corporations, possessing charters, which are differentiated from quasi corporations, which have no charters.

Turning to another title in the same work, we find:

"Quasi Corporations. A term applied to those bodies, or municipal societies, which, though not vested with the general powers of corporations, are yet recognized, by statutes or immemorial usage, as persons, or aggregate corporations, with precise duties, which may be enforced, and privileges, which may be maintained, by suits at law. They may be considered quasi corporations, with limited powers, coextensive with the duties imposed upon them by statute or usage, but restrained from a general use of the authority which belongs to those metaphysical persons, by the common law."

"Among quasi corporations may be ranked counties, and also towns, townships, parishes, hundreds, and other political subdivisions which are established without an express charter of incorporation, commissioners of a county, most of the commissions instituted for public use, supervisors of highways, overseers or guardians of the poor, loan officers of a county, trustees of a school fund, trustees of the poor, school districts, trustees of schools, judges of a court authorized to take bonds to themselves in their official capacity, and the like, who are invested with corporate powers, sub modo, and for a few specified purposes only. The Governor of a state has been held a quasi corporation sole. [Governor v. Allen] 8 Humph. 176. So has a trustee of a friendly society, in whom, by statute, property is vested, and by and against whom suits may be brought. See 1 B. & Ald. 157. So of a levee district, organized by statute to reclaim land from overflow. [Dean v. Davis] 51 Cal. 406. And fire departments, having by statute certain powers and duties which necessarily invest them with limited capacity to sue and be sued. [Clarissey v. Metropolitan Fire Dept.] 31 N. Y. Super. Ct. 224. It may be laid down as a general rule that where a body is created by statute, possessing powers and duties which involve, incidentally, a qualified capacity to sue and be sued, such body is to be considered a quasi corporation," etc.

In Black's Law Dictionary, the primary definition which the author gives of "municipal

pal corporations" is in the language of Chancellor Kent (adopted by Bouvier, supra).

In *Commissioners of Laramie Co. v. Commissioners of Albany Co.*, 92 U. S. 307, 23 L. Ed. 552, it appeared that Albany and Carbon counties were created out of Laramie county, but that no provision was made with regard to the payment of the then debt of Laramie county, and the suit was brought to recover from the new counties their just proportion of that debt. The opinion of the court begins, and reads in part, as follows, to wit:

"Counties, cities, and towns are municipal corporations, created by the authority of the Legislature; and they derive all their powers from the source of their creation, except where the Constitution of the state otherwise provides. Beyond doubt, they are, in general, made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. * * * Trusts of great moment, it must be admitted, are confided to such municipalities. * * * Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the state. * * * Such corporations are composed of all the inhabitants of the territory included in the political organization; and the attribute of individuality is conferred on the entire mass of such residents. * * * Institutions of the kind, whether called counties or towns, are auxiliaries of the state in the important business of municipal rule. * * * 'Civil and geographical division of the state into counties, townships, and cities,' said Thompson, C. J., 'had its origin in the convenience and necessities of the people; but this does not withdraw these municipal divisions from the supervision and control of the state in matters of internal government,'" etc.

The general definition given by Judge Dillon is as follows:

"Sec. 19. Municipal corporations are bodies politic and corporate, * * * established by law to assist in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district which is incorporated. We may therefore define a municipal corporation to be the incorporation, by the authority of the government, of the inhabitants of a particular place or district, and authorizing them, in their corporate capacity, to exercise subordinate specified powers of legislation and regulation with respect to their local internal concerns." Dillon on Mun. Corp. (3d Ed.) vol. 1, p. 19.

It is true that the learned author thereafter explains that there is a difference between municipal and other public corporations, and that, though all municipal corporations are public bodies, created for civil or political purposes, all civil, political, or public corporations are not, in the proper use of language, municipal corporations, and that:

"The phrase 'municipal corporations,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with power of local administration, as distinguished from other public corporations, such as counties and quasi corporations."

"The distinction between municipal corporations proper," the author continues, "such as chartered towns and cities, or towns and cities

voluntarily organized under general incorporating acts, such as exist in a number of the states, and involuntary quasi corporations, such as counties, has been very clearly drawn by the Supreme Court of Ohio."

And a definition is quoted from *Hamilton County v. Mighels*, 7 Ohio St. 109, to the effect that a municipal corporation proper is called into existence either at the direct solicitation or by the free consent of the persons composing it, and for their own local and private advantage and convenience, while counties are, at most, but—

"local organizations, which, for purposes of civil administration, are invested with a few functions characteristic of corporate existence. * * * They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them."

In Words and Phrases, under the title "Municipal Corporations," we find (volume 5, p. 4620):

"A municipal corporation is a body corporate and politic, established by law to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town, or district incorporated [citing many authorities]. * * * The term 'municipal corporations' includes counties. *Glenn v. York County Com'rs*, 6 S. C. (6 Rich.) 412, 418. * * * The term 'municipal corporation' includes a county, under the general municipal law. *People v. Carpenter*, 52 N. Y. Supp. 781, 783, 31 App. Div. 603. * * * The term 'municipal corporations,' in the clause in the Alabama Constitution providing that private property shall not be taken for private use, or for the use of corporations, other than municipal, without the consent of the owner, includes counties. * * * Const. art. 1, § 14, which provides that no right of way shall be appropriated to the use of any corporation, other than municipal, until full compensation therefor be first made, in money, etc., refers to such corporations as are for the purpose of public government, and therefore includes counties. *Pacific Coast Ry. Co. v. Porter*, 15 Pac. 774, 775, 74 Cal. 261. * * *

"The constitutional amendment empowering the Legislature to authorize municipal corporations to levy assessments for local improvements, without regard to the cash value of the property assessed, held to authorize such legislation with respect to counties. *Dowlan v. County of Sibley*, 31 N. W. 517, 518, 36 Minn. 430." Id. p. 4624.

"The word 'municipal,' as originally used, in its strictness applied to cities only; but the word has now a more extended meaning, and, when applied to corporations, the words 'political,' 'municipal,' and 'public' are used interchangeably. *Curry v. District Tp. of Sioux City*, 17 N. W. 191, 192, 62 Iowa, 102 (cited in *Port of Portland*, 27 Pac. 263, 264, 20 Or. 580, 13 L. R. A. 533)."

It will be observed that Judge Dillon speaks of "involuntary quasi corporations, such as counties," and that the Supreme Court of Ohio, whose definition he adopts, refers to counties as "but local organizations which * * * are vested with but few functions characteristic of corporate existence," and which are "created by the sovereign power of the state, * * * without the particular solicitation, consent, or concurrent action of the people who inhabit

them." And what is thus said may be true, in a general sense, when considered with reference to conditions existing in other states, and which, at one time, existed in this state; but it does not accurately describe the conditions now existing and which have existed in Louisiana for the past 30 years and more. The Louisiana Constitution of 1812 mentions the existence of certain "counties" into which the state was then divided, provides for their representation in the General Assembly, and contains no other reference to them, and the succeeding Constitutions, up to that of 1879, were equally reticent upon that subject. The Constitution last mentioned, and those of 1898 and 1913, however, contain among others the following provisions (giving the numbers of the articles in the present Constitution), to wit:

"Art. 277. The General Assembly may establish and organize new parishes, which shall be bodies corporate, with such powers as may be prescribed by law. * * *

"Art. 278. All laws changing parish lines, or removing parish seats, shall, before taking effect, be submitted to the electors of the parish or parishes to be affected thereby, at a special election held for that purpose, and the lines, or parish seat, shall remain unchanged unless two-thirds of the qualified electors of the parish or parishes affected thereby vote in favor thereof at such election.

"Art. 279. Any parish may be dissolved and merged by the General Assembly into a contiguous parish or parishes, two-thirds of the qualified electors of the parish proposed to be dissolved voting in favor thereof at an election held for that purpose: Provided, that the parish or parishes into which the dissolved parish proposes to become incorporated consents thereto by a majority of its qualified electors voting therefor."

It will be seen, therefore, that in Louisiana parishes are not now "created by the sovereign power of the state, without the particular solicitation, consent, or concurrent action of the people who inhabit them," but that, to the contrary, they can neither be established nor disestablished without such consent and concurrent action. On the other hand, there is no special act of the General Assembly incorporating any city or town in the state that may not be repealed by the General Assembly, with or without the consent of the inhabitants, and the same is true of Act No. 136 of 1898, under which many of our cities, towns, and villages enjoy their corporate existence, and from which they derive their powers. Moreover, as the Constitution and the grants contained in Act No. 136 of 1898 furnish the measure of the powers conferred upon the cities, towns, and villages established under their authority, so the Constitution and the various acts of the General Assembly conferring powers upon the police juries furnish the measure of those powers, and include all of the general powers essential to the administration of local government, such as the power to levy taxes, to provide for the general welfare, to maintain peace and order, to incur debt and issue bonds (under certain circumstances and for

certain purposes), to enact ordinances and provide penalties for their enforcement, and to do many other things that are specifically mentioned. Const. Arts. 59, 106, 174, 276, 277, 278, 279, 280, 281, 292, 293; R. S. § 2743 et seq.; Act No. 31 of 1880; Act No. 115 of 1898; Acts Nos. 66, 202, 221, of 1902; Acts Nos. 37, 204, 207, 315, of 1908; Acts Nos. 128, 151, 198, of 1910; Acts Nos. 81, 132 (incorporated as an amendment to the Constitution), 141, 145, 182, 219, 239, of 1912; Acts Nos. 11, 19, 135, 183, 192 (incorporated in the Constitution), 194 (incorporated in the Constitution), 197, 227, 296, 302, of 1914 (and probably many others).

The coupling, in the various Constitutions and statutes, of "parishes" with "municipal corporations," by the conjunction "and," no doubt, indicates that those terms were not regarded as interchangeable under all circumstances; but construing the provision in previous Constitutions, identical with that now under consideration, the court has apparently never for a moment doubted that they were intended to bear the same meaning, within the contemplation of that provision, and for some other purposes.

Thus, in *Parker v. Scogin*, 11 La. Ann. 629, the validity of an ordinance of the police jury of Caddo parish was challenged, upon the ground, among others, that a confession of judgment upon which it was based was not binding upon each individual taxpayer; but the court said:

"The nature of municipal corporations is such that they, of necessity, represent all the citizens of the territory or district submitted to their jurisdiction by classes, as well as collectively."

And the idea that a parish was not to be regarded as a municipal corporation, in that connection, does not seem to have suggested itself, though the amount involved in the case was sufficient, of itself, to have conferred jurisdiction on the court.

In *Parish of Lincoln v. Huey*, 80 La. Ann. 1244, defendant, having resisted the payment of a parish license for a grogshop, was condemned, and appealed, first to the district court, and then to this court, where it was said:

"There was an appeal to the district court, which was properly dismissed, and this second appeal was taken direct from the parish court to this court. Our jurisdiction attaches by reason of the question involved—the legality of the tax—without regard to the amount."

In *Parish of St. Landry ex rel. Fontenot v. Stout*, 32 La. Ann. 1278, defendant appealed from a judgment condemning him to fine or imprisonment, under an ordinance of the police jury, and a motion was made to dismiss the appeal, upon the ground, apparently, that this court was without jurisdiction. But it was said:

"It is a case involving 'the constitutionality or legality of a fine imposed by a municipal corporation,' and is therefore appealable."

In *State and Police Jury v. Isabel*, 40 La. Ann. 340, 4 South. 1, defendant, by demurrer, attacked an ordinance of the parish of Jeffer-

son, under which he was prosecuted, and, his demurrer having been sustained, and the state and parish having appealed, he moved to dismiss the appeal, on the ground that the case was unappealable. The court said:

"This is untenable. It is apparent from the above statement that the case involves a contestation as to the constitutionality or legality of a fine or penalty imposed by a municipal corporation. This authorizes an appeal to this court under article 81 of the Constitution."

In *State v. Miller*, 41 La. Ann. 55, 7 South. 672, defendant appealed from a sentence of fine or imprisonment imposed under an ordinance of a police jury, and it was said by the court:

"The suggestion that we have no jurisdiction in such a case is without merit. It is undoubtedly a case 'wherein the constitutionality or legality of a fine or penalty, imposed by a municipal corporation is in contestation,' and of all such cases, without limitation, article 81 of the Constitution invests this court with jurisdiction."

In *Howcott v. Smart*, 125 La. 50, 51 South. 64, it was found that taxes levied by a police jury were challenged as illegal, and it was held that this court was vested with jurisdiction of the appeal. It appears, therefore, that counties (or, as in our case, parishes), even though they be quasi corporations, with no definite charters, are held by all the authorities to be, in some sense, if not strictly, technically, and for all purposes, municipal corporations; that they are so held by some courts for some purposes, and by other courts for other purposes, the matter depending upon the language and purpose of the law to be construed. It further appears that, in this instance, the language of the law, considering the context as well as the clause which is immediately applicable to the case, extends the appellate jurisdiction of this court to—

"all cases in which the constitutionality or legality of any tax, toll or impost whatever" (meaning any tax, toll, or impost levied by the state, no matter how small the amount involved), "or in which any fine, forfeiture, or penalty, imposed by a municipal corporation, whatever may be the amount thereof, shall be in contestation," and to "all other cases" (regardless of the amount involved and of all other considerations) "wherein an ordinance of a municipal corporation or a law of the state has been declared unconstitutional."

The purpose of these provisions would therefore seem to have been, in the one case, to afford to the citizen an appeal to the court of last resort as against an illegal or unauthorized tax or penalty, whether imposed directly by the state or under its authority, and to afford the same relief to the state as against attempts to defeat the collection of such taxes or penalties, when authorized and legal, and, in the other case, to afford that relief to the state in cases where inferior courts may nullify, as unconstitutional, its laws, enacted by the General Assembly or by its authorized agents; and, if that be the purpose, it would not be half accomplished, and much confusion would re-

sult, if this court should decline to entertain jurisdiction in a case in which the constitutionality or legality of a tax or penalty imposed by a parish (or police jury, acting for a parish) is in contestation, and yet exercise such jurisdiction in a similar case arising under an ordinance of a city, town, or village within such parish, since of the 1,800,000 people (approximately) now constituting the population of the state nearly two-thirds live under the immediate dominion of the parish ordinances, and of the total assessed values in the state a very large proportion, certainly, is similarly situated.

We have shown that Chancellor Kent and the Supreme Court of the United States, long since, defined a municipal corporation to be a "public corporation, created by the government for political purposes, and having subordinate local powers of legislation," and that they included in the definition such political subdivisions as "counties," though they were regarded as mere quasi corporations, without special charters, and with perhaps but feeble powers, and that lexicographers and text-writers are still making use of that definition; and we have also shown that a parish, under our system, is so well within the definition that it would be impossible to exclude it without doing violence to the plain meaning of plain English words. Why, then, may we not assume that the framers of our Constitutions have taken it for granted that the courts, in construing the language used by them, would accept the broader interpretation which had thus been given and accepted by others, rather than defeat the plain and reasonable purpose of that language by adopting an interpretation which, apparently, with a view of distinguishing the subject of particular treaties on corporation law, has narrowed the application of the term "municipal corporation" to a particular class of public corporations, though admittedly all such corporations, for some purposes, if not for others, fall within the meaning of that term, and, more particularly, since, as we have seen, new parishes can be created in this state only by the consent of the inhabitants, and, when created, are constituted "bodies corporate," thus eliminating the two main features which are said to distinguish "counties" from "municipal corporations proper."

We find no sufficient answer to the question thus suggested, and, concluding to adhere to our jurisprudence as established, hold that the court is vested with jurisdiction of this appeal. The motion to dismiss is therefore denied.

On the Merits.

Act No. 221 of 1902, p. 451, is entitled and reads in part as follows:

"An act to amend and re-enact sections 1211 and 2778 of the Revised Statutes of the state of Louisiana, relative to granting or withholding licenses for the sale of intoxicating liquors.

"Section 1. * * * That sections 1211 and 2778 of the Revised Statutes of 1870 be amended and re-enacted so as to read:

"That police juries of the several parishes of the state, the municipal authorities of the several villages, towns and cities, and the city council of the city of New Orleans shall have exclusive power to make such rules and regulations for the sale or the prohibition of the sale of intoxicating liquors, as they may deem advisable, and to grant or withhold licenses from drinking houses and shops within the limit of the city, parish, ward of a parish, town or village, as a majority of the legal voters * * * may determine. * * *"

Act No. 315 of 1908, p. 482, provides:

"Section 1. * * * That * * * the police juries of the parishes shall have full power and authority to enforce such ordinances as they are authorized to pass, by fine or imprisonment, or both, to prosecute by criminal process of indictment or information, or by fine or forfeiture, to be collected by civil process before any court of competent jurisdiction.

"Sec. 2. * * * That no fine shall exceed \$100 and imprisonment shall not exceed 30 days in parish jail, or both, at the discretion of the court."

The defendant now before the court is prosecuted under a bill of information, filed March 10, 1914, which charges that, on that (or possibly an earlier) day—

"being then and there the lessee or owner of a certain room located in the upstairs of building No. 327 Texas street, Shreveport, * * * [he] unlawfully, did keep a blind tiger, and maintain a public nuisance, by then and there keeping in said room a large quantity of whisky and beer, for sale, barter, or exchange, or giving away, to wit: 1 cask of quart bottles of Yellow Stone whisky; ½ cask of ½ bottles of Hill & Hill whisky; ½ cask of Budweiser beer—contrary to the form of the statute of the state of Louisiana in such case made and provided, and against the peace and dignity of the same, in violation of the police jury ordinance of Caddo parish, and" (sic).

This prosecution is conducted in the name and on behalf of the state of Louisiana, by the district attorney for the First judicial district, but is conceded to be a prosecution under "police jury ordinance of Caddo parish" and the "statute of the state of Louisiana," referred to in the bill, meaning, as we take it, the statutes above quoted, which are regarded as the authority under which the ordinance was enacted. The ordinance bears date June 12, 1913, and is entitled and reads in part:

"An ordinance for the suppression of the blind tiger and the enforcement of the prohibition law in the parish of Caddo.

"Section 1. Be it ordained: * * * That any house, store, room or any other place where intoxicating liquors are kept for the purpose of sale, barter, exchange or giving away as a beverage, or where it is kept, whether for sale or not, in a place where near-beer is displayed or kept for sale, or in a place where gambling is permitted, shall be deemed a blind tiger, and the same is hereby declared to be a nuisance, and the owner of said room, together with all keepers, clerks * * * and the owner of the intoxicating liquors shall be deemed guilty of keeping a blind tiger and maintaining a public nuisance, and shall be prosecuted, by indictment or information, and, upon conviction, shall be fined not less than \$80, nor more than \$100, and, in default of payment, * * * shall work out the same on the public roads * * * at

the rate of one dollar per day, or shall suffer imprisonment not less than ten and not more than thirty days, or both, at the discretion of the court; and, for each 24 hours that said nuisance is maintained, it shall be deemed a separate offense."

Section 2 provides that, when three reputable persons shall make oath, before a judge or justice of the peace, that "he" has reason to believe, or does believe, that intoxicating liquors are being illicitly kept in any house, etc., for the purpose of illicitly disposing of the same, or in any place where near-beer is displayed, or where gambling is permitted, and describing the place, or pointing out the keeper, owner, or lessee thereof, it shall be the duty of the judge to issue a warrant directing the sheriff, or constable, to visit such place and ascertain the truth, and, if such officer shall find evidence of such illicit business, he shall arrest all persons found in charge, and the owner, keeper, clerk, or lessee of the premises, and the owner of the liquors, and carry them before a competent court, where they shall be prosecuted "by information or indictment," and, if convicted, fined not less than \$80, nor more than \$100, and, in default of payment, shall work out the fine, at the rate of \$1 per day, on the public roads, or be imprisoned not less than 10 nor more than 30 days, or both, at the discretion of the court, and shall be ordered to abate the nuisance.

Section 3 provides that it shall be the duty of the officer making the search to seize any intoxicating liquors found by him, and bring them before the judge, and hold them as evidence, and, in the event of the conviction of the party charged, the judge shall order them destroyed.

Section 4 provides that, where liquors are so found, under circumstances indicating that the place is being kept as a grog or tippling shop, or for retailing liquors, the officer shall charge the parties implicated with "violating the prohibition law as well as keeping a blind tiger."

Section 5 provides that, if the judge shall find that the parties charged are not guilty, the liquors seized shall be returned to them, save such as may have been used in determining whether they were intoxicating. Defendant's conviction took place on July 9, 1914, and, sentence having been imposed on July 11, he appealed, and lodged his appeal in this court on August 24, 1914.

In the meanwhile, on July 8, 1914, the Governor approved Act No. 146 of 1914, which is entitled and reads in part:

"An act to define and prohibit the keeping of a 'blind tiger'; to provide for the search of same, and for the seizure and destruction of any spirituous, malt or intoxicating liquor found therein; to provide for the punishment of any violations of this act.

"Section 1. * * * That a 'blind tiger' is hereby defined to be any place in those subdivisions of the state where the sale of spirituous, malt, or intoxicant liquors is prohibited, where such spirituous, malt or intoxicant liquors are kept for sale, barter, exchange or habitual giv-

ing away as a beverage in connection with any business conducted at such place.

"Sec. 2. * * * That the keeping of a 'blind tiger' is hereby prohibited, and whoever shall be guilty of violating this act shall be guilty of a misdemeanor."

Section 3 provides for the issuance of a warrant and the searching of a place suspected of being a "blind tiger," and the bringing into court of any person and intoxicating liquors there found.

"Sec. 4. * * * That whoever shall be found guilty of keeping a 'blind tiger,' in violation of this act shall be fined not less than two hundred dollars, nor more than five hundred dollars, and be imprisoned for not less than 30 days nor more than 6 months, and on default of the payment of the fine and costs he shall be imprisoned for not more than 6 months additional.

"Sec. 5. * * * That all laws and parts of laws in conflict herewith be and the same are hereby repealed."

It is not disputed that the parish of Caddo is one of those "subdivisions of the state where the sale of spirituous, malt, or intoxicating liquors is prohibited," and it cannot, therefore, be denied that the statute last above quoted became operative in that parish when promulgated, and after defendant had been allowed his appeal; from which it follows, upon the face of the record (unless there be some sufficient reason, to the contrary), that he must be discharged, for, the law (in so far as it authorized the particular ordinance in question) and the ordinance under which he was sentenced having been superseded by said statute, the sentence imposed thereunder cannot be sustained, and the statute, being *ex post facto* quoad the offense with which he is charged, requiring a severer penalty than the law then in force, and containing no saving clause, no sentence can be imposed thereunder.

"No conviction can take place for an offense after the statute creating it has been repealed. Therefore, if a prior law has been superseded by a statute inconsistent therewith, offenses already committed under the prior law cannot be punished, unless there is a saving clause, for the prior law is no longer in force, and the subsequent statute is not applicable to the offense already committed, because as to such offense it is *ex post facto*. There can be no legal conviction for an offense unless the act complained of be contrary to law at the time it is committed, nor can there be a judgment unless the law be in force at the time the indictment is found and judgment rendered thereunder." McClain's Cr. Law, vol. 1, § 96.

"It has long been settled, on general principles, that, after the expiration or repeal of a law, no penalty can be enforced, or punishment inflicted, for violations of the law, committed while it was in force." Yeaton v. United States, 5 Cranch, 281, 3 L. Ed. 101.

See, also, Kring v. State of Missouri, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; State ex rel. Theus v. Hickman, 127 La. 442, 53 South. 680; State v. Jones, 127 La. 768, 53 South. 985; State v. Guillory, 127 La. 950, 54 South. 297; Clark's Crim. Law, 26.

If, now, it be said that Act No. 146 of 1914 deals with an offense against the state, whilst the ordinance deals with an offense

against the parish, that the same act may constitute an offense against both state and parish, and may be punished by either or both, and hence that the act does not repeal or supersede the ordinance, but that they should be held to stand together, the answer may be briefly stated as follows, to wit:

The parish of Caddo, like the other parishes into which the whole state of Louisiana has been divided, is one of the numerous agencies which the state has established, and in which it has, by various acts of the General Assembly, and especially the acts of 1902 and 1908 (hereinafter quoted), vested certain governmental authority, including the authority to enact laws upon the subject of the sale, and the prohibition of the sale (as the electors may decide), of intoxicating liquors, within its territorial limits. Both of the statutes last mentioned are of state-wide application, and are in no sense special, save, perhaps, as to the city of New Orleans, which is named in the act of 1908; and by virtue of the authority thereby conferred the ordinance, under which the defendant herein has been prosecuted and sentenced, was enacted. Let it be conceded, for the sake of argument (though the writer hereof is not of that opinion), that, consistently with the provision of our fundamental law, which reads, "Nor shall any person be twice put in jeopardy of life or liberty for the same offense, except on his own application for a new trial, or where there is a mistrial, or a motion in arrest of judgment is sustained," it is competent for the General Assembly to declare that the same act which it denounces as an offense against the state may be denounced as a separate offense by every parish, city, town, village, commission, or board which it may authorize to enact ordinances or make rules and regulations, and within the jurisdiction of which the act may be committed, and that each of these agencies may initiate a separate prosecution and impose a separate penalty therefor; let all that be conceded, and yet it cannot be denied that the power remains in the General Assembly to withdraw such declaration, and to repeal or supersede the law wherein it is contained, and the ordinances, rules, or regulations enacted and promulgated pursuant to its authority, whenever it shall see fit so to do.

A large majority of the adjudged cases sustain the proposition:

"That the single act, being made punishable both by the state law and the municipal ordinance of the place wherein the act was committed, constitutes two distinct and several offenses—an offense against the state and an offense against the municipality."

Those adjudications deal, however, with the ordinances of what the writers call "municipal corporations proper"—that is to say, the ordinances of chartered cities and towns—and the real basis upon which they rest seems to be the necessity for such ruling in the interest of the "crowded modern urban

centers of population." McQuillin's *Mun. Corp.* vol. 2, p. 1866.

If there is any case to be found in which the rules, regulations, or ordinances of county authorities have been accorded similar recognition, it has escaped our rather careful investigation; and we draw the inference that the government of the thinly settled rural districts, constituting the main body of the state, is regarded as remaining more directly under the control of the law-makers of the state, an inference that is strengthened when we consider the meagerness of the provisions that are usually made for legislation, and the enforcement of legislation, by county authorities, as compared with those made in behalf of the chartered cities and towns. Even in regard to the status of the "municipal ordinance proper," however, and its relation to the proposition hereinabove stated, the jurisprudence of the country, taken as a whole, appears to be in rather an unsatisfactory condition, as may be seen from the following excerpt from the latest and most exhaustive treatise on Municipal Corporations that has come within our observation, to wit:

"No general rule can be laid down, respecting what matters are state and what are municipal, that will apply in all jurisdictions. This is usually made to depend, not alone upon the fundamental principles of decentralization in our system of government, and home rule for the local community, but as well upon the Constitution and course of legislation and judicial decision in the particular state. In no state is the line very accurately drawn where municipal power ends and state authority begins. This is especially true respecting offenses. * * *

"The decisions on this subject are numerous and conflicting. Perhaps on no single topic of municipal corporation law have there been so many discordant utterances, even by the same courts and the same individual judges. But the best-considered cases, especially the more recent ones, have properly extended the sphere of activity of the municipal corporation in dealing with police offenses. The necessity of thus enlarging municipal jurisdiction is obvious to the careful student of the conditions and needs of the crowded modern urban centers of population. The earlier conceptions of our courts on this subject are less definite and satisfactory. Under the several grants of municipal powers, which, in general terms, include the authority to enact all necessary ordinances to preserve the peace and advance the local government of the community, the local corporation cannot provide by ordinance for the punishment of an act constituting a misdemeanor or crime by state statute. The cases in the note fully illustrate the rule."

And there follows a citation of a number of cases, including *New Orleans v. Miller*, 7 La. Ann. 761; *State v. McNally*, 48 La. Ann. 1450, 21 South. 27, 36 L. R. A. 533:

"It may only exercise such powers as legitimately belong to the local and internal affairs of the municipality. In the performance of such functions much latitude is often permitted. But it is entirely competent for the Legislature to confer, in express terms, such powers as will enable the local corporation to declare by ordinance any given act an offense against its authority, notwithstanding such act has been made by statute a public offense and a crime against

the state. And where the regulation of a specific matter has been thus expressly and exclusively given to the local corporation, whether it be intrinsically state or local, the corporation may exercise the power so conferred, unfettered, until such time as it is legitimately withdrawn by the state. * * *

"The enforcement of the fundamental rule that the ordinance must be in harmony or at least not inconsistent with the state law, has been the source of much confusion on this subject. The true doctrine appears to be that whether the city may exercise control of state offenses must be determined by the legislative intent. And such intent must also decide the manner in which the power is to be exercised, and whether such control is to be exclusive, or whether it is to be exercised concurrently with that of the state.

"The general doctrine, supported by the weight of authority, is that an act may be made a penal offense, under the statutes of the state, and that further penalties may be imposed for its commission or omission by municipal ordinance. But, to authorize such ordinance, the local corporation must possess sufficient charter powers, and such powers must be exercised in the manner conferred and consistent with the Constitution and laws of the state. The cases present some discord respecting the nature of the grant of power necessary to sustain such additional regulations. The question of power seems to be the chief source of conflict."

McQuillin's Municipal Corporations, vol. 2, pp. 1858, 1860, 1863.

From Cooley's Constitutional Limitations (7th Ed.) p. 278, we take the following:

"2. Municipal laws must also be in harmony with the general laws of the state and with the provisions of the municipal charter. The charter, however, may expressly, or by necessary implication, exclude the general laws of the state on any particular subject, and allow the corporation to pass local laws at discretion, which may differ from the rule in force elsewhere.

"But, in these cases, the control of the state is not excluded, if the Legislature, afterwards, see fit to exercise it; nor will conferring a power upon a corporation to pass by-laws and impose penalties for the regulation of any specified subject necessarily supersede the state law on the same subject, but the state law and the by-law may both stand together, if not inconsistent. Indeed, an act may be a penal offense under the laws of the state, and further penalties, under proper legislative authority, be imposed for its commission by municipal laws, and the enforcement of the one would not preclude the enforcement of the other."

In McClain on Criminal Law, vol. 2, § 1217, p. 378, we find:

"As pointed out in the preceding section, there may be difficulty in determining whether a state statute, regulating the sale of liquor, continues in force in a city which, under the authority given it, passes ordinances respecting the same matter. In general, the power given to a city will not be deemed exclusive, but must be exercised in subordination to the general laws of the state."

From Wharton's Crim. Law (9th Ed.) vol. 1, § 293, p. 327, we take the following:

"Where an offense, in its entirety, is cognizable by two sovereigns, the first sovereign that takes possession of the defendant and undertakes the prosecution of the offense absorbs the case, as a general rule, which action, if bona fide and complete, is a bar to the action of the other sovereign."

Note: "Wharton's Cr. Pl. & Pr. §§ 441, 442; Taylor v. Taintor, 16 Wall. 367 [21 L. Ed.

287]; [Coleman v. Tennessee] 97 U. S. 509 [24 L. Ed. 1118].

The remaining question is whether, in fact and law, the state has repealed or superseded the statutes of 1902 and 1906 in so far as they purport to authorize the enactment of the ordinance under which defendant is prosecuted, and whether it has repealed or superseded that ordinance; and that question is to be determined according to the accepted canons which are applied to the interpretation and construction of laws.

The act of 1902, in its application to Caddo parish, as a parish in which the voters have determined that the sale of intoxicating liquors shall be prohibited, authorizes the police jury to make such rules and regulations as it may deem advisable to enforce the prohibition; and in the exercise of that authority, and of the authority conferred by the act of 1908, the police jury enacted the ordinance here in question, defining and denouncing the offense of keeping a "blind tiger" and imposing certain penalties therefor. Something less than a year later the General Assembly passed Act 146 of the session of 1914, being an act to define and prohibit the keeping of a "blind tiger," etc., declaring, among other things, that a "blind tiger" is hereby defined to be:

"Any place in those subdivisions of the state where the sale of * * * liquors is prohibited, where such * * * liquors are kept for sale," etc.

The definition and the penalty given and denounced by the act differ materially from those provided by the ordinance, and there is no doubt that the act was intended to be applied in all prohibition parishes, since it so declares in terms, and, unless it is to be so applied, it is entirely ineffective. On the other hand, being, as we hold, effective in Caddo parish, it repeals by implication, or supersedes, all pre-existing and inconsistent or conflicting laws, purporting to deal with the same subject and operating in that parish, since it contains the last expression of the will of the supreme lawmaking power of the state, and the ordinance in question is one of those laws.

It is therefore ordered that the conviction and sentence appealed from be set aside, and the defendant discharged, without day.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree, on the ground that the police jury was without authority to pass the ordinance in question. O'NIELL, J., however, is of the opinion that this court has no jurisdiction of the appeal, and will hand down reasons.

O'NIELL, J. (dissenting on the question of jurisdiction). My examination of the decisions of this court referred to in the foregoing opinion discloses that it was merely assumed that a parish is a municipal corporation, without any apparent investigation or

discussion of the question. On this false premise, it was said that jurisdiction was conferred, where the constitutionality or legality of a fine or other penalty imposed by a parish or police jury is in contest, by the provisions of article 85 of the Constitution, that the jurisdiction of this court—

"shall extend * * * to all cases in which the constitutionality or legality of any * * * fine, forfeiture, or penalty imposed by a municipal corporation, shall be in contestation, whatever may be the amount thereof."

My review of the decisions heretofore rendered follows:

The decision in *Parker v. Scogin*, 11 La. Ann. 631, has no reference whatever to the question of jurisdiction.

In the case of *Parish of St. Martin ex rel. Baker v. Delahoussaye*, 30 La. Ann. 1092, there was no motion to dismiss the appeal, and the court took no notice of the question of jurisdiction.

In *Parish of St. Landry ex rel. Fontenot v. Stout*, 32 La. Ann. 1278, the appeal was from a judgment rendered by a justice of the peace, condemning the defendant to pay a fine of \$5 for neglecting to perform road duty under an ordinance of the police jury. The court merely said:

"It is a case involving 'the constitutionality or legality of a fine, * * * by a municipal corporation,' and is therefore appealable. The motion to dismiss the appeal must hence be overruled."

In *Barrow v. Hepler et al.*, 34 La. Ann. 362, the question of jurisdiction was not mentioned.

Droz v. Parish of East Baton Rouge, 36 La. Ann. 307, has no application. The only matters decided were (1) that the plaintiff could not compel the parochial authorities to pay his judgment out of a so-called contingent fund, and (2) that he could not enjoin the parochial authorities from paying out the parish funds to the prejudice of his judgment. There was no fine, forfeiture, or penalty in contest.

In *Hoffpauir v. Wise*, 38 La. Ann. 704, the only matter decided was that the president of the police jury had no authority to sue or stand in judgment for the parish. It was said incidentally:

"In this feature of their corporate powers, police juries do not differ from other municipal or private corporations."

In *State and Police Jury v. Isabel*, 40 La. Ann. 340, 4 South. 1, the defendant was prosecuted for the violation of a police jury ordinance. The only discussion of the question of jurisdiction was:

"The case involves a contestation as to the constitutionality or legality of a fine or penalty imposed by a municipal corporation. This authorizes an appeal to this court under article 81 of the Constitution."

In *State of Louisiana and Parish of Jefferson v. Miller*, 41 La. Ann. 53, 5 South. 258, 7 South. 672, the defendant appealed from a judgment imposing upon him a fine of \$20 and, in default of payment, imprisonment for

10 days, as a penalty for violating an ordinance of the police jury prohibiting the running of a railroad train through any village in the parish at a higher rate of speed than 6 miles an hour. All that was said on the question of jurisdiction of the appeal was:

"The suggestion that we have no jurisdiction in such a case is without merit. It is undoubtedly a case 'wherein the constitutionality * * * of a fine or penalty imposed by a municipal corporation is in contestation,' and of all such cases, without limitation, article 81 of the Constitution invests this court with jurisdiction."

In the case last cited it was held that the police jury had no authority to adopt the ordinance, viz:

"Police juries can only exercise such powers as have been granted to them in express terms, or such as are necessarily implied from or incidental to the powers so expressly granted."

In *State v. Harper*, 42 La. Ann. 312, 7 South. 448, and in *Police Jury v. Harper*, 42 La. Ann. 776, 7 South. 716, the question of jurisdiction was not mentioned. It was held, however, that:

"A police jury ordinance to prevent the retailing of spirituous liquors, which defines offenses and imposes fines not known to the laws of the state, is null and void."

In *Parish ex rel. Theriot v. D. & J. Broussard*, 42 La. Ann. 841, 8 South. 590, the defendants appealed from a judgment rendered by a justice of the peace, condemning them to pay a fine of \$6 for violating Act No. 112 of 1880, by failing to perform road duty. The appeal was dismissed on the ground that:

"The defendants were not prosecuted under any municipal regulation, but in pursuance of a law of the state."

In *State ex rel. Illinois Central Railroad Co. et al. v. Board of Levee Commissioners*, 109 La. 435, 33 South. 399 (on rehearing), the only question for decision was whether riparian owners had to obtain the consent of the city council or of the dock board to build a wharf on the river front, under article 290 of the Constitution, requiring them to "obtain the consent of the council or other governing authority." Referring to the argument of counsel that the dock board was not a municipal corporation, the court said:

"Granting that it is not, the conclusion does not follow that it does not exercise a municipal jurisdiction."

The article of the Constitution under discussion did not make use of the term "municipal corporation," but referred to the governing authority, having "municipal or levee district jurisdiction." And it was observed that the adjective "municipal" is more elastic in its meaning than the noun "municipality," or even the term "municipal corporation." Hence the statement that, although parishes are not municipal corporations within the strict meaning of the term, this court has called them municipal corporations, was mere obiter dictum.

The motion to dismiss the appeal in *State v. Dudley*, 123 La. 436, 49 South. 12, was based upon the failure of the defendant to

reserve a bill of exceptions, and the motion was overruled on the ground that the errors complained of were patent on the face of the record. The only expression having reference to jurisdiction was:

"A similar question regarding jurisdiction arose in *State v. Miller*, 41 La. Ann. 53, 5 South. 258, 7 South. 672."

As a matter of fact it was not a similar question.

The error in the foregoing decisions was in assuming that a parish is included in the term "municipal corporation," used in the Constitution. The framers of the Constitution either did not have a parish in mind when they used the term "municipal corporation," or they did not contemplate that police juries would adopt ordinances imposing fines and other penalties, beyond their very limited authority.

As evidence of this, a careful examination discloses that, in every instance in which it was intended to include parishes with municipal corporations, they are mentioned in the Constitution. For example, article 47 provides that the General Assembly shall have no power to grant or authorize any *parish* or *municipal authority* to grant any extra compensation, nor authorize the payment of any claim against the *state* or any *parish* or *municipality*, etc. In article 48, there is a proviso regarding *municipal corporations* having a population of not less than 25,000, and the organization of levee districts and *parishes*. And in this same article municipal corporations and parishes are both subsequently embraced in the designation "political corporations," viz.:

"Nor shall any such law or ordinance be passed by any political corporation of this state," etc.

And in the last paragraph of this article we find the prohibition against passing local or special laws—

"legalizing the unauthorized or invalid acts of any officer, servant or agent of the state, or of any *parish* or *municipality* thereof."

In article 58, we find the term "political corporation" used repeatedly to embrace both parishes and municipal corporations; and the prohibition against the assuming by the state, or any "political corporation thereof," of the liabilities of any political, *municipal*, *parochial*, private or other corporation or association. Article 59 prohibits the passing of laws releasing or extinguishing any liability, indebtedness, or obligation to the state, "or to any *parish* or *municipal corporation* thereof."

The proviso in article 96, authorizing the General Assembly to create city courts, provides that their jurisdiction shall extend to violations of *municipal* and *parochial* ordinances. Article 100, defining the jurisdiction of the district courts, provides that it shall extend to "all cases where the state, a *parish*, *municipality*, or other political corporation is a party defendant," etc. Article 174 provides that *every parish* and *every municipi-*

pal corporation shall care for its paupers. Article 183 mentions officers, state, *parochial*, or *municipal*, and offices, state, *parochial*, or *municipal*. Article 186, referring to privileges for taxes, mentions state, district, *parish*, ward, or *municipal* taxes. Article 199, declaring the qualifications of voters in elections on questions submitted to taxpayers, mentions any *municipal* or other political subdivision. Article 210 mentions offices, state, judicial, *parochial*, *municipal*, or ward. Article 224 provides that the taxing power may be exercised by *parishes* and *municipal corporations* and public boards, under authority granted to them by the General Assembly, for *parish*, *municipal*, and local purposes, strictly public in their nature. Article 229 refers to municipal corporations and parishes by the designation "political corporations," and provides that the General Assembly may provide that municipalities levying license taxes equal to those levied by police juries for *parochial* purposes shall be exempt from the payment of such *parochial* licenses. Article 232 provides that no *parish*, *municipal*, or public board tax shall exceed ten mills, etc., provided any *parish*, *municipal corporation*, ward, or school district may levy a special tax, etc., when authorized by a vote of the property taxpayers of the *parish*, *municipality*, ward, or school district. Article 276 declares that the police juries of the several *parishes*, and the constituted authorities of all incorporated *municipalities*, shall alone have the power of regulating the slaughtering of cattle and other live stock, within their respective limits. And article 281 authorizes *municipal corporations*, *parishes*, and other political subdivisions or public corporations to issue bonds and levy special taxes, etc.

In none of the foregoing articles—and in fact nowhere in the Constitution—has it been taken for granted that the term "municipal corporations" includes parishes. And there is no article of the Constitution into which we can read the word "parish" where "municipal corporation" is written, without enlarging and amending the Constitution under color of construing its provisions.

The jurisprudence of this court upon this question was reviewed in the case of *Fischer Land & Improvement Co. v. Police Jury*, 52 La. Ann. 435, 27 South. 59, and it was said that the prior decisions contained only *chance* or *accidental expressions* indicating that parishes are municipal corporations. "But," the court went on to say, "nowhere is the distinction between parishes and municipal corporations more clearly defined than in the Constitution of this state." The court then took up each article of the Constitution of 1898 in which parishes or municipal corporations were mentioned, and demonstrated that parishes were not intended to be included in the term "municipal corporations," adding:

"The clear distinction observed in these constitutional provisions between municipal corporations and parishes can leave no doubt in our minds as to the proper conclusion in regard to the issue before the court; but the adjudications on the question are equally clear."

Then followed quotations from the decisions of the Supreme Court of the United States and of the various states, and from Judge Dillon and other authors, holding that a county is not a municipal corporation.

The Act No. 136 of 1898, for the creation and government of municipal corporations, provides:

"That municipal corporations are divided into three classes: * * * Cities, towns and villages."

Parishes are created by acts of the Legislature, and have only such powers as are expressly given them and such as are incidental to those expressly conferred.

As was said in *Commissioners v. Mighels*, 7 Ohio St. 119:

"A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration, in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the general administration of justice. With scarcely an exception, all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch to the general administration of that policy."

In *Parish v. Gaddis*, 34 La. Ann. 931, this court said:

"Parishes, like counties in other states, are involuntary political or civil divisions of the state, designed to aid in the administration of government, as state auxiliaries or functionaries, possessing no powers other than those delegated, ranking low down in the scale of corporate existence, and well distinguishable from municipal corporation; * * * the powers of municipal corporations * * * being more extensive than those of counties or parishes," etc.

In *Cathcart v. Comstock*, 56 Wis. 609, 14 N. W. 842, the following was quoted from Cooley regarding public corporations:

"Some of them are so feebly endowed with corporate life, and so much hampered, controlled, and directed in the exercise of the functions which are conferred upon them, that they are sometimes spoken of as nondescript in character, and as occupying a position somewhere between that of a corporation and a mere voluntary association of citizens. Counties, townships, school districts, and road districts do not usually possess corporate powers under special charters, but they exist under general laws of the state, which apportion the territory of the state into political divisions for convenience of government, and require of the people residing within these divisions the performance of certain public duties as a part of the machinery of the state, and, in order that they may be able to perform those duties, vest them with certain corporate powers. Usually their functions are wholly of a public nature. * * * They are, therefore, sometimes called quasi corporations, to distinguish them from the corporations in general which possess more completely the functions of an artificial entity."

And the following was quoted from Dillon:

"The phrase 'municipal corporations,' in the contemplation of this treatise, has reference to incorporated villages, towns, and cities, with power of local administration, as distinguished from other public corporations, such as counties and quasi corporations. These distinctions between municipal corporations, existing under and deriving their power from special legislative grants, and a mere township or town, existing as a mere civil institution or delegation of certain very limited political power, known as quasi corporations, are in harmony with our own views of the meaning of these terms, and are supported by the reasoning of Mr. Justice Taylor in *Smith v. Sherry*, 50 Wis. 213-216 [6 N. W. 561]."

The same distinction between municipal corporations and other public corporations was observed in the case of the *Memphis Trust Co. v. Board of Directors of St. Francis Levee District*, 69 Ark. 284, 62 S. W. 903, where it was said:

"Now, while every municipality is a public corporation, yet every public corporation is not a municipality, for, as defined above, a municipality is not only a public corporation; it is such a corporation created for governmental purposes, and having, to a large extent, local powers of legislation and self-government. An incorporated levee district, created for the sole purpose of constructing and maintaining a levee, is, like a municipality, a public corporation; but in respect to powers of self-government and legislation it falls far short, and in that regard is clearly distinguished from a municipality, such as an incorporated town or city. These are, to a certain extent, miniature governments, having legislative, executive, and judicial powers; but a levee district has few, if any, such powers, and is not intended to have them, being only an agency created for a special and particular purpose. The courts have often recognized the distinction between municipal corporations and these inferior corporations, such as levee districts, school districts, and the like. The distinction was pointed out by the Supreme Court of Missouri in *State v. Leffingwell*, 54 Mo. 458, where the court said that the term 'municipal corporation' included only cities, towns, and other like organizations with political and legislative powers for their local government and police regulation of the inhabitants thereof. In *Morrison v. Morey* [148 Mo. 543, 48 S. W. 629] the same court held that the bonds of a levee district, payable out of assessments on lands of the districts benefited by the levee, were not debts of a municipality, and did not come within the meaning of a provision of the state Constitution limiting municipal indebtedness."

It is true that *Bouvier's Law Dictionary* mentions counties as examples of municipal corporations, but the author adds:

"Strictly, this word [municipal] applies only to what belongs to a city. It is used in this sense in the terms 'municipal court,' 'municipal ordinance,' 'municipal officer.' Among the Romans, cities were called 'municipia.'"

In *Askew v. Hale County*, 54 Ala. 639, 25 Am. Rep. 730, the Supreme Court of that state said:

"While a county has corporate characteristics, it is in no proper sense a municipal corporation, but a mere governmental auxiliary or agency, possessing no power and subjected to no duty, not originating from the statute creating it."

The Supreme Court of Colorado, in the case of *Stermer v. Commissioners of La Plata*

County, 5 Colö. App. 379, 38 Pac. 839, declined to hold that counties were "municipal corporations" within the meaning of the term used in a statute of that state, and said:

"Here we are met by the contention, put forward by counsel, that the term 'municipal corporations' includes counties, and that, therefore, by the express terms of the act of 1891, counties are subject to garnishment. There has sometimes been a loose and indiscriminate use of that term in speaking of cities, towns, and counties, in cases where it was not disputed that some particular law which was the subject of construction applied equally to all of them; and, in determining the sense in which the term is employed in the act of 1891, cases where it is loosely used, or even misapplied, the facts not calling for critical accuracy in that respect, are of no assistance whatever. We are referred to sections 7 and 8 of article 10 of the Constitution, where the words 'county, city, town or other municipal corporation' are used; but the word 'other' does not necessarily refer back to the word 'county.' No violence would be done to the language employed, if the word should be confined in its reference to the words 'cities' and 'towns'; and, if it is important to know what meaning the makers of the Constitution attached to the words 'municipal corporations,' as used in that instrument, an examination of section 13, article 14, will, we think, be satisfactory. It seems clear from that section that the words were intended to be limited in their application to cities and towns. But it is the legislative meaning of the words which it is important to know, and, to ascertain that, we must avail ourselves of the usual means employed in the construction of statutes. Counties are classified by all writers upon the subject as 'quasi corporations,' in contradistinction to 'municipal corporations.' The distinction between these two classes of public corporations is very clearly drawn by Mr. Dillon in section 23 of his work on Municipal Corporations, and we think a careful examination of the attachment and garnishment laws which have been enacted in this state will make it apparent that the Legislature did not intend to confound them. In the absence of anything indicating a contrary intention, it must be assumed that the terms employed in a legislative enactment are used according to the definition placed upon them by standard authorities. Mr. Dillon says that a municipal corporation, in its strict and proper sense, is a body politic and corporate, constituted by the incorporation of the inhabitants of a city or town for the purposes of local government therefor. 1 Dill. Mun. Corp. para. 19, 22."

In *People v. Johnson*, 30 Cal. 102, speaking of a municipal fine, it was said:

"The position assumed by counsel, to the effect that the fine imposed as a punishment for the alleged offense is a municipal fine, within the meaning of section 4 of article 6 of the Constitution, and that its legality is involved in this case, is not tenable. In the first place, it is not a municipal fine within the meaning of the Constitution. * * * As to the first point, the argument turns upon the meaning of the word 'municipal,' as used in the Constitution, and it is insisted that the word is used in its broadest and most enlarged sense, and therefore includes all fines imposed by the laws of the state, and is not limited to such as are imposed by the local laws of particular places, such as towns or cities. Such, however, cannot be the

case. To give it the broad meaning contended for would be to strip it of all meaning in the place where we find it, for the meaning of the sentence would be the same without it as with it. Under the definition of counsel, the word 'fine' would mean precisely the same thing as if the qualifying word 'municipal' had been omitted, which in effect strips the latter word of all meaning in the connection in which it is used. The word 'municipal' is obviously used in its strictest sense. * * * It qualifies and limits the word 'fine,' and thus serves to distinguish the fine intended from all other fines."

To the same effect was the decision of this court in *Parish ex rel. Theriot v. D. & J. Broussard*, 42 La. Ann. 841, 8 South. 590, cited in the beginning of this opinion.

Black on the Interpretation of Laws, under the title "Construction of Constitutions," says that interpretations are not to be on narrow and technical principles, but liberal and on broad general lines; but the author adds:

"It is also to be observed that it is not within the lawful powers of the courts, in any event, to amend the Constitution, under color of construction, by interpolating provisions not suggested by any part of it. We cannot supply any omissions which we may believe have arisen from inadvertence on the part of the constitutional convention. *Walker v. Cincinnati*, 21 Ohio St. 14 [8 Am. Rep. 24]. But it is also a rule of construction that, when the Constitution defines the circumstances under which a right may be exercised or a penalty imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases. See *Phillips v. Covington Bridge Co.*, 59 Ky. [2 Meta.] 219."

I am of the opinion that the word "parish" was omitted from article 85 of the Constitution intentionally, and not inadvertently, when the framers of that instrument gave us appellate jurisdiction of all cases in which the constitutionality or legality of any fine, forfeiture, or penalty imposed by a *municipal corporation* is in contestation. Parishes have not the police power of municipal corporations, and we have no greater right to include them in the term "municipal corporations" than we would have to include school districts, levee or drainage districts, boards of health, or other political corporations. The remedy against an illegal imposition of a fine, forfeiture, or penalty imposed by any other than a municipal corporation, beyond a suit in the district court, may be a resort to our supervisory jurisdiction; but we have no other appellate jurisdiction than the Constitution has conferred.

I respectfully dissent from the view of the majority of the members of the court upon this question, and believe the appeal should be dismissed for the same reason that the appellant contends that the parish had no authority to adopt the penal ordinance; that is, that the parish is not a municipal corporation.

(136 La. 891)

No. 20858.

STATE v. EMILE et al.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by Editorial Staff.)

1. INTOXICATING LIQUORS \S 197—JURISDICTION OF PROSECUTION—DISTRICT COURT.

The district court has jurisdiction of prosecutions on informations for the violation of a police jury ordinance prohibiting the keeping of intoxicating liquors for sale.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 216; Dec. Dig. \S 197.]

2. INTOXICATING LIQUORS \S 10—KEEPING FOR SALE—"BLIND TIGER."

An ordinance forbidding the keeping of intoxicating liquors for sale in prohibition territory is an exercise of the power to define and punish "blind tigers," which are defined to be places where intoxicating liquors are sold on the sly, since no one would keep such liquors for sale in such territory, unless the sale was intended to be on the sly.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 7-12; Dec. Dig. \S 10.]

For other definitions, see *Words and Phrases*, First and Second Series, *Blind Tiger*.]

3. INTOXICATING LIQUORS \S 10—POWERS OF POLICE JURY—ORDINANCES.

The police jury of a parish is not vested with any general police power, and in the absence of special authority cannot pass an ordinance forbidding the keeping of intoxicating liquors for sale in prohibition territory.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 7-12; Dec. Dig. \S 10.]

4. INTOXICATING LIQUORS \S 10—POWERS OF POLICE JURY—ORDINANCES.

Act No. 221 of 1902, empowering police juries of parishes to make such rules and regulations for the sale or prohibition of the sale of intoxicating liquors as a majority of the voters of the parish may determine by ballot, does not authorize such jury, in a parish where the prohibition of such sale has been adopted to pass an ordinance prohibiting the keeping of intoxicating liquors for sale therein without an election, since, even if that act could be construed to authorize the regulation of such sales without a special vote, there can be no regulation after the voters have prohibited the sales.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. \S 7-12; Dec. Dig. \S 10.]

Appeal from First Judicial District Court, Parish of Caddo; John R. Land, Judge.

A. Emile and another were convicted of unlawfully keeping a blind tiger, in violation of a police jury ordinance of Caddo parish, and defendant Emile appeals. Reversed, and accused discharged.

Stewart & Tanner, of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and Wm. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

PROVOSTY, J. The accused, A. Emile, has appealed from a conviction and sentence upon an information before the district court of the parish of Caddo, charging that he and Miller Joseph—

"being then and there the proprietors of a certain building located 800 block of Louisiana street, Shreveport, Caddo parish, Louisiana, unlawfully did keep a blind tiger and maintain a public nuisance in said building, by then and there keeping for sale, barter, exchange, or giving away a large quantity of whisky and beer, to wit, six cases of quart bottles of Old Forrester whisky, one trunk full of Old Forrester whisky, 3 dozen bottles of Budweiser beer, in violation of the police jury ordinance of Caddo parish, contrary to the form of the statute of the state of Louisiana in such case made and provided, and against the peace and dignity of the same."

[1] The accused excepted to the jurisdiction of the district court of the parish of Caddo to try the case, on the ground that, the offense charged being the violation of an ordinance, the city court of the city of Shreveport alone had jurisdiction.

To the contrary, see *State v. Foggin*, 135 La. 497, 65 South. 622.

The accused moved to quash the information, on the ground that said ordinance is null, for the reason that the police jury had no authority to pass it, it possessing no powers but such as are expressly delegated to it, or result by necessary implication from those that are expressly delegated, and the power to define and punish blind tigers not having been delegated to it or resulting from any power delegated to it, and for the further reason that, even if it possessed said power, it could not in the exercise of it make that a blind tiger which in reality is not, that it cannot make the mere keeping of liquors for sale a blind tiger, a blind tiger being, according to the definition given of it by this court in *City of Shreveport v. Maroun*, 134 La. 490, 64 South. 388, a place where liquors are sold on the sly, so that, in order that there should be a blind tiger, there must be an actual sale of liquors, and it must be on the sly.

[2] Between the said definition and the said ordinance we find no conflict; for, as a practical question, the keeping of liquors for sale in prohibition territory is the same thing as the keeping of them for sale on the sly, since no sensible person would keep liquors for open sale in prohibition territory, and thereby foolishly incur the heavy penalties denounced by law for selling intoxicating liquors without a license, but, if keeping them at all, would do so for selling secretly, and seek thereby to reap the benefit of the sale without incurring the penalties. And an actual sale is not necessary, since in the case of an actual sale the offense is no longer that of keeping a blind tiger, but of a selling of liquors without a license. Moreover, in the said case of *City of Shreveport v. Maroun* the court upheld the validity of an ordinance of the city of Shreveport which is a replica of the said police jury ordinance, in so far as making a mere keeping of liquors for sale a blind tiger. The said city ordinance is reproduced in the said

Maroun Case, and the police jury ordinance is reproduced in the case of *State v. Emmet Hagen* (No. 20,860) 67 South. 935, this day decided.

[3] The other part of the objection is, however, on more solid ground. We are not referred to any statute which authorizes a police jury to enact such an ordinance as this. The learned Attorney General and the district attorney would seek to derive the authority from an inherent power to abate nuisances, such as in the case of *City of Shreveport v. Maroun*, supra, was found to be vested in the city council of the city of Shreveport, although not specially delegated in the city charter; but police juries or parishes differ widely from town and city councils, or towns and cities, in respect to the powers with which they are impliedly or inherently vested. See *State v. Miller*, 41 La. Ann. 53, 5 South. 258, 7 South. 672; *Parish of Concordia v. Railway Co.*, 44 La. Ann. 615, 10 South. 809; *Police Jury v. Arleens*, 34 La. Ann. 646; *Sterling v. Parish of West Feliciana*, 26 La. Ann. 59; *Farmer v. Myles*, 106 La. 333, 30 South. 858, and cases there cited. In this last case the court said:

"The * * * powers * * * of a parish and its governing officers differ materially from those of a city."

And the court held that a police jury can exercise no powers but such as are specially or specifically granted, and that therefore the power to "pass all such ordinances as they may deem necessary relative to roads" did not authorize them to allow private individuals to establish a tramroad along and upon one of the public highways of the parish. In the first of the above-cited cases it was held that:

"The Legislature has not seen fit to invest police juries with any general grant of police powers," but has "very carefully limited and defined the powers granted to these bodies"

—and that therefore a police jury is without power to prescribe a speed limit for railroad trains passing through the villages of the parish. This matter of the restricted character of the power of police juries was treated so completely in the case of *Farmer v. Myles*, supra, that anything we might add here in that connection would in reality be nothing more than a mere rehash or repetition. We will therefore simply refer to that case for a full discussion of the question, and hold the said ordinance to be unauthorized and therefore null.

[4] The court has considered whether Act 221, p. 451, of 1902, contains authority to police juries to pass the said ordinance, and has concluded that it does not. In the first place, the said statute authorizes the police jury to act only "as a majority of the legal voters of the parish may determine," and the said ordinance was passed without consultation of the voters of the parish. In the next place, after prohibition has been established, there can no longer be any occasion for rules and regulations for the sale of liquors, and hence, even if said statute could be said to authorize the adoption of rules and regulations for the sale of liquors without previous submission to the legal voters of the parish, such authority could not apply in localities where prohibition has been established.

The motion of the state to dismiss the appeal is identical in its features with the like motion in the case of *State v. Emmet Hagen*, supra, and for the reasons there given is overruled.

The judgment appealed from is therefore set aside, and the accused is ordered discharged without day.

MONROE, C. J. I concur in the decree, for the reasons assigned in *State v. Hagen*, supra, this day decided.

(136 La. 396)

No. 20844.

STATE v. WHITBECK et al.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)*(Syllabus by the Court.)*ORDINANCE OF POLICE JURY—POWER TO EN-
ACT—JURISDICTION.This case is governed by the ruling in
State v. Hagen (No. 20860) 67 South. 935, this
day decided.

O'Niell, J., dissenting.

Appeal from First Judicial District Court,
Parish of Caddo; J. R. Land, Judge.J. J. Whitbeck and another were convicted
of unlawfully maintaining a public nuisance,
and appeal. Reversed, and defendants dis-
charged.See, also, 134 La. 812, 64 South. 759, 52 L.
R. A. (N. S.) 883.Lewell C. Butler, of Shreveport, for appel-
lants. R. G. Pleasant, Atty. Gen., and W.
A. Mabry, Dist. Atty., of Shreveport (G. A.
Gondran, of New Orleans, of counsel), for the
State.MONROE, C. J. Defendants were charg-
ed with unlawfully maintaining, conducting,
and operating—“a public nuisance, commonly known as a ‘blind
tiger,’ * * * being a store operated by J. J.
Whitbeck and Tom Harris, where near-beer is
kept for sale, and at which place the said J.
J. Whitbeck and Tom Harris, unlawfully, did
have and keep intoxicating liquors for the pur-
pose of sale, barter, exchange, or giving away,
as a beverage; said intoxicating liquors being
as follows, to wit: One cask of Pabst beer,
on ice—contrary to the ordinances of the police
jury of the parish of Caddo,” etc.And, having been convicted, were sen-
tenced, each, to pay a fine of \$100, and, in
default of payment, to work out the fine on
the public roads of the parish, at the rate
of \$1 per day, each, and to serve 30 days in
jail, “subject to work on the public roads.”
They have each appealed.

On the Motion to Dismiss the Appeal.

The state moves to dismiss the appeal, on
the grounds: (1) That the offense charged
is not punishable with death or hard labor,
and that no fine exceeding \$300 and no im-
prisonment exceeding six months has actual-
ly been imposed; (2) that the ordinance which
defendants attack has not been declared un-
constitutional; (3) that all other matters
concerning which defendants seek to have
the judgment appealed from reviewed are
questions of fact.Defendants, however, by demurrer and
motion to quash, attacked the ordinance un-
der which they have been convicted and sen-
tenced, on the grounds that it describes no
offense known to the law, and that it is un-
constitutional, illegal, and ultra vires of the
police jury, from which it follows that there
is in contestation the constitutionality andlegality of a fine and penalty imposed by a
police jury, and the remaining question is
whether the case falls within the meaning
of so much of article 85 of the Constitution
as confers upon this court appellate jurisdic-
tion, in “all cases in which * * * any
fine, forfeiture, or penalty, imposed by a mu-
nicipal corporation, shall be in contestation,
whatever may be the amount thereof.” That
question has been fully considered, and this
day decided in the affirmative, in the case of
State of Louisiana v. Emmet Hagen, 67
South. 935 (No. 20,860 of the docket), and
for the reasons there assigned, the motion to
dismiss the appeal in this case is overruled.

On the Merits.

We pretermitt consideration of the bills re-
served by defendants to the overruling of
their demurrer and motion to quash, and to
the finding by the trial judge, as a matter of
judicial cognizance, that “Pabst blue ribbon
beer” is intoxicating, as we are of opinion
that the conviction and sentence complained
of must be set aside for another reason, to
wit:Defendants were charged, on June 26,
1914, with conducting and operating “a pub-
lic nuisance, commonly known as a ‘blind
tiger,’” under an ordinance of the police
jury which declares that any one convicted
of that offense—“shall be fined not less than eighty nor more
than one hundred dollars, and, in default of
payment, shall work out the same on the public
roads, at the rate of one dollar per day, or
shall suffer imprisonment not less than ten,
and not more than thirty days, at the discre-
tion of the court, and that, for each twenty-
four hours that the nuisance is maintained, it
shall be deemed a separate offense.”Thereafter, on July 8, 1914 (pending de-
fendants' appeal to this court) the General
Assembly enacted a law—No. 146 of the Ses-
sion of 1914—defining and denouncing the of-
fense of “keeping a blind tiger,” and declar-
ing that any one convicted thereof—“shall be fined not less than \$200 nor more than
\$500 and be imprisoned for not less than thirty
days nor more than six months, and on default
of the payment of the fine and costs he shall
be imprisoned for not more than six months ad-
ditional.”It is evident that defendants cannot be
sentenced under the ordinance, for (assum-
ing it to have been competent legislation) it
has been superseded by the statute; and
it is equally evident that they cannot be
sentenced under the statute, which is ex
post facto, quoad the offense with which
they are charged, imposes a severer mini-
mum penalty than the ordinance, and con-
tains no saving clause.“No conviction can take place for an offense
after the statute creating it has been repealed.
Therefore, if a prior law has been superseded
by a statute inconsistent therewith, offenses al-
ready committed under the prior law cannot be
punished, unless there is a saving clause, for
the prior law is no longer in force, and the sub-

sequent statute is not applicable to the offense already committed, because as to such offense it is *ex post facto*. There can be no legal conviction for an offense, unless the act complained of be contrary to law at the time it is committed, nor can there be a judgment, unless the law be in force at the time the indictment is found and the judgment rendered thereunder." McClain, Cr. Law, vol. 1, p. 96.

"An *ex post facto* law * * * is a law which makes an act criminal which was not criminal when done, or which, with reference to a crime already committed, increases the punishment, or makes it harder for the accused to defend himself against the charge." Id. p. 78.

"It has been long settled, on general principles, that, after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force." Yeaton et al. v. United States, 5 Cranch, 281, 3 L. Ed. 101.

See, also, *Kring v. Missouri*, 107 U. S. 221, 2 Sup. Ct. 443, 27 L. Ed. 506; *State ex rel. Theus v. Judge*, 109 La. 236, 33 South. 209; *State v. Callahan*, 109 La. 946, 33 South. 931; *State v. Smith*, 118 La. 248, 42 South. 791; *State v. Hickman*, 127 La. 442, 53 South. 680; *State v. Jones*, 127 La. 768, 53 South. 985; *State v. Guillory*, 127 La. 951, 54 South. 297; *Clark's Cr. Law*, 26.

The questions thus dealt with have been somewhat more fully considered in the case of *State v. Hagen*, 67 South. 935, this day decided; and, for the reasons assigned in that case, as well as those above given, it is ordered and decreed that the conviction and sentence appealed from be set aside, and the defendants discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is of the opinion that this court is without jurisdiction of this appeal, for the reasons assigned in the case of *State v. Hagen*, supra, decided this day.

(136 La. 899)

No. 20837.

STATE v. COURIS.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Tony Couris was convicted of violating an ordinance of a police jury, and appeals. Reversed, and defendant ordered discharged.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. This case presents the same questions that are presented in the cases of *State v. Emmett Hagen*, 67 South. 935, and *State v. Whitbeck and Harris*, 67 South. 949, this day decided, and is governed by the same principles of law. For the reasons assigned in those cases, therefore, the conviction and sentence herein appealed from are set aside, and the defendant ordered to be discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is of the opinion that this court is without jurisdiction, for the reasons given in his dissenting opinion in *State v. Hagen*.

(136 La. 900)

No. 20859.

STATE v. CROSS et al.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Cal Cross and others were convicted of violating an ordinance of a police jury, and appeal. Reversed, and defendants ordered discharged.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellants. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. This case presents the same questions that are presented in the cases of *State v. Hagen*, 67 South. 935, and *State v. Whitbeck and Harris*, 67 South. 949, and is governed by the same principles of law. For the reasons assigned in those cases, therefore, the convictions and sentences herein appealed from are set aside, and the defendants ordered to be discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is also of the opinion that this court is without jurisdiction, for the reasons assigned in his dissenting opinion in *State v. Hagen*.

(136 La. 901)

No. 20861.

STATE v. JOLIFF.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

George Joliff was convicted of violating an ordinance of a police jury, and appeals. Reversed, and defendant ordered discharged.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. This case presents the same questions that are presented in the cases of *State v. Hagen*, 67 South. 935, and *State v. Whitbeck and Harris*, 67 South. 949, this day decided, and is governed by the same principles of law. For the reasons assigned in those cases, therefore, the conviction and sentence herein appealed from are set aside, and the defendant ordered to be discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is of the opinion that this court is without jurisdiction of the appeal, for the reasons assigned in his dissenting opinion in the case of *State v. Hagen*, supra, decided this day.

(136 La. 901)

No. 20862.

STATE v. FOGGIN.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

Dan Foggin was convicted of violating an ordinance of a police jury, and appeals. Reversed, and defendant ordered discharged.

See, also, 65 South. 622.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. This case presents the same questions that are presented in the cases of State v. Hagen, 67 South. 935, and State v. Whitbeck and Harris, 67 South. 949, this day decided, and is governed by the same principles of law. For the reasons assigned in those cases, therefore, the conviction and sentence herein appealed from is set aside, and the defendant ordered to be discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is of the opinion that this court is without jurisdiction of the appeal, for the reasons assigned in his dissenting opinion in the case of State v. Hagen, supra, decided this day.

(136 La. 902)

No. 20836.

STATE v. NEJIN.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

Appeal from First Judicial District Court, Parish of Caddo; J. R. Land, Judge.

F. A. Nejin was convicted of violating an ordinance of a police jury, and appeals. Reversed, and defendant discharged.

Scheen & Blanchard and E. P. Mills, all of Shreveport, for appellant. R. G. Pleasant, Atty. Gen., and W. A. Mabry, Dist. Atty., of Shreveport (G. A. Gondran, of New Orleans, of counsel), for the State.

MONROE, C. J. This case presents the same questions that are presented in the cases of State v. Hagen, 67 South. 935, and State v. Whitbeck and Harris, 67 South. 949, this day decided, and is governed by the same principles of law. For the reasons assigned in those cases, therefore, the conviction and sentence herein appealed from is set aside, and the defendant ordered to be discharged.

PROVOSTY, LAND, and O'NIELL, JJ., concur in the decree on the ground that the police jury was without authority to pass the ordinance in question.

O'NIELL, J., is of the opinion that this court is without jurisdiction, for the reasons assigned in his dissenting opinion in State v. Hagen, supra, decided this day.

(136 La. 903)

No. 20084.

BROCK et al. v. E. McILHENNY'S SON.

(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)

(Syllabus by the Court.)

1. DEEDS \S 114—DESCRIPTION OF LAND—CONSTRUCTION.

There is no statute or rule of law providing that such a description as 50 acres of land in the northeast corner of a designated larger body of land means necessarily a square tract containing 50 acres.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. \S 816-322, 826-329, 388; Dec. Dig. \S 114.]

2. TAXATION \S 764—TAX DEED—VALIDITY—DESCRIPTION OF LAND.

Such a description of land as 50 acres in the northeast corner of a large area constituting two tracts several miles apart is no designation at all; and a tax deed containing such description is absolutely null.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1519-1522; Dec. Dig. \S 764.]

3. TAXATION \S 804—TAX DEED—VALIDITY—PRESCRIPTION.

The prescription of three years cannot give validity to a tax deed that is null for want of a description by which the property can be identified.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 1591, 1592; Dec. Dig. \S 804.]

Appeal from Sixteenth Judicial District Court, Parish of St. Landry; William J. Sandoz, Judge ad hoc.

Action by Jimmie Stewart Brock and others against the E. Mcilhenny's Son. From a judgment for defendant, plaintiffs appeal. Affirmed.

Edward P. Veazie, of Opelousas (John W. Lewis, of Opelousas, of counsel), for appellants. Dudley L. Guilbeau, of Opelousas, for appellee.

O'NIELL, J. This is a suit to confirm a tax title, under the provisions of Act No. 101 of 1898. The plaintiffs are the surviving heirs and legal representatives of the deceased, J. T. Stewart, who purchased at a public tax sale, on the 9th of May, 1908, for the unpaid taxes of 1907, the following described property, viz:

"50 acres of land in the northeast corner of the following property: 2165.56 acres of land, being lots 3 and 4 of section 25, east half of southeast quarter (E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) section 35, lots 1 and 2 and west half of west half (W. $\frac{1}{2}$ of W. $\frac{1}{4}$) section 36, in T. 7 S., R. 3 E., west half of section 36, in T. 7 S., R. 3 E., west half of section 25, all of section 26, east half of section 27, east half of west half (E. $\frac{1}{2}$ of W. $\frac{1}{4}$) section 27; southwest quarter of northwest quarter (S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) and west half of southwest quarter (W. $\frac{1}{2}$ of S. W. $\frac{1}{4}$) section 27, lots one, two, three and four, section 25, in T. 8 S., R. 3 E."

The above described lands consist of two tracts, one containing 379.52 acres described as lots 3 and 4 of section 25, E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of section 35, and lots 1 and 2 and W. $\frac{1}{2}$ of W. $\frac{1}{4}$ of section 36, in township 7 S., range 3 E., and the other containing about 1,800

acres, situated four miles south of the first tract, and described as the W. $\frac{1}{2}$ of section 25, all of section 26, all except N. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ of section 27 and N. $\frac{1}{2}$ of N. $\frac{1}{2}$ of section 35, in township 8 S., range 3 E.

The purchaser located the 50 acres of land described in his tax deed as a square containing 50 acres in the northeast corner of the N. W. $\frac{1}{4}$ of section 25, township 8 S., range 3 E.

The defendant contends that such a description as 50 acres of land in the northeast corner of 2,165.56 acres, comprising two tracts, four miles apart, does not identify or designate any particular tract of 50 acres, and that the alleged tax title is therefore null.

The district judge sustained the defendant's contention and dismissed the plaintiffs' suit, reserving their right to sue for the amount of taxes paid by them and their father.

The only reason assigned by the plaintiffs for locating the 50 acres in the northeast corner of the lower tract, instead of in the tract four miles further north, is that the latter tract is irregular in shape, and a square containing 50 acres could not be located in its northeast corner. The deed, however, does not call for a square containing 50 acres. The strip designated as lots 3 and 4 of section 25, township 7 S., range 3 E., contains 32.52 acres. A line projected south from a point on the southern boundary of this section, so as to cut off 17.48 acres from fractional section 36, would, with the adjacent lots 3 and 4 of section 25, locate 50 acres in the northeast corner of the northern tract.

In fact, the tract claimed by the plaintiffs, as located by their father, is not square. A 35-foot public road extends along the eastern edge, cutting off 17.5 feet for a distance of 1,115.8 feet from the southern boundary. The 50-acre tract claimed is therefore laid off with a northern boundary of 1,489 feet, a southern boundary of 1,472.5 feet, and a western boundary of 1,475.8. Hence the tract is not square, including or excluding the portion which encroaches upon the public road.

[1] We know of no law declaring that 50 acres of land in a specified corner of a larger tract necessarily means a square tract with side lines bearing due north and south and east and west, each measuring 22.36 chains. The decisions to this effect by the courts of Alabama and Ohio are not founded upon any authority unless it be upon the statutes of those states. Forty acres in the northeast corner of a regular section might be understood to mean the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$, according to official survey, but 50 acres in the northeast corner of a regular section might as well mean a right angle triangle measuring 31.62 chains on its north and east boundary line as a square measuring 22.36 chains on each side.

A court cannot perform the function of selecting the shape of a tract of land of a given area in order that it may pass by a deed of the stated number of acres in a certain locality.

[2] Such a description as 50 acres of land in the northeast corner of two larger tracts is no designation at all. The land supposed to be conveyed by such description cannot be identified.

[3] The asserted tax title is therefore absolutely null, and the prescription of three years invoked by the plaintiffs cannot give it validity. *Skelly v. Friedrichs*, 117 La. 679, 42 South. 218; *Guillory v. Elms*, 126 La. 566, 52 South. 767; *Levy v. Gause*, 112 La. 789, 36 South. 684.

The letters written by the president of the defendant company, offering to redeem the property by refunding the amount of taxes paid in the purchase of the 50 acres, with interest and penalties, did not operate as an estoppel or a recognition of the validity of the tax sale. The defendant owed and still owes the amount of the taxes paid by the plaintiffs' father; and in offering to pay it, the president of the defendant company did not recognize the plaintiffs' title to any specified 50 acres of land.

The judgment appealed from is affirmed.

MONROE, C. J., and LAND and SOMMERVILLE, JJ., concur in the decree.

(136 La. 906)

No. 21040.

STATE v. GEORGE.

(Supreme Court of Louisiana. Feb. 23, 1915.
On Rehearing, March 22, 1915.)*(Syllabus by the Court.)*

1. STATUTES §118—TITLE OF STATUTE—UNLAWFUL SALE OF LIQUORS.

Section 4 of Act No. 211 of 1914, relative to the manufacture and sale of near-beer, is a regulation restricting such sale to places where no other beverages or articles of merchandise are sold, and is covered by the title of the act. Said section was intended to prevent near-beer saloons from being used as blinds or screens for the sale of intoxicating liquors in prohibition districts.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. §118.]

2. INTOXICATING LIQUORS §17—MALT LIQUORS—PROHIBITION—POLICE POWER.

A state may, in the exercise of its police power, prohibit the sale of intoxicating liquor, and to the end of making the prohibition effectual may include in the prohibition nonintoxicating malt liquors. *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 21-23; Dec. Dig. §17.]

3. INTOXICATING LIQUORS §6—PROHIBITION—NEAR-BEER—LEGISLATIVE POWER.

If a state may prohibit, it may regulate the sale of near-beer to the point of suppression.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 4; Dec. Dig. §6.]

Provosty, J., dissenting.

Appeal from First Judicial District Court, Parish of Caddo; T. F. Bell, Judge.

Lee George was charged with violating Act No. 211 of 1914, relative to the sale of near-beer. From a judgment quashing the information, the State appeals. Reversed and remanded, and rehearing denied.

R. G. Pleasant, Atty. Gen., Wm. A. Mabry, Dist. Atty., of Shreveport, G. A. Gondran, John P. Sullivan, Arthur Landry, and Edward M. Heath, all of New Orleans, for the State. Alexander & Wilkinson, of Shreveport, for appellee.

LAND, J. Defendant was prosecuted for violating Act No. 211 of 1914, relative to the sale of near-beer.

Defendant moved to quash the information on the ground that said act is illegal and unconstitutional, in that it does not express its object in the title, and in that it has more than one object, and on the further ground that said act is unreasonable, and abridges the inalienable rights of the citizen to engage in a lawful occupation, in a lawful way, and thereby deprives him of his property rights without any compensation, in violation of the Constitutions of the state and of the United States.

The judge below sustained the motion to quash on the ground that the title of the act does not cover section 4, relating to the

sale of other things besides near-beer. The state has appealed.

[1] The title of Act No. 211 of 1914 reads as follows:

"To prohibit the manufacture and sale of all substitutes for near-beer; to define near-beer and provide for the method of the manufacture thereof; regulating the sale and use of near-beer, and fixing penalties for the violation of any of the provisions of this act."

Section 4 of the act reads:

"That it shall be unlawful to sell, or offer for sale, any other beverage of any nature, kind or description, whether intoxicating or non-intoxicating, or any article of merchandise under the same roof where near-beer is sold as a beverage."

At the same session was passed a drastic act (No. 146) defining and prohibiting the keeping of a "blind tiger" in prohibition districts. The definition covers any place where spirituous, malt, or intoxicating liquors are kept for sale, barter, exchange, or habitual giving away as a beverage in connection with any business conducted at such place. Section 4 of Act 211 of 1914 was intended to prevent the near-beer saloon from being used as a blind or screen for the sale of real beer and other intoxicating liquors. In order to accomplish this purpose the Legislature made it unlawful to sell or offer for sale any other beverage or any articles of merchandise under the same roof where near-beer is sold. While the language of section 4 may be too broad, in this case the information charges that the defendant did sell or offer for sale certain articles of merchandise *in the same store where he sold near-beer as a beverage*.

The intent of section 4 is to separate sale of near-beer from sales of all other beverages and articles, as was done in the case of saloons and groceries by section 4 of Act 176 of 1908.

[2] In *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44, 57 L. Ed. 184, it was held that a state may, in the exercise of its police power, prohibit the sale of intoxicating liquor, and to the end of making the prohibition effectual may include in the prohibition beverages which separately considered may be innocuous, and so hold as to Poinsetta, a beverage containing a small percentage of malt. In that case the sale of malt liquors, whether intoxicating or not, had been prohibited by a statute of the state of Mississippi. In the same case the court, speaking through Mr. Justice Hughes, said:

"It was competent for the Legislature of Mississippi to recognize the difficulties besetting the administration of laws aimed at the prevention of traffic in intoxicants. It prohibited, among other things, the sale of 'malt liquors.' In thus dealing with a class of beverages which in general are regarded as intoxicating, it was not bound to resort to a discrimination with respect to ingredients and processes of manufacture which, in the endeavor to eliminate innocuous beverages from the condemnation,

would facilitate subterfuges and frauds and fetter the enforcement of the law. * * *

"That the opinion is extensively held that a general prohibition of the sale of malt liquors, whether intoxicating or not, is a necessary means to suppress trade in intoxicants, sufficiently appears from the legislation of other states and the decision of the courts in its construction."

[3] It follows that near-beer falls within the grasp of the police power of this state, which may prohibit its manufacture and sale; and if the state may prohibit, it may regulate the traffic in near-beer to the point of suppression.

Section 4 prohibits the sale of all other beverages or articles under the same roof where near-beer is sold as a beverage, and thereby restricts the sale of near-beer to places where nothing else is sold. The prohibition of the sale of any other beverage or merchandise is only in connection with the sale of near-beer. In order to isolate the business of selling such beer, the lawmaker prohibited the sale of any other things under the same roof. Section 4 is a regulation of the sale of near-beer, and is therefore expressly covered by the title of the act. This court, in speaking of the subject of the Gay-Shattuck Law, said:

"There is but one object—the saloons." *State ex rel. Tax Collector v. Falkenheimer et al.*, 123 La. 623, 49 South. 214.

So in this case we might say:

"There is but one object—regulating the sale of near-beer."

It is therefore ordered that the judgment below be reversed, and this case be remanded for further proceedings according to law.

PROVOSTY, J. (dissenting). Section 4 of Act 211, p. 403, of 1914, provides as follows:

"That it shall be unlawful to sell, or offer for sale, any other beverage of any nature, kind or description, whether intoxicating or non-intoxicating, or any article of merchandise under the same roof where near-beer is sold as a beverage."

The indictment against the accused is under this section, for having sold groceries.

He contends that the object of this section, in so far as it is to make it a crime to sell ordinary merchandise or groceries, is not expressed in the title of the act, and that therefore this section is unconstitutional and null in so far as it purports to make it a crime to sell ordinary merchandise or groceries.

The title of the act reads:

"To prohibit the manufacture and sale of all substitutes for near-beer; to define near-beer and provide for the method of the manufacture thereof; regulating the sale and use of near-beer, and fixing penalties for the violation of any of the provisions of this act."

Certainly the object of making it a crime to sell ordinary groceries is not expressed in the clause:

"To prohibit the manufacture and sale of all substitutes for near-beer."

Nor in the clause:

"To define near-beer and provide for the method of the manufacture thereof."

Nor in the clause:

"Regulating the sale and use of near-beer."

Nor in the clause:

"Fixing penalties for the violation of any of the provisions of this act."

Therefore the said object is not expressed in the title of the act.

It is perfectly manifest that what the person who drafted this act intended to say in this section 4 was that it should be unlawful to sell near-beer under the same roof under which other merchandise was sold, and that he inadvertently reversed the order of things—in other words, got the wrong sow by the ear.

My colleagues take the view that to forbid the sale of ordinary merchandise under the same roof with near-beer is practically, or in effect, the same thing as to forbid the sale of near-beer under the same roof with ordinary merchandise; but, with all due deference, it seems to me that that view will not hold water. It will not stand the test of practical application.

Take, for instance, the case of a large office building, with hundreds of rooms rented to as many different persons carrying on as many different kinds of business. We know that stores are now kept in such buildings, not alone on the ground floor, but scattered throughout the building. A person selling near-beer under the roof of such a building would know that he was selling this now popular beverage under the same roof under which other merchandise was being sold; but how would the person selling ordinary merchandise know that some other person was not selling near-beer in some nook or corner of the building, on one or other of the 10, 15, or 20 floors of the building, in one or other of the hundreds of rooms. Under the doctrine of the present case, such a person thus innocently violating section 4 would be indictable. Would the court apply this section to him? I imagine not. And the court would be driven to the alternative of overruling the present case, or of announcing that it would enforce section 4, or not, as it saw fit.

Not wishing to find myself confronted by that alternative, I respectfully dissent.

On Rehearing.

PER CURIAM. Rehearing refused.

PROVOSTY, J., dissents, being of opinion the rehearing applied for should be granted.

(136 La. 910)

No. 21047.

STATE v. MANCUSO.

(Supreme Court of Louisiana. March 8, 1915.)

*(Syllabus by the Court.)*1. INDICTMENT AND INFORMATION \S 130 — JOINDER OF COUNTS—VIOLATION OF LIQUOR LAWS.

Distinct misdemeanors relating to the violation of liquor laws may be charged in separate counts of the same indictment or information.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 419-423; Dec. Dig. \S 130.]

2. CRIMINAL LAW \S 595 — CONTINUANCE — EVIDENCE TO DISCREDIT WITNESSES.

Under an indictment charging the unlawful sale of one pint of whisky, the brand of the liquor is too immaterial to warrant a continuance for a chemical analysis, for the purpose of discrediting witnesses for the prosecution.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 1323-1327; Dec. Dig. \S 595.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

John Mancuso was convicted of unlawfully selling and receiving an order for intoxicating liquors, and appeals. Affirmed.

A. R. Mitchell, of Lake Charles, for appellant. R. G. Pleasant, Atty. Gen., T. A. Edwards, Dist. Atty., of Lake Charles (G. A. Gondran, of New Orleans, of counsel), for the State.

LAND, J. Defendant was indicted on two counts:

(1) For selling and retelling intoxicating liquor, to wit, one point of whisky for \$1, without previously obtaining a license from the local authorities.

(2) For unlawfully receiving an order for the purchase of spirituous and intoxicating liquor in prohibition territory, to wit, city of Lake Charles, parish of Calcasieu.

[2] Defendant was duly arraigned and pleaded not guilty. The first bill of exception was taken to the refusal of the judge, after the state had adduced all of its evidence in chief, to grant defendant's motion for delay in order that he might, through a chemical analysis, demonstrate to the court that the contents of the flask produced by two certain witnesses for the state was not "Old Forester Whisky" as indicated by the marks and labels thereon; and as testified by

said witnesses; the purpose being to show that the testimony of these witnesses in relation to the sale of the whisky was untrue.

The motion for delay was refused by the trial judge for the following reasons:

"The state's two principal witnesses had testified that they bought a bottle of whisky from defendant; that the bottle, which was afterwards offered in evidence, was the bottle they bought. The bottle was labeled 'Old Forester Whisky' and they said that it was '____'. The granting of such a continuance is within the sound discretion of the court, and it occurred to the court that, even if it should appear that the contents of the bottle were not 'Old Forester Whisky,' but some other brand of whisky, still it would not overcome the statement that these witnesses bought a bottle of whisky from defendant. The particular brand was immaterial."

We may add that the bottle may have been so labeled, and yet not have contained that particular brand of whisky. The defendant was charged with selling a pint of whisky. The brand or quality of the liquor was immaterial. On the facts, the issue was whether the defendant had sold, as charged, a bottle of whisky labeled as stated by the witnesses for the state. Defendant testified he had not.

The district judge considered that the indefinite postponement of the trial for the purpose of an analysis was not justified by the relevancy or importance of the fact of quality sought to be proved, and concludes his per curiam as follows:

"The contents might have been other than 'Old Forester' and yet the changes have been made prior to the sale."

The issue was one of credibility, and we agree with our learned Brother below that the brand or quality of the whisky was a fact too remote and inconclusive to justify the indefinite continuance of the trial for the purpose of a chemical analysis.

[1] The second bill was taken to the refusal of the judge during the trial of the case to order the district attorney to elect between the two counts of the indictment. The judge ruled correctly that distinct misdemeanors may be charged in separate counts of the same indictment, especially when they are of the same generic class, and, further, that the question was a moot one, as the second count had been disposed of by a nolle prosequi. On the first proposition, see *State v. Isaac*, 129 La. 124, 55 South. 736, and *State v. John*, 129 La. 214, 55 South. 766.

Judgment affirmed.

\S For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

(136 La. 913)

No. 20990.

MARCEAUX v. EAST CAMERON DRAINAGE DIST. NO. 3.(Supreme Court of Louisiana. Feb. 23, 1915.
Rehearing Denied March 22, 1915.)*(Syllabus by the Court.)***1. DRAINS §2 — "GRAVITY DRAINAGE" — STATUTE.**

"Gravity drainage" provided for in paragraph 2 of article 281 of the Constitution, as amended by Act No. 192 of 1914, p. 370, is a system of drainage of land "which is susceptible of gravity drainage," and has reference to land which may be entirely drained by such system.

[Ed. Note.—For other cases, see Drains, Cent. Dig. § 17; Dec. Dig. §2.]

2. DRAINS §28—DRAINAGE SYSTEM — PETITION—TAXATION.

Taxes, or forced contributions, on land for drainage purposes, where the land has to be leveed and pumped, must be petitioned for by the landowners, resident and nonresident, of the district to be drained, as is provided for in paragraph 3 of said article 281 of the Constitution.

[Ed. Note.—For other cases, see Drains, Cent. Dig. §§ 20-23; Dec. Dig. §28.]

*(Additional Syllabus by Editorial Staff.)***3. WORDS AND PHRASES—"DRAINAGE."**

"Drainage," as applied to land, contemplates the removal of water therefrom by means of an artificial channel or trench.

[Ed. Note.—For other definitions, see Words and Phrases, Drainage.]

Appeal from Fifteenth Judicial District Court, Parish of Cameron; Winston Overton, Judge.

Action by Dupraville Marceaux against the East Cameron Drainage District No. 3. From a judgment for plaintiff, defendant appeals. Affirmed.

T. Arthur Edwards, Dist. Atty., and McCoy & Moss, both of Lake Charles, and Robert L. Knox, of New Orleans, for appellant. Robira & Miller, of Jennings, for appellee. Foster Milling, Saal & Milling, Frank W. Hart, H. L. Favrot, Richardson & Soule, and Oliver S. Livaudais, all of New Orleans, amici curiæ.

SOMMERVILLE, J. Plaintiff is the owner of 959 acres of overflowed land in the East Cameron Drainage District No. 3, and he asks for judgment against the authorities of the district, declaring all of the proceedings up to and including an election held on June 23, 1914, and the promulgation thereof on July 3, 1914, to be illegal, invalid, and void, and that an ordinance levying and imposing an acreage tax of 12 cents per acre per annum on all lands situated in said district, and authorizing the issuance of bonds in the sum of \$260,000, be declared illegal, and that same cannot serve as a basis for the collection of the tax sought to be imposed, etc.

Defendant answered that plaintiff's land would be improved by the drainage to be constructed from the proceeds of the tax and

the bonds to be issued, and that the increased value of the land would amount to more than the total tax levied against it. It alleged that the money derived from the tax and bonds would be used for the purpose of constructing a canal, i. e., a canal designed to drain all of the land included in the district, including plaintiff's land, by gravity; and that the results from this gravity canal would greatly enhance the value of plaintiff's land, and will make it fit for pasturage throughout the year; and that said gravity drainage canal would be the basis for the draining of the whole of said district when it will have been divided into units for the system of perfect drainage by leveeing and pumping.

Article 281 of the Constitution of 1898 provides that taxpayers, in municipal corporations, parishes, and drainage districts, by an election held for the purpose, may tax themselves an ad valorem tax for drainage and other purposes. The original article contains but two paragraphs. It has been amended at various times, until it now contains six paragraphs, as set forth in the Constitution of 1913. It was again amended in 1914 by the passage of Act No. 192, p. 370, which act, or joint resolution, was adopted at the general election in 1914.

This last-mentioned act amended paragraphs 2 and 3 of said article 281 of the Constitution of 1913; and in paragraph 2 gravity drainage in drainage districts is authorized on a majority vote of the property taxpayers of the drainage district where land "is susceptible of gravity drainage." The defendant drainage district proceeded, under this paragraph, to levy a forced contribution of 12 cents an acre on the land within said district, after an election favorable to such work.

And plaintiff contends that the governing authorities in said district could not impose a forced contribution on the lands within that district except upon a petition of the taxpayers, preceding the vote or election by the property holders, as is provided for in paragraph 3 of the article 281.

[2] The only question submitted for the decision of the court is as to whether it was necessary that the imposition and collection of the contribution sought to be enforced against plaintiff and his property had to be preceded by a petition of the property holders of that district or not.

Paragraphs 2 and 3 of article 281 of the Constitution, as amended, are as follows:

"Paragraph 2. Police juries in any parish or parishes may in accordance with law create drainage districts, which in addition to the powers hereinabove granted, shall have further power and authority to establish and maintain drainage systems and the governing authorities of such districts, when authorized by a majority in number and amount of the property taxpayers of said district qualified to vote under the Constitution and laws of the state of Louisiana who

vote in an election held for that purpose, may, for the purpose of establishing and maintaining gravity drainage in such districts, impose and collect for a period not exceeding forty (40) years forced contributions or acreage taxes not exceeding fifty cents (50 cts.) per acre per year on each and every acre of land, which is susceptible of gravity drainage, in the subdivision where such an election is held. The governing authority of such subdivisions, when authorized as set forth, may incur debt and issue negotiable bonds to represent same, secured by the forced contribution or acreage taxes above described provided that the total amount of debts thus incurred or bonds issued shall not exceed in principal and interest the aggregate amount to be raised by said annual contributions or acreage taxes during the period for which the same are imposed and that no such bonds shall be issued for any other purpose than that for which the said contributions or acreage taxes, are voted, to run for a longer period than forty (40) years, bear a greater rate of interest than five per centum per annum, payable annually or semiannually, or to be sold for less than ninety per centum (90%) of par. And the board of commissioners of drainage district without submission to the taxpayers are authorized to levy additional taxes under the terms and conditions of this article and within the limits fixed thereby for the purpose of perfecting and completing any system of drainage eighty per cent. of which shall have been accomplished at the time of said additional levy of taxes, and to fund the avails of said additional levy of taxes into bonds under the terms and conditions set forth in the present article.

"Paragraph 3. When the character of any land is such that it must be leveed and pumped in order to be drained and reclaimed the board of drainage commissioners of the district in which the land is situated, shall upon the petition of land owners, whether individuals or corporations, resident or nonresident, owning not less than a majority of acres in the area to be affected, ascertain the cost per acre of draining and reclaiming said land incur debt against each and every acre of land thus situated for an amount sufficient to drain and reclaim it, and to issue for such debt negotiable bonds for the total aggregate amount of the total cost of such drainage, which bonds shall run not longer than forty (40) years from their date and bear interest at a rate not exceeding five per centum per annum, payable annually or semiannually, and shall be sold for not less than ninety per centum (90%) of par; and said board of drainage commissioners shall each year as long as any bonds are outstanding levy annually upon each and every acre of land, whether public or private, situated in said drainage or subdrainage district, forced contributions or acreage taxes in an amount per acre sufficient to maintain the drainage of the said district or subdrainage district, to pay the interest annually or semiannually and the principal falling due each year, or such amount as may be required for any sinking fund for the payment of said bonds at maturity, provided, that such forced contributions or acreage taxes for all purposes shall never exceed three dollars and fifty cents (\$3.50) per acre per annum.

"All bonds heretofore issued under and by virtue of this article 281 of the Constitution by the governing authority of any subdivision, which have heretofore not been declared invalid by a judgment of a court of last resort in the state of Louisiana and more than sixty (60) days have elapsed since the promulgation of the proceedings evidencing the issuing of said bonds, are hereby recognized and declared to be valid and existing bonds and obligations of the district or subdivision issuing the same, and no court shall have jurisdiction to entertain any contest wherein their validity or constitutionality is questioned."

[1] Article 281, in its entirety, provides for systems of drainage and other works of public improvement to be carried on in the several drainage and other districts of the state. And paragraphs 2 and 3 of the article refer to lands of different conditions, and to different modes or systems of drainage. Paragraph 2 refers to land which may be drained by gravity drainage; which drainage defendant, in its answer, defines as:

"A canal designed to drain all of the land in the defendant's district, including that of plaintiff, by gravity."

[3] In providing that drainage districts may "provide and maintain drainage systems" within said districts, we understand the language of the Constitution to mean that the districts must be drained by the systems established; that is, that the land drained should be rid of its superfluous moisture by the system adopted and established in any one district. Drainage, as applied to land, ordinarily contemplates the removal of the water therefrom by means of an artificial channel or trench. 14 Cyc. 1023, 1024.

It is not at all clear that the legislators, in Act No. 192 of 1914, p. 370, had the intention to depart from the ordinary meaning of the word "drainage" when they provided for the gravity drainage of the lands of the state. The meaning of the words used is clear and unambiguous, and the court will not seek for the possible intention of the legislators which is not expressed by the language used in the act.

The evidence of defendant in the case shows that the land of plaintiff, together with that of all other land in the defendant district, is swamp or overflowed land, and that the proposed gravity drainage would have the effect of reducing the water on said land from one to two feet; and it further shows, that the land of plaintiff would still continue to be under water, and that it would not be habitable or cultivable. The only use to which it might be put would be that of pasturage; and then it would be subject to the ebb and flow of the tide which exists in the Mermentau river, which is close to the Gulf of Mexico.

The engineer of the defendant district further testified:

"I would not have advised that [gravity drainage] being all that was necessary to make the land cultivable. * * *

"The levees would be necessary to keep the overflow of water from the river and Gulf, and it would be necessary to lower the water level on the land in order to raise crops other than hay or grass on this land. * * * by a system of pumps."

The said engineer further testified that it would be necessary, in addition to the proposed gravity drainage, that the district should be subdivided, so that the land might be reclaimed from water to make it habitable and cultivable. He further testified:

"I consider they [gravity canals] will be of practical value in two ways: That they will assist in removing the excess water on the land,

and will furthermore act as a nucleus for further developments, which will be contemplated in the shape of installing pumps and construction of levees. The system as outlined, according to the general practice, would be entirely inadequate. Ditches would be necessary to construct—ditches of considerable area, at least every mile, with small ditches between, probably as close as 300 feet apart. * * *

"Q. And without the pumps and these levees, the ditches that you speak of, the land with only the canals that you propose as shown on this map, would not be drained, would it, sufficient to raise a crop on it? A. No, sir."

He further testified that the Mermentau river overflowed the land in the district. And in conclusion he says:

"It seems to me that in this particular section of the country all crops are a gamble, more or less, and I don't know that his gamble will be any greater than at any other point."

The evidence is very clear to the effect that to drain the land of plaintiff of the surplus water on it that it would have to be leveed, and that pumps would have to be used, and that, unless these things were done, the land would not be either habitable or cultivable.

Paragraph 3 of article 281 embraces the drainage system which may be successfully used in the district of the defendant; and it follows that the drainage authorities therein may not levy forced contributions upon the land of that district, except on petition of the property holders, as is provided for in said paragraph 3; and, as no such petition was made in the defendant district, the tax levied and sought to be collected cannot be enforced. The ordinance levying it is null and void.

It may well be that a gravity drainage system might be adopted in certain districts of the state, and that the costs of such system would be small in comparison with that of other systems, as provided for in the law. And it may be that the gravity drainage, might be used in connection with a system for drainage by levees and pumps. But, from the pleadings and evidence in this case gravity drainage is not feasible for draining the land in the defendant district of all of the surplus water thereon.

It may be, as argued by defendant, that drainage is a relative term, and that land may be said to be drained if water be removed therefrom, even though it be not all removed, and that it is practical to have gravity drainage of a tract of land down to a certain water level, even though thereafter it may be necessary to employ levees and pumps; but gravity drainage can hardly be considered as a system of drainage, as is provided for in the Constitution, unless it drains the land entirely, so that it may be cultivated, unless, it only forms part of another drainage system, such as by the use of levees and pumps which will render the land cultivable.

This view is sanctioned by the language contained in paragraph 2, where it refers to land "which is susceptible of gravity drain-

age." The land of the district involved in this suit cannot be said to be susceptible of gravity drainage, in the ordinary acceptance of such language, while it continues to be covered with water.

This view is strengthened by the provision in section 21, Act No. 317 of 1910, p. 552, which says that:

"Such acreage tax shall only be imposed upon such lands in the district as are especially benefited by the drainage."

Judgment affirmed.

O'NIELL, J., concurs in the decree only.

(136 La. 920)

No. 20969.

STATE ex rel. LOUISIANA NAT. BANK v. HALL, Governor, etc.

(Supreme Court of Louisiana. March 8, 1915.)

(Syllabus by the Court.)

1. COLLEGES AND UNIVERSITIES ↔7—STATE UNIVERSITY — BOARD OF SUPERVISORS — QUORUM.

Act No. 145 of 1876 provides that five members of the board of supervisors of the Louisiana State University and Agricultural and Mechanical College "shall constitute a quorum for the transaction of business; provided, that all the acts of said such [sic] five members, at said such meeting, shall be submitted for ratification or rejection at the next meeting of the board of supervisors, when a majority of all the fourteen members of the board may be present"—and there is no provision in the act for an "executive committee." Less than five members do not, therefore, constitute a quorum, either of the board or of any executive committee of the board, with power to transact business; hence where, during the intervals between the meetings of the board, three of the members meet together and assume to award or enter into a contract, their action imposes no obligation on the board, unless the board thereafter ratifies it and makes it its own; and a fortiori is that true where it appears that, of the three members who have so met, two of them were personally interested in the subject-matter of the alleged contract and asked to be excused from voting upon that account.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. ↔7.]

2. COLLEGES AND UNIVERSITIES ↔7—CONTRACT AFFECTING UNIVERSITY FUNDS—MANDAMUS.

Mandamus will not lie to compel the Governor, in his capacity of ex officio president of the board of supervisors of the Louisiana State University, etc., to sign a contract affecting the funds of the university which the board, in which the powers of the university are vested, has never entered into, authorized, ratified, or done anything about that could reasonably have misled the relator into the belief that it had taken such action. And a fortiori is that true where the board of supervisors, which alone is authorized to represent the university, is not made a party to the proceeding.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 16-19; Dec. Dig. ↔7.]

3. COLLEGES AND UNIVERSITIES ↔6—UNIVERSITY FUNDS—DONATION—CUSTODY.

Money donated to "the Louisiana State University," etc., by the Peabody Educational

Board, for the purposes of the university, is as much a part of the funds in charge of the board of supervisors of the university, within the contemplation of the law (Act No. 205 of 1912) regulating the custody of such funds, as any other money dedicated to such purposes and placed in charge of said board.

[Ed. Note.—For other cases, see Colleges and Universities, Cent. Dig. §§ 6, 11–15; Dec. Dig. § 6.]

Appeal from Twenty-Second Judicial District Court, Parish of East Baton Rouge; H. F. Brunot, Judge.

Mandamus by the State, on relation of the Louisiana National Bank, against L. E. Hall, Governor and President of Board of Supervisors of the Louisiana State University and Agricultural and Mechanical College. From judgment for relator, defendant appeals. Reversed, and proceeding dismissed.

R. G. Pleasant, Atty. Gen., Harry Gamble, Asst. Atty. Gen., and Laycock & Beale, all of Baton Rouge, for appellant. Taylor & Porter, of Baton Rouge, for appellee.

MONROE, C. J. Defendant prosecutes this appeal from a judgment making peremptory an alternative writ of mandamus, directed to him, in his capacity as president of the board of supervisors of the Louisiana State University and Agricultural and Mechanical College (hereafter called the "University") and commanding him to forthwith execute agreeably to the provisions of Act No. 205 of 1912 and in accordance with an award made on June 23, 1914, a contract by and between said board and the Louisiana National Bank, relator herein, recognizing said bank as the fiscal agent of said board and binding said board to deposit in said bank, for the period ending August 15, 1916, all the funds belonging to, or under the control of, said board, including \$40,000, commonly known as the "Peabody Fund," now on deposit in the Bank of Baton Rouge.

Act No. 205 of 1912 required the board of supervisors of the University to send out notices 30 days before the expiration of its then contract, calling for bids for the custody, on deposit, of all the funds in its charge, and "to let such funds to the highest bidder therefor consistent with the safety of such funds." Section 7, p. 420. And on May 23, 1914, notices were sent out, by the authority of what is called the "Executive Committee" of the board, to the effect that at 11 o'clock a. m., on June 23, 1914, bids for the custody of the funds of the University would be opened, in the president's office, and that the contract would be let in accordance with said act. Among the bidders who responded were the Capital City Bank, Baton Rouge Bank and Louisiana National Bank, all of Baton Rouge; each of the two first mentioned bidding for one-half, and the last mentioned for all, of the funds, and each offering to pay interest at 4.99 per cent. (which was the highest rate offered), and to comply with the act of 1912.

Of the so-called Executive Committee, by which the bids were received and opened, there were three members (out of five constituting the whole committee) present, and two of them asked to be excused from voting on the ground that they were holders of stock in one of the banks above mentioned. With the concurrence, however, of the remaining member of the committee and the representative of the banks, who agreed that the funds should be equally divided between them, the contract was awarded to the banks hereinabove mentioned. There was a delay of several weeks following the award, and, relator having made demands that the contract be reduced to writing and executed, there was tendered to it, about August 15th, an instrument purporting to express the contract, but excluding therefrom the \$40,000 heretofore mentioned, which was then on deposit, to the credit of the University, in the Bank of Baton Rouge, which instrument relator refused to sign, and thereupon brought this suit, alleging that it is the mandatory duty of the ex officio president of the University to sign a contract in which shall be included the \$40,000 in question, and praying that he be ordered so to do.

To the demand thus made, there was an exception and answer to the effect that the action of the Executive Committee (so-called) imposed no obligation on the University unless and until ratified by the board of supervisors, and that the \$40,000 referred to is a special fund, not within the contemplation of Act 205 of 1912.

[1] The University, as now existing, was created by Act No. 145 of 1878 (published with the acts of 1878, at page 18), being an act entitled—

"An act to unite the Louisiana State University * * * and the Agricultural and Mechanical College * * * under the name * * * of the Louisiana State University and Agricultural and Mechanical College, and to establish and locate the same temporarily at Baton Rouge."

The act provides (section 5) that the University shall be under the control of 15 supervisors "who shall be a body corporate, under the style and title of the board of supervisors of the Louisiana State University and Agricultural and Mechanical College"; that (section 6) the Governor shall be ex officio member of the board; that the 12 remaining members shall be appointed by the Governor, by and with the advice and consent of the Senate; that one of the 12 shall reside in the parish of East Baton Rouge; "that the member * * * appointed for the parish of East Baton Rouge, * * * shall be ex officio the vice president of the board. * * * Five members of the board, * * * including the president or vice president shall constitute a quorum for the transaction of business; provided, that all the acts of said such five members, at said such meeting, shall be submitted for

ratification or rejection at the next meeting of the board of supervisors, when a majority of all the fourteen members * * * may be present."

[2] It will be seen, therefore, that five members constitute a quorum of all the members of the board, but with authority to take tentative action only, and that the action taken by them can bind the board only in the event of its being ratified by the board, at its next meeting. It will also be seen that, whilst any five members may, perhaps, assemble and call themselves a quorum, such action does not constitute them an executive committee; for if it did, perhaps three of the five could act for the committee, whereas no less than five can act as a quorum of the board. No one was able to testify that any "Executive Committee" has ever been appointed, though it appears that members of the board have, as they have supposed, been members of such a committee for many years. All agree that the action of the committee has always been referred to the board, at its next ensuing meeting, for ratification or rejection, and no one recalled an instance in which the board has failed to ratify. It remains, nevertheless, that the action here in question had never been submitted to the board at the time this suit was brought, and hence had never been ratified. Beyond that, as two (of the three) members who were present when that action was taken recused themselves, it is evident that, even supposing that there was a committee (of five) there was no action taken by it, since only one of the members participated in what was done. It is said that the respondent signed the contracts (excluding the \$40,000) with the other two banks, and that he is estopped to deny his authority to sign the contract here set up. The Governor, by virtue of his office, appoints the members, and is president of the board of supervisors; but as ex officio, president of the board he is authorized merely to preside over its deliberations, with the right to vote, implied (perhaps) from that fact, and (undoubtedly) from the fact that he may be one of the five members required to make a quorum, but

that authority and right vest in him no power to bind or estop the board with respect to an alleged contract which it has never entered into, authorized, ratified, or done anything about that could reasonably have misled the relator into the belief that it had taken such an action; for the most that can be said is that, agreeably to the terms of its charter, it has allowed five of its members, constituting a quorum of the whole body (but assuming that they constituted an Executive Committee), to enter into tentative engagements, during the intervals between its meeting, subject to the condition (which is shown never to have been disregarded) that their action should be submitted to its next meeting, for ratification or rejection, whereas in this case relator is relying upon the action of one member of the board out of three who were present at a supposed meeting of a quorum of the board (where five were required), or of the supposed committee of five, which action has not been submitted to or ratified by the board. Beyond that the matter is one in which the University is concerned and the "power to sue and be sued * * * and, in general, to do all acts, for the benefit of the * * * University, * * * which are incidental to bodies corporate," is conferred upon the board of supervisors (Act 145 of 1876, § 5), and not upon its ex officio president, and the board has not been cited to appear in this case.

[3] There is no merit in the other defense, since the \$40,000 to which it refers was sent by the Peabody Educational Board to the University to be used for the purposes of the latter, and, unless expended for those purposes, is still in the possession of the University, and is just as well within the contemplation of act No. 205 of 1912 as any other fund so situated.

For the reasons thus stated mandamus will not lie.

It is therefore ordered and decreed that the judgment appealed from be set aside, that relator's demands be rejected, and that this proceeding be dismissed at its cost.

(107 Miss. 363)

PEOPLE'S BANK v. LAMAR COUNTY BANK (No. 17154.)

(Supreme Court of Mississippi. April 5, 1915.)

1. BANKS AND BANKING \Leftrightarrow 101—OWNERSHIP OF STOCK IN OTHER BANKS—TRANSFER—VALIDITY.

Under Code 1906, § 5005, providing that no corporation shall purchase or own the capital stock or any part thereof of any other competing corporation, and that any corporation offending the provision shall forfeit its charter or its right to do business in the state, the acquisition by a bank of stock of another bank is a mere ultra vires act of which the state alone may complain.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 237, 238; Dec. Dig. \Leftrightarrow 101.]

2. BANKS AND BANKING \Leftrightarrow 40—TRANSFER OF STOCK—BONA FIDE PURCHASER WITHOUT NOTICE.

A corporation issuing a second certificate of stock without surrender and cancellation of the first is liable to any subsequent purchaser of the first for value without notice.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 49, 51-54; Dec. Dig. \Leftrightarrow 40.]

3. CORPORATIONS \Leftrightarrow 149—TRANSFER OF STOCK—BONA FIDE PURCHASER WITHOUT NOTICE.

One accepting corporate stock in payment of a debt due it to the extent of the value of the stock is a purchaser for value as if it had paid money.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 539-546; Dec. Dig. \Leftrightarrow 149.]

Reed, J., dissenting.

On suggestion of error. Sustained, and judgment of trial court affirmed.

For original opinion, see 66 South. 219.

McIntosh Brothers, of Collins, and Hathorn & Hearst, of Hattiesburg, for appellant. Tally & Mayson, of Hattiesburg, and Mayes & Mayes, of Jackson, for appellee.

SMITH, C. J. The facts of this case necessary to now be stated, in addition to what was said relative thereto in our former opinion, are that the certificate of stock here in question was lost by its former owner, McDonald, and on March 20, 1908, a new certificate was issued to him therefor, which new certificate, or, rather, another issued in lieu thereof, is now owned by J. H. McLeod. In April, 1909, the certificate first issued, the one here in question, was assigned by McDonald to appellee in part payment of an indebtedness due it by him. Whether McDonald had in fact lost this certificate at the time he obtained the issuance of the new certificate does not appear, and is not material.

[1] The ground upon which we reversed the judgment of the court below was that appellee's acquisition of this certificate of stock was in violation of section 5005 of the Code, and therefore it could not invoke the aid of the courts in enforcing any right which it claimed to have thereby acquired. 66 South. 219.

Appellant has now called to our attention,

for the first time, the case of Watts v. Buchanan, 92 Miss. 543, 46 South. 66, in which the acquisition of stock by one of two competing corporations in the other was treated as a mere ultra vires act and of which the state only could complain. The construction there put upon the statute is controlling here unless that case is to be overruled, and this we do not think should be done.

[2, 3] Two other reasons are assigned by appellant for reversing the judgment of the court below: First, that, when it in good faith issued the second certificate of stock, the first ceased to be binding upon it; second, that appellee was not a purchaser for value. It is stated in 4 Thompson on Corporations, § 3522, that "stock properly issued is valid and binding until taken up by the corporation and canceled." Whether this be true or not, it is beyond question that by issuing the second certificate without the surrender and cancellation of the first appellant became liable to any subsequent purchaser for value of the first who was without notice of the issuance of the second (10 Cyc. 634); and, when appellee accepted the stock in payment of the debt due it by McDonald to the extent of its value, it became a purchaser thereof for value to the same extent as if it had paid the money. Soule v. Shotwell, 52 Miss. 236; Harris v. Lombard, 60 Miss. 29.

Suggestion of error sustained and judgment of the court below affirmed.

REED, J. I cannot agree to the affirmance of this case. My reasons for declining to join with the majority of the court in sustaining the suggestion of error and affirming the case are fully stated in our former opinion appearing in 66 South. 219.

It is stated in the present opinion that this case is controlled by the decision in the case of Watts Mercantile Co. v. Buchanan, 92 Miss. 543, 46 South. 66. I note quite a difference in the two cases. In the Watts Case, Buchanan sold his interest in the Alberta Hoop Company to the Watts Mercantile Company. The suit was upon a promissory note given by the vendee to evidence the purchase price. To escape the payment of the note, the company defended on the ground that the transaction was ultra vires, because it involved a purchase by one corporation of an interest in another. It seems that the Watts Company had been part owner and stockholder of the Hoop Company, and when it bought from Buchanan it practically owned the entire company. Judge Calhoun delivering the opinion of the court, after reciting the facts, said:

"We are thus drawn to consider the bald proposition whether a corporation, which makes" an ultra vires * * * "purchase from a private individual who has the power to sell, can set up its own ultra vires to defeat payment, and at the same time hold on to the" proceeds of "the contract."

In referring to the statute forbidding the purchase by one corporation of the capital stock of another, and the penalty which is provided that the corporation offending should forfeit its charter and be proceeded against by the attorney general, the judge continued:

"It might be enough in the case before us to say that the penalty denounced is against the purchasing corporation, and that it would have to be stretched to cover a case as against an individual seller."

The decision of the court was planted particularly on the language of a New York court (*Seymour v. Spring Forest Cem. Ass'n*, 144 N. Y. 333, 39 N. E. 365, 26 L. R. A. 859) which is as follows:

"That kind of plunder which holds on to the property, but pleads the doctrine of ultra vires against the obligation to pay for it, has no recognition or support in the law of this state."

Judge Calhoun then said:

"We subscribe to that doctrine in the particular case we have on hand."

It will be noted that in the *Watts v. Buchanan* Case the court was dealing with the enforceability of an ultra vires contract between the parties thereto. The court was applying the rule taken from the language of the New York court to the particular case in hand. The *Watts* Company, a corporation, was seeking to defeat the collection of its promissory note by setting up its own ultra vires act, and at the same time holding on to the proceeds of the contract.

This case is different. Appellant is not endeavoring to hold on to property acquired by any ultra vires act on its part. It is not seeking to defeat payment of any indebtedness it owes. It has not been guilty of any ultra vires act. It has received no benefit from such an act.

What appellee complains of is appellant's refusal to transfer on its books stock of its company which was acquired by appellee in clear violation of the statute.

Appellant is not pleading ultra vires. Appellant bases its refusal to make the transfer upon the unlawfulness of appellee's purchase. Appellee claims its right to the stock through the medium of an illegal transaction. The contract in this case is illegal because in breach of a statute. I think that this was sufficient ground for appellant's refusal to make the transfer, and I do not believe that this case should be controlled by the decision in the case of *Watts Mercantile Co. v. Buchanan*.

(109 Miss. 140)

YAZOO & M. V. R. CO. v. DOWNS.
(No. 16871.)

(Supreme Court of Mississippi. April 5, 1915.)

1. MASTER AND SERVANT §112, 155—INJURY TO SERVANT—NEGLIGENCE—SAFE PLACE TO WORK—FAILURE TO WARN OF PERILS.

A section hand pulled out by use of a claw-bar spikes holding old rails. One of the spikes gave way suddenly, and he fell to the ground,

smashing his finger on one of the new rails distributed along the right of way for use in replacing the old ones. *Held*, that the place of work was not unsafe because of the presence of the new rails, and the company was not required to give any warning as to dangers which were ordinary hazards patent to the average workman or easily discoverable by ordinary care.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 212, 213, 218-223, 310; Dec. Dig. §112, 155.]

2. MASTER AND SERVANT §276—PERSONAL INJURIES — FAILURE TO FURNISH PROPER MEDICAL ATTENTION.

Where an injured railroad employé placed himself under the care of a district surgeon of the hospital department of the company, and received from him medical and surgical treatment, and there was no proof that the surgeon was incompetent, or that he failed to give proper attention to the case, or that there was unreasonable delay in sending the employé to a hospital, the evidence did not authorize recovery of damages from increased suffering due to failure to receive proper medical attention.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. §276.]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by J. T. Downs against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and rendered for defendant.

Mayes & Mayes, of Jackson, for appellant. P. P. Lindholm, of Lexington, for appellee.

.REED, J. Appellee obtained a judgment against appellant for \$500 for damages from injury to a finger, which he alleged was caused by appellant's negligence. He was in the employ of appellant as one of a section gang. At the time of the injury the gang was at work on one of appellant's main line tracks, substituting new rails for old ones. The new rails had been distributed along the right of way. Appellee, with other laborers, was engaged in pulling out spikes, holding the old rails to the cross-ties, by the use of a clawbar, or iron lever used to pull spikes, when one of the spikes gave way suddenly, perhaps by reason of its head snapping off, and he fell to the ground with the bar in his hand, mashing his finger between the bar and one of the new rails.

Appellee claimed liability on the part of appellant because: (1) He was not furnished a reasonably safe place to work; and (2) he should have been warned and instructed as to the alleged perils of his position. He further claimed that he did not receive the medical attention to which he was entitled as a member of the hospital department of appellant company, and that there was a failure to get him to a proper place of treatment in a reasonable time.

[1] We do not see that any of these contentions by appellee are supported by the proof. The new rails strewn beside the track

along the right of way, ready for use in replacing the old ones, did not render the roadbed an unsafe place for the work which was being done by appellee. The track and roadbed were reasonably safe places in which appellee and his fellow laborers could do their work in replacing new rails for old ones, which included the pulling of spikes from the old rails.

It was not incumbent upon the appellant to give any warning and instruction to appellee regarding any dangers or perils connected with the work in which he was engaged. Such dangers were ordinary hazards, patent to the average workman, or such as were easily discoverable in the exercise of ordinary intelligence and care. The proof shows that appellee was not without experience in the work of a section hand about railroad tracks and roadbeds, and that the work then being done was not unusual, but was ordinary. From the facts in evidence we believe that appellant could have rightfully assumed that appellee possessed such experience and judgment ordinarily found in workmen of his grade, and that he was reasonably skilled in the work he was undertaking.

[2] Conceding for this consideration only, but not deciding, that appellee might have a right to recover for damages from increased suffering due to a failure to receive proper medical attention and hospital treatment to which he was entitled as a member of the hospital department of appellant company, we do not find that the proof in this case sustains his claim to such damages. When he was injured he placed himself under the care of one of the district surgeons of the hospital department, and received from him medical and surgical treatment in his home town. It does not appear from the proof that this surgeon was incompetent, nor is it shown that he failed to give the proper attention to the case. Appellee was finally sent to a hospital at the suggestion of the surgeon, who continued to treat him until he was furnished transportation and sent to the hospital. No unreasonable delay is shown in furnishing the transportation and sending appellee to the hospital.

The peremptory instruction asked by appellant when all of the testimony had been introduced should have been granted by the trial court.

Reversed, and judgment here in favor of appellant.

(109 Miss. 143)

YAZOO & M. V. R. CO. v. MESSINA.
(No. 16861.)

(Supreme Court of Mississippi. April 5, 1915.)

1. CARRIERS \S 321—DERAILMENT OF TRAIN—PRIMA FACIE EVIDENCE—INSTRUCTIONS.

Where, in an action for injuries from derailment of the train on which plaintiff was riding either as trespasser or licensee, plaintiff's evidence as to the speed of the train tended to show that the engineer's negligence was wanton and in reckless disregard of consequences,

it was not error to charge Code 1906, \S 1985, providing that in all actions against railroad companies for injury to persons or property, proof of injury by the running of locomotives or cars shall be prima facie evidence of want of reasonable skill and care of the servants of the company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1247, 1326-1336, 1343; Dec. Dig. \S 321.]

2. CARRIERS \S 321—PERSONAL INJURIES—INSTRUCTIONS—PROOF.

In an action for injuries from the derailment of a train being run at an excessive speed, an instruction to find for plaintiff if all the evidence left it doubtful as to whether defendant had met the burden placed on it by the prima facie evidence statute (Code 1906, \S 1985), was erroneous, as placing on defendant a greater burden than the law required it to sustain; the burden of proof under the statute being merely that of showing the facts, when the liability will be determined by them.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. \S 1247, 1326-1336, 1343; Dec. Dig. \S 321.]

3. TRIAL \S 255—INSTRUCTIONS—REQUEST—NECESSITY.

Under Code 1906, \S 793, prohibiting the giving of instructions not requested in writing, defendant could not predicate error on the court's failure to give instructions counter to those given at plaintiff's request, where no request was made for the counter instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 627-641; Dec. Dig. \S 255.]

4. TRIAL \S 255—INSTRUCTIONS—REQUESTS—NECESSITY.

In a personal injury case, failure of the court to limit, pursuant of the concurrent negligent statute, the quantum of damages which plaintiff was entitled to recover was not error, in the absence of request for such an instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. \S 627-641; Dec. Dig. \S 255.]

5. APPEAL AND ERROR \S 1064—HARMLESS ERROR—INSTRUCTIONS.

Where, in an action for injuries from the derailment of a train at a point where the water covered the track, the evidence showed that, though the engineer knew of the threatened danger and was rounding a curve, and on account of the existing weather conditions could not see further than 25 yards in front of his locomotive, he was running the engine at such speed that he was unable to bring it to a standstill within less than 150 yards, the giving of an instruction which was erroneous, as placing on defendant a greater burden than was required to meet the prima facie case made out by proof that the injury was inflicted by a running train, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 4219, 4221-4224; Dec. Dig. \S 1064.]

6. WITNESSES \S 211—"PRIVILEGED COMMUNICATION"—SURGEONS—KNOWLEDGE ACQUIRED FROM EXAMINATION OF PATIENT.

The word "communications," as used in Code 1906, \S 3695, providing that communications made to a surgeon by a patient under his charge shall be privileged, includes matters ascertained by a railroad surgeon from the examination of a person injured in a wreck; it not being necessary that the communications be by words in order to make them privileged.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 768, 773; Dec. Dig. \S 211.]

For other definitions, see Words and Phrases, First and Second Series, Privileged Communication.]

7. CARRIERS \Leftrightarrow 282—FREE TRANSPORTATION— APPLICATION OF STATUTE.

The act of Congress to regulate commerce, approved June 29, 1906, c. 3591, 34 Stat. 584, amended April 13, 1908, c. 143, 35 Stat. 80, and June 18, 1910, c. 309, 36 Stat. 544 (U. S. Comp. St. 1913, § 8563), prohibiting carriers from giving any free pass or free transportation, did not apply to a case where a person was injured from the derailment of a train while he was riding on the tender with the consent of the engineer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. \Leftrightarrow 282.]

Appeal from Circuit Court, Holmes County; Monroe McClurg, Judge.

Action by V. P. Messina against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

R. V. Fletcher, of Chicago, Ill., and Mayes & Mayes, of Jackson, for appellant. Barbour & Henry, of Yazoo City, Burch & Stricker, and C. D. Potter, all of Jackson, for appellee.

COOK, J. Mr. Messina instituted suit against the railroad company for personal injuries, and recovered a judgment for \$10,000. The defendant railroad company appeals.

The evidence for plaintiff discloses that plaintiff had been employed by the railroad company as a switchman; that the day before the injury he had decided to lay off and go to Memphis, and in pursuance of this purpose he left Jackson on a freight train to go to Canton; he traveled deadhead, with the permission of the train crew, to Canton. About midnight of the next day he and several companions secured the permission of the engineer of the north-bound passenger train to ride on the tender of the locomotive from Canton to Memphis. The engineer denied this, and said he had no knowledge that the party was on the tender. Before the train left Canton the engineer was given a telegram from the train dispatcher, which read: "More or less rain all over district tonight." The plaintiff, Messina, and his companions boarded the locomotive as it pulled out of Canton, and rode to Durant on the tender. When the train reached Durant the engineer received another telegram from the train dispatcher, reading:

"No. 5 reports water high between Beatty and Sawyer; have had very hard rains in there past 3 hours; water over the track but no damage reported, at Sawyer."

The train then proceeded on its way. There was no scheduled stop between Durant and Winona. After the train passed Beatty, it was then in the storm zone. The engineer testified that he then reduced his speed from 50 miles per hour to 35 miles per hour. At the place where the derailment occurred, and for some distance south thereof, a creek paralleled the railroad right of way, crossing the track under a trestle about 30 yards

wide. About 250 yards south of this trestle there was a curve in the track, and the trestle could not be seen from a north-bound train until the curve was rounded. The locomotive was running 35 miles per hour according to the engineer's testimony, and 50 to 60 miles according to plaintiff's evidence, when the water over the track came in view of the engineer, after he had passed the curve. The engineer said that he could not have stopped his train in less than 150 yards, meaning, perhaps, that if the train had remained on the track, it would not have been possible to have stopped the train in less than 150 yards. When the danger was discovered the emergency brakes were applied; the engine ran 100 yards, leaving the track in the meantime, and finally "laid down," with the machinery still running. Three of the cars attached to the locomotive were derailed, plaintiff was caught between the tender and one of these cars and permanently crippled. The extent of the injuries and the consequent suffering justified a verdict for the amount rendered by the jury.

There is no material conflict in the evidence, except upon the question as to whether or not plaintiff was riding on the engine with the knowledge and consent of the engineer. This question was a question of fact, and its solution was submitted to the jury. It is conceded by counsel for plaintiff that plaintiff was a trespasser, or a mere licensee, and that the defendant owed him no duty, except to refrain from willfully and wantonly injuring him. If the engineer did not know that plaintiff was riding on the engine, it is conceded that plaintiff must lose his case. Accepting this as a correct interpretation of the law of the case, we find that the disputed question of fact was submitted to the jury.

[1] Appellant earnestly insists that the facts as to just how and why the wreck occurred were proven, and therefore the instruction upon the prima facie statute (section 1985, Code of 1906) should not have been given. This contention, we think, is not supported by the record. If the evidence for plaintiff in regard to the speed of the train is to be taken as true, the negligence of the engineer was so flagrant that the court would have been warranted in instructing the jury peremptorily that his conduct was wanton and in reckless disregard of the consequences. If it can be said that the engineer's estimate of the speed of the train raised a question of fact for the jury's decision, we think the conflict of evidence on this point was submitted to and decided by the jury.

[2] The instruction based upon the statute was a little too stout in some particulars, one of which is that the jury should not have been told, "If all the evidence leaves it doubtful," as to whether the defendant has not met the burden. As recently pointed out by this court in *Gentry v. Gulf & Ship Island*

R. R. Co., 67 South. 849, this language places a greater burden upon the defendant than the law requires it to sustain. In order to meet the prima facie case made by the proof that the injury was inflicted by a running train, it is not necessary for the defendant to do more than to disclose the facts, and if this is done the liability of defendant depends upon the facts and not upon the statutory presumption.

[3] The argument upon the alleged error of the trial court in refusing to give to the jury the counter instruction the defendant was entitled to receive if it had requested same. It is true that this court in the Thornhill Case, 63 South. 674, and in the Daniell Case, 66 South. 730, said that:

"When the facts and circumstances have been ascertained, they must be able to say therefrom that the defendant was guilty of negligence."

The court below would, no doubt, have so instructed the jury, if the defendant had seen fit to request such instruction. The defendant did not ask for this instruction, and cannot complain that the court did not do what the statute (section 793, Code of 1906) forbids him to do, unless requested in writing. By the uniform decisions of this court the circuit judge cannot volunteer instructions to the jury, and if he does so he has exceeded his power. The plaintiff's instruction stated his side of the case, and if the defendant had requested the counter instruction the law of the case would have been complete, except as to the defects noted in plaintiff's instruction. Inasmuch as the trial court was not asked to give the counter instruction, and inasmuch as the court was without power to volunteer same, no error can be predicated of his failure to give the instruction.

[4] It is argued that the court did not limit the quantum of damages which plaintiff was entitled to recover, in accordance with the provisions of our concurrent negligence statute. Defendant did not ask an instruction along this line, and we think it was the error of defendant, rather than the error of the court, that defendant did not get the benefit of the law.

[5] In this case the train was a heavy passenger train, consisting of one mail and one express car, a baggage car, two day coaches, and five sleepers. The crew in charge of this train knew of the threatened danger, and when the train entered the danger zone, it seems to us that the engineer should have reduced his speed to the point where he could have brought it to a standstill in less than 150 yards. The evidence shows that he was rounding a curve in the road, and on account of the existing weather conditions he could not see further than 25 yards in front of his locomotive. This, we believe, was taking chances with the human lives in his charge, that was little, if any, short of a reckless indifference to the consequences. It appears that at this point especially the loss of time, as compared with

the impending danger, was of no consequence, and ordinary prudence required that the train should have been under perfect control to avoid the probable catastrophe. This being our view of the record, taken most favorably for defendant, it follows that the instructions criticized could not have prejudiced appellant.

[6] After the wreck appellant sent its own surgeons to take charge of the injured, and to carry them to the hospital at Winona. There was some evidence tending to show that plaintiff was not given that care and consideration which he was entitled to receive while he was at the scene of the wreck. To rebut this evidence appellant offered to prove by its surgeons that they examined plaintiff at this time, and that his wounds had been dressed and properly treated, and that this was all that could have been done under the circumstances. At the instance of the plaintiff the trial court excluded this evidence from the jury. Section 3695 of the Code of 1906 provides:

"All communications made to a physician or surgeon by a patient under his charge * * * are hereby declared privileged."

It will be noted that plaintiff was a patient under the charge of the surgeons selected by defendant. By our statute "all communications" made to a physician by his patient are privileged. It is argued by appellant that the evidence offered did not consist of "communications," by the patient to the physician; that the physician's information was gained by an inspection of the patient, and that the statute did not cover this character of evidence. Taken literally, this view of the statute may be sound, but when we consider the manifest policy of this sort of legislation, we believe that what appellant sought to prove was communicated to him by the patient. Except as a physician, he was not qualified to testify. His knowledge of the matter inquired about came to him from his examination of his patient. It is not necessary that the communication should be made by words in order to make it privileged. There is no more sacred relation of confidence than the relationship of physician and patient, and it was, in our opinion, the intention of the Legislature to close the lips of the physician concerning any and every thing he knows about the patient by oral communication or from a physical examination of his patient. Quoting from *Briggs v. Briggs*, 20 Mich. 34:

"He had no knowledge upon the subject except what he obtained in the course of his professional employment, and the case appears to be directly within the statute. * * * We do not understand the information here referred to, to be confined to communications made by the patient to the physician, but regard it as protecting, with the veil of privilege, whatever, in order to enable the physician to prescribe, was disclosed to any of his senses, and which in any way was brought to his knowledge for that purpose."

The Supreme Court of Missouri had under review a statute similar to ours in *Gartside v. Connecticut Mutual Life Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765, and said:

"The construction contended for by defendant's counsel that by the statute a physician is forbidden to disclose only such information as may have been communicated to him orally by his patient would, in our opinion, nullify the law. To hold that, while under the statute a physician would be forbidden from disclosing a statement made to him by his patient that he was suffering from syphilis, and to allow him to state as the result of his observation and examination of the patient that he was diseased with syphilis would be to make the statute inconsistent with itself. It is doubtless true that a physician learns more of the condition of a patient from his own diagnosis of the case than from what is communicated by the words of the patient; and to say that while the mouth of a physician is sealed as to the information acquired orally from his patient, it is opened wide as to information acquired from a source upon which he must rely, viz., his own diagnosis of the case, would be to restrict the operation of the statute to narrower limits than was ever intended by the Legislature and virtually to overthrow it."

The statutes of the several states vary in the language employed, but in our view they were all designed to accomplish the same purpose. Our statute in protecting the patient makes privileged "all communications," and we think it would be absurd to say that what the patient says to the physician is privileged, but what is communicated to the physician by his expert examination and exploration of his patient's body is not privileged. The oral communications are usually of little importance, but the physical examination is always of prime importance. The fact that the physicians in the present case were not called by the plaintiff, but were sent by the defendant to examine or treat plaintiff, does not change the legal aspect of the case. The physicians were acting in their professional capacity, and the plaintiff was their patient, and all communications to their professional senses are privileged, and the physician, however willing he may be to violate the confidence of his patient, will not be permitted to do so by the wise provisions of the statute. In the light of such authorities as we have been able to find, the overwhelming weight are in accord with this view of the law. The cases may be found in the notes to *May Woods v. Town of Lisbon*, 16 L. R. A. (N. S.) 886.

[7] It is also contended by appellant that the plaintiff was violating the act of Congress to regulate commerce, approved June 29, 1906, and amended April 13, 1908, and June 18, 1910, which thus provides:

"No common carrier subject to the provisions of this act, shall, after January 1st, 1907, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except * * * to their families, etc.

"Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than \$100

nor more than \$2,000, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty."

We do not understand that the act of Congress referred to has any application to the facts of this case. The common carrier did not issue any free transportation to this plaintiff, and he was not using any such free transportation. The engineer in charge of the locomotive pulling a passenger train under no conceivable circumstances has any power to issue free transportation to any person, and we are unable to see the force of the argument along this line. Certainly, a common carrier would not be liable to the penalty provided by the act of Congress should some employé, having no sort of connection with the transportation of passengers, assume to issue a free pass to some prohibited passenger. If an engineer could lawfully permit a person to ride free, it seems to us that the plaintiff in this case would be entitled to the same degree of care that other passengers are entitled to receive. This seems clear, unless the act of Congress would change the rights of the passenger. It is clear to us that the engineer was not authorized to carry plaintiff free, and it is also manifest that the act of Congress is not directed against acts of the character here involved. As we interpret the act of Congress and the regulations adopted by the Interstate Commerce Commission, neither are directed against acts such as are disclosed by the record in this case. After a careful review of the entire record, and after giving due consideration to the able and exhaustive briefs of counsel for appellant, we can find no error of sufficient importance to justify us in disturbing the judgment of the trial court. The *Daniell Case* seems to have been unduly magnified. The gist of that case may be found in this sentence:

"The rule invoked by the instructions here under consideration is one which should always be acted upon by the court in determining whether a peremptory instruction should be granted, but was not intended to be given in charge to the jury as a guide to be followed by it in arriving at its verdict."

The court did not, by this sentence, intend to say that it was improper to instruct the jury that proof of injury by the running of the train was *prima facie* evidence of negligence. This court has repeatedly held that that rule could be given in charge to the jury, even when all the facts and circumstances were in evidence. The court merely held that the rule that "the circumstances of the accident must be clearly shown, and the facts so proven must exonerate the company from blame," was the rule for the guidance of the court in determining whether or not it could be said, as a matter of law, that the burden of the statute had been met and overturned. Whether or not the giving

of the instruction in the form criticized in Danfell's Case will be held as prejudicial error will necessarily depend upon the facts of each case.

Affirmed.

YAZOO & M. V. R. CO. v. FRANCIS.
(No. 16948.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Circuit Court, Bolivar County; Monroe McClurg, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and H. T. Francis. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, and C. N. Burch, of Memphis, Tenn., for appellant. Cutrer & Johnston, of Clarksdale, for appellee.

PER CURIAM. Affirmed.

YAZOO & M. V. R. CO. v. WOODWARD.
(No. 16932.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Circuit Court, Warren County; H. C. Mounser, Judge.

Action between the Yazoo & Mississippi Valley Railroad Company and George Woodward. From the judgment, the Railroad Company appeals. Affirmed.

Mayes & Mayes, of Jackson, for appellant. Jas. D. Thames, of Vicksburg, for appellee.

PER CURIAM. Affirmed.

EASTERLING LUMBER CO. v. SCANLON.
(No. 16896.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Circuit Court, Newton County; C. L. Dobbs, Judge.

Action between the Easterling Lumber Company and T. M. Scanlon. From the judgment, the Lumber Company appeals. Affirmed.

Flowers, Brown & Davis, of Jackson, for appellant. Foy & Banks, of Decatur, for appellee.

PER CURIAM. Affirmed.

WOODMEN OF UNION v. MEREDITH.
(No. 16908.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Circuit Court, Hinds County; W. A. Henry, Judge.

Action between Woodmen of Union and Charlie Meredith. From the judgment, the Woodmen of Union appeal. Affirmed.

Power & Powers, of Jackson, for appellant; Howie & Howie, of Jackson, for appellee.

PER CURIAM. Affirmed.

MERCHANTS' & FARMERS' BANK OF STARKVILLE v. MONTGOMERY.
(No. 18146.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Chancery Court, Oktibbeha County; J. Q. Robins, Chancellor.

Action between the Merchants' & Farmers'

Bank of Starkville and Mrs. Hattie Montgomery. From the judgment, the Bank appeals. Appeal dismissed.

W. W. Magruder, of Starkville, for the motion.

PER CURIAM. Motion to dismiss appeal sustained.

MAY & CAMERON v. GOLDMAN, BEEKMAN & CO. (Nos. 18147, 18148.)

(Supreme Court of Mississippi. April 5, 1915.)

Appeal from Circuit Court, Lincoln County; J. B. Holden, Judge.

Action between May & Cameron and Goldman, Beekman & Co. From the judgment, May & Cameron appeal. Appeal dismissed.

George Butler, of Jackson, for the motion.

PER CURIAM. Motion to dismiss sustained.

No. 21035.

(136 La. 926)

MERIDIAN FERTILIZER FACTORY v. WRIGHT et al.

In re WRIGHT et al.

(Supreme Court of Louisiana. Feb. 23, 1915. Rehearing Denied March 22, 1915.)

(Syllabus by the Court.)

CORPORATIONS §477 — EVIDENCE §417 — PAROL EVIDENCE — RECORD OF CORPORATE RESOLUTION.

Where the board of directors of a corporation passed a resolution authorizing its president to execute a certain special mortgage, their failure to enter their resolution on the minutes does not affect its validity, but the fact may be proved by parol, even where the contract does not recite the previous authorization.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1857-1863, 1865-1869; Dec. Dig. §477; Evidence, Cent. Dig. §§ 1874-1890; Dec. Dig. §417.]

O'Niell, J., dissenting.

Action by the Meridian Fertilizer Factory against T. Q. Wright and others. A judgment for defendants was reversed by the Court of Appeals, and T. Q. Wright and J. F. Cochran apply for certiorari or writ of review. Judgment of Court of Appeals reversed, and judgment of district court affirmed.

McCoy, Moss & Knox, of Lake Charles, for plaintiff. Stewart, Powell & Ferguson, of De Ridder, for defendants.

LAND, J. Plaintiff instituted a petitory suit to recover two lots in Hall City, parish of Beauregard, alleged to be in the possession of the defendants, and coupled with the action a demand for the cancellation of a certain special mortgage upon said property purporting to have been executed in 1909, by the Louisiana Manufacturing & Mercantile Company in favor of the defendant Cochran.

Plaintiff claimed title from the said company by virtue of a purchase at sheriff's sale made in June, 1911. Defendants did not dispute plaintiff's title, but averred the valid-

ity of the said special mortgage and prayed for its recognition and enforcement.

The petition alleged that said mortgage was null and void, and should be canceled from the records, because "no resolution of the board of directors of said corporation was passed authorizing its execution."

Over the objections of the plaintiff, the trial judge permitted the defendants to prove by parol that the mortgage was authorized at a formal meeting of the board of directors, but through oversight of the secretary was not entered on the minutes.

There was judgment in the district court in favor of the plaintiff on the issues of title and revenues, but its demand for the cancellation of the mortgage was rejected; and there was judgment in favor of the defendant Cochran, recognizing the validity of the mortgage, and ordering its enforcement.

The Court of Appeals held that parol evidence is not admissible to show the adoption of a resolution by the board of directors of a corporation, authorizing its president to mortgage its real estate, where such resolution was not entered on the minutes, and therefore reversed the judgment in favor of the defendants, and decreed the act of mortgage to be null and void.

The case comes before us on a writ of review granted on the application of the defendants. We shall first review the authorities cited by the defendants:

Prothro v. Minden Seminary, 2 La. Ann. 939: The resolution was written by the secretary on a loose slip of paper, which was lost, and never inscribed on the book of minutes. The court treated the case as that of a lost writing.

Railroad Co. v. Ouachita, 11 La. Ann. 652: Parol evidence held admissible to prove that a police jury ordinance was not adopted by a majority of the members elect. The minutes stated that the ordinance was adopted, but did not give the yeas and nays.

Kilgore v. Willis, 26 La. Ann. 665: Authorization of president of a manufacturing corporation to confess judgment may be shown by parol.

Donnelly v. Church, 26 La. Ann. 738: Authority of wardens to execute a note may be shown by parol, or by evidence tending to show ratification by the vestry. The court said, in part:

"It has been determined that the neglect, incompetence, not to say dishonesty, of a corporation in making up its minutes, can not exclude an interested third party from proving the truth by parol. [*Vicksburg S. & F. R. Co. v. Ouachita*] 11 La. Ann. 649; [*Prothro v. Minden Seminary*] 2 La. Ann. 939."

Boggs v. Lakeport Agricultural Park Association, 111 Cal. 354, 43 Pac. 1106: In this, as in the *Prothro* Case, supra, minutes of the proceedings were made on slips of paper, which were afterwards lost; and it was held that parol evidence was admissible, in an action against the corporation to foreclose the mortgage, to show the proceedings

of the board authorizing and ratifying the execution of said mortgage, and it was not limited to showing merely the contents of the lost minutes.

Allis v. Jones (C. C.) 45 Fed. 148: Bill to annul mortgages alleged to be void because not authorized by board of directors. Caldwell, J., said:

"Parol evidence is admissible to prove the action of the board of directors or stockholders where the record fails to state it."

Township v. Koehler, 35 Mich. 22: Suit to recover value of iron furnished for bridge:

"It has, however, frequently been held that, while parol evidence could not be admitted to contradict the record, yet that it might be introduced to show facts omitted to be stated; that the rights of creditors or third persons cannot be prejudiced by the neglect of the clerk to perform his duty in this respect."

Defendants cite other authorities along the same line, among them 10 Cyc. 1198, to the effect that even the authority to execute so important an instrument as a mortgage need not be shown by any formal resolution of the board of directors; that if the officers execute the instrument with the knowledge or concurrence of the directors, or with their acquiescence, it will be regarded as the act of the corporation; and that a corporate vote authorizing the execution of a mortgage is not like an ordinary power of attorney to convey land.

The evidence in the case before us shows that all the directors voted for and authorized the mortgage in question, and its validity has been disputed by no one except the plaintiff, who purchased the lots in question, subject to this recorded mortgage.

The Court of Appeals, in a very brief opinion, concluded that parol evidence was inadmissible to show the action of the directors in the premises. That court reasoned that an agency to alienate real property must be in writing, that a conventional mortgage is a species of alienation, and that therefore an agency to mortgage cannot be proved by parol.

This may be true as a general proposition, but whether the principle applies to the case at bar is another question. Corporations differ widely from individuals in their modes of action. The president of a corporation does not occupy the position of an agent acting under a power of attorney, but by virtue of his office is the executive of the corporation, and in case of sales or mortgages of real estate his authority to act is conferred by resolution of the board of directors. In the instant case the president's power to mortgage was conferred by a resolution of the board of directors, and the mortgage was executed pursuant to the resolution. Did the subsequent failure of the secretary to enter the resolution in the minute book nullify the action of the board of directors? It certainly did not, as the entry could have been made at any time subsequent to the action of the board. The line of cases cited supra

hold that omissions from the corporate records may be supplied by parol evidence. The rule has been tersely stated as follows:

"Where an antecedent authorization by the board of directors is necessary to the making of a given contract, their failure to enter their resolution of record does not affect its validity, but the fact may be proved by parol; and the rule is the same where the contract does not recite the previous authorization." 10 Cyc. 1001.

Plaintiff purchased the lots, subject to the mortgage, at sheriff's sale, and acquired nothing beyond the right and claims of the corporation. Code of Practice, art. 690.

As there is no law in this state requiring powers of attorney or resolutions of board of directors to be recorded, there is no question of registry involved.

It is therefore ordered that the judgment of the Court of Appeals herein be annulled, avoided, and reversed, and it is now ordered that the judgment of the district court herein be affirmed; plaintiff to pay costs in both appellate courts.

O'NIELL, J., dissents.

(136 La. 931)

No. 20952.

GREटना EXCHANGE & SAVINGS BANK
v. MARRERO, Sheriff, etc.

(Supreme Court of Louisiana. Feb. 23, 1915.
On Application for Rehearing, March
22, 1915.)

(Syllabus by the Court.)

TAXATION \S 197—EXEMPTION — OPERATION
OF STATUTES.

Act No. 138' of 1856, relative to municipal and parochial taxation in the parish of Jefferson, was superseded by Act No. 136 of 1898, relative to the creation and organization of municipal corporations. A law which exempts property within the limits of municipalities from parish taxation and provides for contributions by the municipalities for the purpose of paying the general expenses of the parish is utterly inconsistent with a law which contains no such exemption, no such provision for contributions, and confers the power of taxation for municipal purposes only.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. \S 315, 316; Dec. Dig. \S 197.]

Provosty, J., dissenting.

Appeal from Twenty-Eighth Judicial District Court, Parish of Jefferson; Prentice E. Edrington, Judge.

Action by the Greटना Exchange & Savings Bank against L. H. Marrero, Sheriff and ex officio Tax Collector. From a judgment for defendant, plaintiff appeals. Affirmed.

W. J. Waguespack, Fred A. Middleton, and Robert H. Marr, all of New Orleans, for appellant. L. H. Marrero, Jr., of New Orleans, for appellee. F. S. Wels, Howe, Fenner, Spencer & Cocke, Denegre, Leovy & Chaffe, and T. M. & J. D. Miller, all of New Orleans, amici curiæ.

LAND, J. The crucial question involved in this litigation is stated in plaintiff's brief as follows:

"The Greटना Exchange & Savings Bank brings this action to enjoin the sheriff of the parish of Jefferson from seizing its property for the parish taxes of 1913, on the ground that said property is situated within the incorporated limits of the city of Greटना, and for that reason owes no parish tax because of the provisions of Act 138 of 1856."

The facts are stated in plaintiff's brief as follows:

"Both sides admit that the city of Greटना was incorporated on the 17th and organized on the 24th of May, 1913; that all the property within the limits of said city was regularly assessed for the year 1913; that the assessments were exposed for inspection, and passed upon by the police jury, sitting as a board of reviewers as required by law, viz., in July, 1913, Act 170, section 24 of 1898; that the police jury levied a parochial tax on all the property in the parish of Jefferson on the first Wednesday of July, 1913, and that this tax is for the same purpose and on the same property as that levied by the city of Greटना, which also levied its 1913 tax; that plaintiff has paid all the taxes levied by the City of Greटना for the year 1913."

"It is admitted also that the city of Greटना appointed its member of the parish committee, in compliance with Act 138 of 1856, for the purpose of adjusting the taxes between the city and the parish, and that plaintiff deposited in court all of the taxes claimed by defendant for 1913 except the parish tax in contestation."

The city of Greटना was incorporated under the general incorporation law (Act 136 of 1898), which does not exempt property within its limits from parochial taxation. The statute provides a mode by which existing municipalities, which have not come under its provisions, may do so by amendment of their charter.

Plaintiff claims that the city of Greटना is exempt from parish taxation by Act No. 138 of 1856, the provisions of which apply only to the parish of Jefferson. Under the scheme of taxation provided in said act each municipality contributed towards defraying the expenditures, which by law bore upon the whole parish, on a ratio based upon the proportion of states taxes assessed within the limits of the corporation. The act provided for the creation of a parish committee, to fix the pro rata contribution of each municipality, to examine all bills or claims set up against the parish, and to report thereon to the several councils and police jury for final action, but with no power to bind the corporations of the parish of Jefferson, without having been first duly authorized by special resolution adopted by a legal majority in each of the corporations constituting said parish. Under this act, the police jury levied no taxes on property within the limits of the municipalities of the parish. Jefferson City, in 1870, and the city of Carrollton, in 1874, the two largest of these municipalities, were annexed to the city of New Orleans. In the year 1884, the parish seat was located at Greटना, which gradually developed

into a community, which is thus described in Fortier's Louisiana, vol. 1, p. 481:

"Gretna, the parish seat of Jefferson parish, was laid out by the St. Mary Market and Ferry Company in 1839, and was made the seat of justice in 1884. It is to-day practically a suburb of New Orleans, with a population of 3,500. It has important manufactures in cotton seed oil, cooperage, brick, moss, lumber, etc., and a number of first-class mercantile establishments."

This thriving community, however, was not incorporated as a municipality until May, 1913, as stated supra.

The case of *Felix v. Wagner*, 39 La. Ann. 391, 1 South. 926, has no application, because the city of Kenner was incorporated in 1873, under the régime established by Act No. 138 of 1856.

The city of Gretna was incorporated under the Municipal Corporation Act of 1898, in reference to which this court has said:

"The scheme of the Constitution is that * * * all corporations shall be governed by general laws, which scheme imposes upon the General Assembly the obligation to enact such law * * * in the discharge of that obligation, the General Assembly passed Act No. 136 of 1898, as a general law, under which municipal corporations are authorized to be established, and from which alone those which are so established can derive any power or authority whatever, since beyond it they have, and can have no existence." *Powell v. Town of Providence*, 127 La. 71, 53 South. 431.

The said statute confers on municipal corporations organized under its provisions no exemption whatever from parochial taxation, nor does it impose on them the burden of contributing to the payment of parish expenses. The general rule is that the incorporation of a town within the limits of a parish does not exempt the property and inhabitants thereof from parochial taxation, unless such exemption is expressed in some legislative act. *Felix v. Wagner et al.*, 39 La. Ann. 393, 1 South. 926. The provisions of Act 136 of 1898 relative to taxation cannot be reconciled with those of Act 136 of 1856, and the latter was consequently repealed or superseded quoad municipal corporations created under the former.

We do not deem it necessary to pass on the question of the constitutionality of section 11 of Act 136 of 1898, or the question of the right of the city of Gretna to levy taxes for the year 1913, raised by the defendant, but affirm the judgment below on the sole ground that all the taxable property within the limits of said city is subject to parochial taxation.

Judgment affirmed.

O'NIELL, J., concurs in the decree only as to the taxes of 1913, and only because the city of Gretna could not levy taxes for that year, in which it came into existence.

On Application for Rehearing.

PER CURIAM. Rehearing refused.

PROVOSTY, J. (dissenting). The majority opinion holds that the case of *Felix v.*

Wagner, 39 La. Ann. 391, 1 South. 926, has no application to the present case; that the present case is governed by the doctrine of the case of *Powell v. Town of Providence*, 127 La. 69, 53 South. 429.

With all due deference, the situation appears to me to be clearly just the other way. In its facts and in its law, the *Powell v. Town of Providence* Case appears to me to bear no analogy whatever with the present case; whereas the *Felix v. Wagner* Case appears to me to be exactly and precisely similar, names and dates only being changed.

In the *Powell v. Town of Providence* Case, the facts are stated by the court, as follows:

"Plaintiff, as a citizen and taxpayer of the town of Providence, enjoins the municipal authorities from issuing bonds in the name of the corporation to the amount of \$27,000, under Act No. 136 of 1908 and levying a tax of 3¼ mills for their payment, on the ground that the statute mentioned is a local and special law, having the effect of amending the charter of said town, and the enactment of which is prohibited by article 48 of the Constitution of this state."

The law and doctrine of the case is stated in the syllabus, as follows:

"Act 136 of 1908, purporting to confer on the town of Providence the authority to issue bonds and levy a tax for their payment, is obnoxious to the prohibitions against local and special legislation contained in article 48 of the Constitution, and is therefore void; and the action and proposed action of the mayor and aldermen, tending to the issuance of such bonds and the levy of such taxes, is therefore illegal and incompetent, and is perpetually enjoined at the suit of a citizen and taxpayer."

The sole question presented in that case was whether it was competent for the Legislature to pass a special act authorizing the town of Providence to issue bonds and levy taxes in view of article 48 of the Constitution, providing that:

"The General Assembly shall not pass any local or special laws on the following * * * subjects: * * * Creating corporations, or amending, renewing, extending or explaining the charters thereof; provided, this shall not apply to municipal corporations having a population of not less than 2,500 inhabitants."

There was no denial of the fact that the town of Providence had a population of less than 2,500 inhabitants, but it was contended that the act in question was not an act creating a corporation nor amending, renewing, extending, or explaining the charter of a corporation, but that it was simply a special, independent statute. It was in refutation of these contentions that the court made use of the expression quoted in the majority opinion in the present case.

But evidently no question of that kind, or anything resembling it in the most distant manner, is presented in the instant case. In fact, the city of Gretna has more than 2,500 inhabitants; so that if any question such as that which the court dealt with in this Providence Case had been raised in the present case, the law applicable to it would have been the proviso of said article 48, and not the body of the article.

The doctrine of the Providence Case is

simply that under article 48 of the Constitution municipalities of less than 2,500 inhabitants can be incorporated, or their charters modified, only by operation of some general statute, not by special act. I cannot see what application that doctrine can have to the present case, where the city of Gretna was incorporated under a general, not a special, statute, although it might have been validly incorporated by a special statute because containing more than 2,500 inhabitants.

So much for the case of *Powell v. Town of Providence*. It is seen that it bears no analogy either in its facts or in its law to the instant case. Now, what of the case of *Felix v. Wagner*? I will let the decision speak for itself, and it can serve as a statement of the present case, names and dates changed. The court said:

"The issue in this case is whether or not the late police jury of the parish of Jefferson had authority to impose and collect taxes upon the property of plaintiff situated in the town of Kenner.

"This act (i. e., Act 138 of 1856) required the several corporations to appoint delegates, on a basis of representation therein fixed, to form a parish committee, and imposed upon this committee the duties to determine and fix the pro rata of contribution by each corporation towards defraying the expenditures which by law bear upon the whole parish, the ratio thus established to be based upon the proportion of state taxes assessed within the limits of each corporation; second, to examine all bills of claims which may be set up against the parish and to report upon them to the several councils and police jury, who shall act finally thereupon.

"In 1873 the town of Kenner was incorporated and vested with powers of taxation and other municipal powers. Act 71 of 1873.

"The town was composed of territory which had theretofore been under the jurisdiction of the police jury of the left bank, and the charter contained no express exemption from parochial taxation or police jury control.

"The general principle is undoubtedly well established that the incorporation of a town within the limits of a parish does not exempt the property and the inhabitants thereof from parochial taxation unless such exemption is expressed in some legislative act. *Cook v. Dendinger*, 38 La. Ann. 261; *Iberia v. Chiapella*, 30 La. Ann. 1143; *Benefield v. Hines*, 18 La. Ann. 420; *Maurin v. Smith*, 25 La. Ann. 445.

"But inasmuch as the act of 1856 continued in force, providing for 'the appointment of a parish committee by the several corporations composing the parish of Jefferson,' and inasmuch as the then existing corporations were not named therein, it seems to have been assumed, and not without reason, that the mere creation of Kenner into a corporation vested with the taxing power brought it within the operations of the act and of the system of parish government established thereby under which each corporation exercised exclusive powers of taxation within its own limits and contributed from the funds thus raised its pro rata of general parish expenses under the direction and control of the parish committee.

"The exclusion of Kenner from representation on the police jury and her inclusion in the parish committee, and her assessment therein, are entirely inconsistent with the power claimed of subjecting her to direct police jury taxation;

for the first involved taxation without representation, and the last subjected her to double burden.

"Confronted with this clear, customary, legislative, and judicial construction of the effect of these laws, with the strong reasons by which it is supported, and with the manifest injustice which would result from subjecting Kenner to these taxes, which have been levied by a body in which she has had no representation, and which, if enforced, would subject her to burdens which have already been imposed on her by the parish committee in a different form, we feel bound to affirm the judgment appealed from."

Every word that is here said is applicable to the present case. The parallel between the town of Kenner and the city of Gretna is complete; both are situated within the parish of Jefferson, and both were incorporated subsequently to the adoption of Act 138 of 1856 regulating the apportionment of taxes between the municipalities of that parish and the parish itself. The only difference between them is that Kenner was incorporated by special act of the Legislature, whereas Gretna was incorporated under the general incorporation statute. But the question arising in the two cases is precisely the same, to wit, whether a municipality created subsequently to the adoption of Act 138 of 1856 comes within the provisions of that act. On this point, both the special act incorporating Kenner (Act 71 of 1873) and the general incorporation law (Act 136 of 1898) are equally silent.

By its terms the said Act 138 of 1856 unquestionably governs the case. No one denies that. And the question therefore resolves itself simply into whether said act has been modified or repealed. In the *Kenner Case* the court found that the act was still in force, and therefore applied it. In the present case the majority opinion finds that it is no longer in force, because:

"The provisions of Act 136 of 1898 relative to taxation cannot be reconciled with those of Act 136 of 1856, and the latter was consequently repealed or superseded quoad municipal corporations created under the former."

The "provisions relative to taxation" here said to be irreconcilable with those of the act of 1856, are those which authorize the municipality to levy taxes. These provisions do no more than authorize the municipality to levy taxes for its maintenance. They are contained in sections 15, 17, and 35 of Act 136 of 1898. Provisions which, to all intents and purposes, are exactly similar, are contained in Act 71 of 1873 incorporating Kenner, sections 6 and 20. It did not occur, either to counsel or to the court, in the case of *Felix v. Wagner*, that there was any conflict, let alone irreconcilability, between the said provisions and said Act 138 of 1856. And indeed I, for my part, can discover no conflict between these provisions contained in the acts of 1873 and 1898, authorizing the municipalities to levy taxes for their maintenance and the act of 1856; the former simply authorizes the municipalities to levy taxes for their maintenance, the other makes pro-

vision for the relations between the municipalities and the rest of the parish of Jefferson in regard to the apportionment of the taxes after they are levied and collected.

The majority opinion says that:

"The general rule is that the incorporation of a town within the limits of a parish does not exempt the property and inhabitants thereof from parochial taxation unless such exemption is expressed in some legislative act."

That is true, but the very purpose of the said Act 138 of 1856 was to express in a legislative act that exemption for the municipalities of the parish of Jefferson. And, I repeat, the court discovered no conflict between that act and the provision of Act 71 of 1873, authorizing the town of Kenner to levy taxes, and I can discover none between it and the provisions of the Act 136 of 1898, authorizing the city of Gretna to levy taxes, the said provisions of the said acts of 1873 and 1898 being, to all intents and purposes, exactly similar; they simply giving the necessary authority to the municipalities to levy taxes for their maintenance.

But say there was conflict; what then? Would the act of 1856 be repealed? Certainly not expressly, for there is not one word to that effect in the act of 1898. It would have to be by implication if at all.

There can be no denial that the act of 1856 is a special act, and that of 1898 is a general act. Their respective titles are, as follows:

Act 138 of 1856, p. 116:

"An act authorizing the appointment of a parish committee by the several corporations composing the parish of Jefferson."

Act 136 of 1898:

"An act for the creation and government of municipal corporations throughout the state and defining their powers and duties and providing for the extension or contraction of their limits."

The legal proposition involved is therefore, How far, or when, is a special act repealed by a general act? The rule on that point is stated in 36 Cyc. 1090, as follows:

"When the provisions of a general law, applicable to the entire state, are repugnant to the provisions of a previously enacted special law, applicable in a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arises by necessary implication. The principle, 'Generalia specialibus non derogant,' is especially applicable to cases where general statutes are argued to overrule the provisions of special charters granted to municipal corporations, or special acts passed for their benefit."

A particular statute is not repealed by a general statute unless the two are irreconcilably inconsistent, or so repugnant that they cannot stand together under any circumstances. For illustrative cases see *Olivier v. Adeline*, 131 La. 712, 60 South. 201; *State v. Morris*, 47 La. Ann. 1660, 18 South. 710; *Garrett v. Mayor*, 47 La. Ann. 618, 17 South. 238; *State v. Callac*, 45 La. Ann. 27, 12 South. 119; *State ex rel. Pemble v. Judge*,

42 La. Ann. 75, 7 South. 65; *Barber, etc., Co. v. Gogreve*, 41 La. Ann. 251, 5 South. 848; *State ex rel. City v. Judge*, 40 La. Ann. 844, 5 South. 525; *State v. Labatut*, 39 La. Ann. 516, 2 South. 550; *Railroad v. City*, 34 La. Ann. 441; *Bond v. Hiestand*, 20 La. Ann. 140; *St. Martin v. City*, 14 La. Ann. 113; *Beridon v. Sheriff*, 13 La. Ann. 458; *Johnson v. Pilster*, 4 Rob. 77; *De Armas' Case*, 10 Mart. (O. S.) 172; *Rogers v. Beiller*, 3 Mart. (O. S.) 672.

It was held in *Telephone Co. v. Railroad Co.*, 112 La. 287, 36 South. 352, and in *Welch v. Gossens*, 51 La. Ann. 852, 25 South. 472, that:

"A special statute enacted on a particular matter is not affected by a general statute, subsequently enacted, on the same subject-matter, containing different provisions."

In the *Telephone Case* the court, after announcing this principle, held that the method of selecting juries in expropriation suits was not affected by the subsequent adoption of a general jury law which provided a different method of selecting juries. How, then, can a general incorporation act, which says nothing about whether cities incorporated under its provisions shall or shall not pay parish taxes, be held to repeal a special act fixing the liability to the parish of Jefferson of municipal corporations in the parish of Jefferson? In the *Welch Case* the court, in applying the same principle, held that the adoption of a general election law does not affect the mode of election provided in a city charter. In *State v. Kitty*, 12 La. Ann. 805, it was held that a special statute providing a local tribunal for the trial of certain specified cases was not repealed by a later statute applicable to the state at large. In *Naturalization of Osthoff*, 48 La. Ann. 1094, 20 South. 282, it was held that a provision of a statute, requiring the clerk of the civil district court to furnish copies of naturalization papers free of cost, was not repealed by a subsequent statute fixing the fees of the clerk for issuing copies from his office on the ground that the earlier was a special statute, the later a general one. In *Succession of Fletcher*, 12 La. Ann. 498, it was held that a statute authorizing the auditor "to employ attorneys to recover money due the state from any cause whatever, whenever in his discretion he may deem it proper and expedient to do so," did not affect a statute making it the duty of the Attorney General to represent the state in civil suits in New Orleans, and hence did not authorize the auditor to employ counsel in the courts in New Orleans.

Act of 1898 does not deal at all with the question of the liability of municipalities created under it to parish taxation. It is true that, as a general rule, municipalities created under the act of 1898 are subject to parish taxation, but this is true, not because the act of 1898 provides that such municipalities shall be liable to parish taxation, but

simply because neither that act, nor any other act, provides that such municipalities shall be exempt from parish taxation, the well-established rule being that all municipalities of the state, however created, are liable to parish taxation, unless they are exempted by the terms of some legislative act.

In regard, however, to municipalities of the parish of Jefferson created under the act of 1898, the act of 1856 applies just as it would to all municipalities of the parish of Jefferson created under any other act, the said act of 1856, providing that all municipalities of the parish of Jefferson, however created, shall be exempt from parish taxation.

I, therefore, respectfully dissent.

(136 La. 335)

No. 21118.

STATE v. THIBODEAUX.

(Supreme Court of Louisiana. March 8, 1915.)

(Syllabus by the Court.)

1. INDICTMENT AND INFORMATION — REQUISITES OF INDICTMENT — STATUTORY CRIME.

An indictment for a statutory crime must charge, with certainty and precision, that the person accused committed the act under the circumstances and with the intent mentioned in the statute; if any essential element of the crime is omitted, the indictment is not valid.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 286-288; Dec. Dig. § 109.]

2. ABDUCTION — UNLAWFUL TRANSPORTATION OF WOMAN—CONSENT OF WOMAN.

The act of taking a woman to a house of ill fame or assignation or other place with her consent for the purpose of having illicit sexual intercourse with her, is not denounced by a statute that merely prohibits the taking of a woman to such place *against her will*, for that immoral purpose.

[Ed. Note.—For other cases, see Abduction, Cent. Dig. §§ 1-10; Dec. Dig. § 1.]

3. PROSTITUTION — UNLAWFUL TRANSPORTATION—"PROSTITUTE."

In its restricted and legal sense, prostitution means the practice of a woman submitting to indiscriminate sexual intercourse with men for pay, as distinguished from illicit sexual intercourse with one man. A woman who submits to illicit sexual intercourse with one man, not for pay, is not a prostitute, within the meaning of a statute that prohibits transporting a woman through or across the state "for the purpose of prostitution or with the intent to induce her to become a prostitute" (citing Words and Phrases, Prostitute; Prostitution).

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.]

4. PROSTITUTION — STATUTES — "PANDERING"—"PIMPING."

Act No. 307 of 1910, entitled "An act in relation to pandering, to define and prohibit the same, to provide for the punishment thereof, and for the competency of certain evidence at the trial thereof," deals only with the subject of pandering, vulgarly called "pimping," defined in the dictionaries as catering for the gratification or lust of another. Hence the statute cannot be construed to embrace other immoral acts,

without, to that extent, rendering it violative of the constitutional provision that a statute shall embrace but one object, and that shall be expressed in its title.

[Ed. Note.—For other cases, see Prostitution, Cent. Dig. §§ 1, 2; Dec. Dig. § 1; Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.]

Appeal from Fifteenth Judicial District Court, Parish of Calcasieu; Winston Overton, Judge.

Omar Thibodeaux was indicted for pandering, and from a judgment quashing the indictment the State appeals. Affirmed.

R. G. Pleasant, Atty. Gen., T. A. Edwards, Dist. Atty., of Lake Charles, J. H. Jackson, Asst. Dist. Atty. of De Ridder (G. A. Gondran, of New Orleans, of counsel), for the State. John L. Kennedy, of La Fayette, for appellee.

O'NIELL, J. The state has appealed from a judgment quashing an indictment against the defendant, containing the following two counts and particulars, viz:

"First count: That Omar Thibodeaux, at the parish of Calcasieu, on the 4th day of December, A. D. 1914, did unlawfully and feloniously take, place, harbor, persuade, entice, and by promises take and place one, M—N—, in the hotel and boarding house of one Henri Daigle, in the city of Lake Charles, said parish and state, for the purposes of prostitution and illegal sexual intercourse.

"Second count: That Omar Thibodeaux, at the parish of Calcasieu, state of Louisiana, on the 4th day of December, A. D. 1914, did unlawfully and feloniously and knowingly transport, and cause to be transported, the woman M—N—, from the town of Lafayette, state of Louisiana, to the city of Lake Charles, Calcasieu parish, La., for the purpose of prostitution.

"That the state charges that the acts of sexual intercourse and prostitution on the part of the woman were with only the defendant, Omar Thibodeaux, and that said defendant, Omar Thibodeaux, did not intend her to lead a life of prostitution with any other person than himself."

[2] The first count in this indictment was annulled because it was not alleged that the taking, harboring, persuading, and enticing of the woman and placing her into the hotel or boarding house was done against her will.

The district attorney contends that this count in the indictment charges a violation of section 1, Act No. 307 of 1910, which provides:

"That any person who takes, places, harbors, inveigles, entices, persuades, encourages, either by threats, promises, or by any other device or scheme, takes or places, or causes to be placed or taken any female into a house of ill fame or of assignation or elsewhere, *against her will*, for the purpose of prostitution or illegal sexual intercourse, * * * shall be punished," etc.

The immoral acts denounced by this section of the law are only such as are done against the woman's will. The failure to allege that the acts were committed *against her will* was fatal to the first count in the indictment.

[1] An indictment under a statute ought to charge, with certainty and precision, that the defendant committed the acts under the circumstances and with the intent mentioned in the statute. If any essential element of the crime is omitted, the indictment is not valid. *State v. Stiles*, 5 La. Ann. 324; *State v. Read*, 6 La. Ann. 227; *State v. Delerno*, 11 La. Ann. 648; *State v. Johnson*, 42 La. Ann. 559, 7 South. 588; *State v. Ackerman*, 51 La. Ann. 1213, 26 South. 80; *State v. Breaux*, 122 La. 520, 47 South. 876.

[3, 4] One of the reasons assigned by the district judge for holding that the second count in this indictment was invalid was that the alleged transportation of the woman from Lafayette to Lake Charles by the defendant for him to have sexual intercourse with her was not for the purpose of prostitution. The law which the district attorney relies upon to support this count in the indictment is section 7, Act No. 307 of 1910, which provides that:

"Any person who shall knowingly transport or cause to be transported, or aid, or assist in obtaining transportation for, by any means of conveyance, through or across this state, any woman or girl for the purpose of prostitution or with the intent and purpose to induce, entice or compel such woman or girl to become a prostitute, shall be deemed guilty of a felony," etc.

The statute does not define "prostitution" or "prostitute." That was not necessary. The word "prostitute" has a well-defined meaning. It is defined in 32 Cyc. 730 as:

"A female given to indiscriminate lewdness for gain; a hireling; a mercenary; a strumpet; one who is let to sale."

And from the same volume we quote:

"In its most general sense, prostitution is the setting one's self to sale or devoting to infamous purposes what is in one's power. In its more restricted and legal sense, it is the practice of a female offering her body to an indiscriminate intercourse with men, as distinguished from sexual intercourse confined to one man; or, as sometimes stated, common lewdness of a woman for gain; the act of permitting a common and indiscriminate sexual intercourse for hire."

The words "prostitute" and "prostitution" are similarly defined in *Am. & Eng. Ency. of Law* (2d Ed.) vol. 23, and in *Words and Phrases* and by the standard lexicographers. A woman who has illicit sexual intercourse with only one man—not for pay—is not a prostitute, within the meaning of Act No. 307 of 1910. One who transports a woman through or across this state for the purpose of having illicit sexual intercourse with her is not thereby guilty of transporting her for the purpose of prostitution, within the meaning of the statute of 1910.

The title of this statute is:

"An act in relation to pandering, to define and prohibit the same, to provide for the punishment thereof, and for the competency of certain evidence at the trial thereof."

Hence the statute deals only with pandering, which is defined in the dictionaries as pimping—catering for the gratification or

lust of another person. A pander is a procurer or pimp. If this statute could be construed so as to denounce any other immoral act than pandering, it would, to that extent, be violative of article 31 of the Constitution, which provides that a statute shall embrace but one object, and that shall be expressed in its title.

The judgment appealed from is affirmed.

(69 Fla. 238)

**CRYSTAL RIVER LUMBER CO. v.
KNIGHT TURPENTINE CO. et al.**

(Supreme Court of Florida. March 4, 1915.
On Rehearing, March 30, 1915.)

(Syllabus by the Court.)

1. MORTGAGES §412—DEFECTIVE FORECLOSURE PROCEEDINGS—RIGHTS OF PURCHASER—SUBSEQUENT ACTION.

When, for any reason, foreclosure proceedings are imperfect, irregular, or void, the purchaser at the sale becomes subrogated to all the rights of the mortgagee in and to the mortgage and the indebtedness that it secured, and becomes thereby virtually an equitable assignee of such mortgage and of the debt that it secured, with all the rights of the original mortgagee, and becomes entitled to an action de novo for the foreclosure of such mortgage against all parties holding junior incumbrances or the legal title, who had been omitted as parties to such original foreclosure proceedings under which he bought.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1185, 1186; Dec. Dig. §412.]

2. MORTGAGES §412—DEFECTIVE FORECLOSURE—PARTIES—SUBSEQUENT PROCEEDINGS.

Though, in enforcing a mortgage lien upon lands, the existence of contract rights in the land acquired subsequent to the mortgage is known to the mortgagee, and such contract holders are not made parties to the foreclosure proceedings, a subsequent foreclosure of such contract rights may be had upon equitable principles.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1185, 1186; Dec. Dig. §412.]

Cockrell, J., dissenting.

Appeal from Circuit Court, Citrus County; W. S. Bullock, Judge.

Bill by the Knight Turpentine Company, a corporation, and another, against the Crystal River Lumber Company, a corporation. From an order overruling a demurrer to the bill, and an order denying petition for rehearing on the demurrer, defendant appeals. Affirmed, and rehearing denied.

Anderson & Anderson, of Ocala, for appellant. H. M. Hampton and Hocker & Martin, all of Ocala, for appellees.

WHITFIELD, J. This appeal is from an order overruling a demurrer to a bill of complaint, and from an order denying a petition for a rehearing upon the demurrer. The bill of complaint in effect alleges that R. J. Knight executed mortgages on certain lands to secure an indebtedness; that, subsequent to the execution of the mortgages, the mortgagor exe-

cuted to the Crystal River Lumber Company a contract to convey the timber on the land, with the right to take the timber from the land during a long term of years; that the mortgage liens were held by the Consolidated Naval Stores Company and were enforced by foreclosure proceedings, in which a decree for \$18,270.46 was rendered, but the Crystal River Lumber Company, who was the holder of the contract for the conveyance of the timber and incidental rights in the land, was not made a party to the foreclosure proceedings, for the reason that said Crystal River Lumber Company had "ceased sawmill operations, and, having dismantled its mill and moved away," "it was the belief of all parties connected with the transaction that said company would not thereafter make any claim under said contract"; that the lands were bought at foreclosure sale for \$15,000 by the mortgagee, who "sold and conveyed all of the said property, and all of its rights under the said mortgage, * * * which it acquired by and through said sale" to the appellee Knight Turpentine Company; that the mortgagee purchaser at the sale "has transferred, assigned, set over, and sold to * * * Knight Turpentine Company all of its rights therein, both under the said purchase at said master's sale and under the said mortgages"; that the Knight Turpentine Company sold and conveyed to the appellee the Pine Lumber Company the lands in controversy, reserving all the timber upon the lands; that a deficiency decree against Knight, the mortgagor, would be of no value, because said Knight was and is utterly insolvent; that the premises purchased at the foreclosure sale was not of the value bid therefor if the contract right of the defendant is valid; that the Crystal River Lumber Company is making some claim of title or right to the timber on the land, which asserted claim is inferior to complainants' rights acquired under the mortgage foreclosure. The Knight Turpentine Company and the Pine Lumber Company brought this suit against the Crystal River Lumber Company to subject the contract held by the latter company for the conveyance of the timber rights and giving other incidental rights in the lands to the payment "of the sums of money remaining due upon the mortgages." A demurrer to the bill of complaint was overruled, and defendant appealed.

The rights of the appellant Crystal River Lumber Company in the lands were acquired subsequent to the mortgage liens; and, as the appellant was not a party to the proceedings to enforce the liens, its rights were not affected thereby. Such contract holder had a right to pay off the mortgage debts and redeem the land itself. See *Dundee Naval Stores Co. v. McDowell*, 65 Fla. 15, 61 South. 108; *Burns v. Hiatt*, 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157.

[1] The purchaser of property at a foreclosure sale for the full amount due on the decree of foreclosure, when, for any reason, the foreclosure proceedings are imperfect, irregular, or void, becomes subrogated to all the rights of the mortgagee in and to such mortgage and the indebtedness that it secured, and becomes thereby virtually an equitable assignee of such mortgage and of the debt that it secured, with all the rights of the original mortgagee, and becomes entitled to an action de novo for the foreclosure of such mortgage against all parties holding junior incumbrances or the legal title, who had been omitted as parties to such original foreclosure proceedings under which he bought. *Key West Wharf & Coal Co. v. Porter*, 63 Fla. 448, 58 South. 599, Ann. Cas. 1914A, 173; *Jordan v. Sayre*, 29 Fla. 100, 10 South. 823.

[2] In this case the purchaser at the foreclosure sale was the mortgagee, and it did not bid the full amount decreed to be due on the mortgages, but this does not alter its rights as a mortgagee purchaser at the sale with reference to junior incumbrances, particularly when, as alleged, the land is not worth the purchase price if the contract right in the land is valid. The rights of the appellant under its contract do not amount to the legal title, but such rights do constitute a right in the land in the nature of a junior incumbrance covering rights in the growing timber and in the use of the land for a period of years in cutting and moving the timber, and the mortgagee or its legal or equitable assignee is entitled to maintain a suit de novo for the enforcement of the mortgage lien against the contract rights of the appellant in the lands; the holder of the junior incumbrance having its reciprocal rights when the suit to repurchase is instituted. See *Georgia Pacific R. R. Co. v. Walker*, 61 Miss. 481; *Shaw v. Helsey*, 48 Iowa, 468; *Morey v. City of Duluth*, 69 Minn. 5, 71 N. W. 694; *Cooke v. Cooper*, Adm'r, 18 Or. 142, 22 Pac. 945, 7 L. R. A. 273, 17 Am. St. Rep. 709; *Johns v. Wilson*, 180 U. S. 440, 21 Sup. Ct. 445, 45 L. Ed. 613; *Foster v. Johnson*, 44 Minn. 290, 46 N. W. 350; *Brown v. San Francisco*, 16 Cal. 452, text 461; *Shirk v. Andrews*, 92 Ind. 509. The fact that the mortgagee purchaser and the appellees, its successors in title, knew of the appellant's contract rights in the land, and that the appellant was not made a party to the first foreclosure proceedings, does not affect the appellees, having all the rights of the mortgagee, to enforce the mortgage liens, any more than the failure to make the appellant a party to the first proceedings affects the right of the appellant to redeem its contract rights in the land from the mortgage lien and to maintain the contract right by paying the balance due on the debt when the mortgagee or its legal or equitable assigns undertake to enforce the mortgage lien against the appellant's contract rights in the

land. The appellant may be able to show a right to redeem or take a conveyance of the land upon payment of the entire debt for which the mortgages were given.

As there is equity alleged in the bill of complaint upon which appropriate orders and decrees may be made in adjudging the rights and equities of the parties in the premises, the demurrer was properly overruled. Additional costs that may accrue because of the failure to make the appellant a party to the first foreclosure proceedings may be equitably adjusted. See 2 Jones on Mortg. §§ 1679, 1680; State Bank of Wisconsin v. Abbott, 20 Wis. 599.

The orders appealed from are affirmed.

TAYLOR, C. J., and SHACKLEFORD and ELLIS, JJ., concur.

COCKRELL, J., dissents.

On Rehearing.

PER CURIAM. A petition for rehearing suggests that the court omitted to consider the circumstance that the complainants, appellees here, are not the purchasers at the foreclosure sale, but claim through a conveyance from the mortgagee purchaser. The opinion expressly refers to the appellees as being the successors in title to the mortgagee purchaser and to the rights of the legal or equitable assigns of such mortgagee.

As shown by the opinion, the bill alleges that the mortgagee purchaser sold and conveyed the property to one of the appellees, and also transferred to such appellee all of its rights both under the purchase and under the mortgage. If the appellant's contract rights in the property were in fact subject to the mortgage, such rights cannot be made superior to the rights growing out of the mortgage by mere failure to make the appellant a party to the foreclosure proceeding, where it is alleged that appellant had ceased operations under its contract rights, and it was the belief of all parties that appellants "would not thereafter make any claim under said contract"; no estoppel of appellees appearing.

Even if appellant was not a necessary party to the foreclosure proceedings, the right of appellees to reforeclose is not thereby affected. Nor does this right of appellees prolong the life of the mortgage. If a foreclosure proceeding is not complete, it can be made complete by appropriate proceedings, in the absence of controlling equities forbidding it.

Rehearing denied.

TAYLOR, C. J., and SHACKLEFORD, WHITFIELD, and ELLIS, JJ., concur.

COCKRELL, J., dissents.

(191 Ala. 352)

HEAD v. J. M. ROBINSON, NORTON & CO.
(No. 540.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. CORPORATIONS \S 514—ACTIONS BY—DESCRIPTION OF CORPORATION IN COMPLAINT—SUFFICIENCY.

A plaintiff corporation need only describe itself in the complaint as a body corporate, without alleging facts constituting it a body corporate.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2052-2081; Dec. Dig. \S 514.]

2. DISCOVERY \S 40—DESCRIPTION OF CORPORATION.

Where defendant, in an action by a corporation, merely alleging in the complaint that it is a corporation, desires information as to the facts constituting plaintiff a corporation or as to whether it is a domestic or a foreign corporation, he may propound interrogatories under the statute, and thereby elicit all proper information.

[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 52, 53; Dec. Dig. \S 40.]

Appeal from City Court of Andalusia; Ed T. Albritton, Judge.

Action by J. M. Robinson, Norton & Co. against J. M. Head. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Jones & Powell, of Andalusia, for appellant. A. Whaley, of Andalusia, for appellee.

THOMAS, J. The appellee, J. M. Robinson, Norton & Co., a corporation, filed its suit on the common counts against appellant, J. M. Head. The complaint describes the plaintiff therein as "J. M. Robinson, Norton & Co., a corporation." Appellant demurred to the complaint because it failed to aver whether the plaintiff was "a foreign corporation or a domestic corporation." The court overruled defendant's demurrers, from which judgment appellant appealed under the provisions of an act creating the Andalusia city court of law and equity, permitting appeals from judgments on pleadings in civil causes.

In Western Railway of Alabama v. Sistrunk, 85 Ala. 352, 5 South. 79, the original summons and complaint described the defendant as "the Western Railway of Alabama." The attorney for the defendant as amicus curiæ moved to strike the case from the docket on the ground that the defendant did not appear to be a legal person capable of being sued; but the court overruled the motion and allowed the plaintiff to amend the summons and complaint by adding the words "a body corporate" after the name of the defendant, which was sanctioned by this court.

In Southern Life Insurance Co. v. Roberts, 60 Ala. 431, the complaint was, "The plaintiff, the Southern Life Insurance Company, of Memphis, Tenn., claims of the defendant," etc. A demurrer was filed because the names of the individual partners composing the company, if it be a partnership, were not set

forth, and because, if it be a corporation, it was not alleged and shown how it became so. The demurrer was sustained, and the court allowed the complaint to be amended by the addition of the words "a body corporate, made public by virtue of the laws and statutes of the state of Tennessee," etc. The court then allowed the cause to be stricken from the docket on the idea that there was no *party plaintiff* in the cause *when the suit was brought*. This court said:

"We cannot concur in this view. The corporation does not, even *quoad hoc*, become nonexistent, by a failure to describe the manner and place of its origin. It continues to be a body politic. In this instance, it comes into court by attorney, and with its right name—that conferred upon it, and by which it is known—and we see no reason for denying to it leave to set itself right, as any other suitor may do, upon the record."

A suit was commenced in *Rosenberg v. Claflin Co.*, 95 Ala. 249, 10 South. 521, in the name of "H. B. Claflin Company," and the plaintiff was permitted to file an amended affidavit "in which its corporate character was duly stated" as a body corporate. This court held, on the authority of *Southern Life Insurance Co. v. Roberts*, *supra*, and *Alabama Conference v. Price*, 42 Ala. 47, that "such an amendment is a mere correction of the description of a plaintiff, already named," and is not a departure. So in *Lewis Lumber Co. v. Camody*, 137 Ala. 578, 35 South. 126, where the complaint describes the defendant as "the Lewis Lumber Company, a firm composed of B. A. Lewis et al. and B. A. Lewis, individually," an amendment was allowed striking out the words commencing with "a firm," etc., and inserting in lieu thereof "a corporation organized under the laws of the state of Maine." The court declared that the amendment substituted no new party defendant, and that the party sued was "the Lewis Lumber Company." In *Hobdy v. Manistee Mill Co.*, 156 Ala. 308, 47 South. 69, where the suit was against the Manistee Mill Company, a body corporate, which was amended by striking out the words "a body corporate," etc., the court said:

"This left undefined the entity of the company, whether a corporation, a partnership, or an individual doing business under that name."

On a second appeal in *Manistee Mill Company v. Hobdy*, 165 Ala. 411, 416, 51 South. 871, 873 (138 Am. St. Rep. 73), the court held:

"That the entity sued * * * is the Manistee Mill Company, and whether it be a corporation, a copartnership, or a name assumed by an individual is a matter merely of description, as to which an amendment may be made without changing the parties to the suit."

[1, 2] The foregoing authorities by analogy sustain our conclusions that a plaintiff corporation is not required to do more than describe itself as a body corporate, and that it is not necessary that the facts constituting the plaintiff such body corporate should be pleaded or be disclosed by the record. If a defendant desires information as to the facts

constituting the plaintiff a body corporate, or as to whether it is a domestic or a foreign body, he may propound interrogatories under the statute and elicit all pertinent and proper information.

So far as appears from this complaint, defendant has the same matter of defense, whether plaintiff be a domestic or a foreign corporation.

Finding no error in the record, the judgment of the trial court must be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 45)

TATUM v. TATUM. (No. 125.)

(Supreme Court of Alabama. Jan. 21, 1915.)

1. HUSBAND AND WIFE ⇨232—CONVEYANCE OF LAND—VALIDITY—EVIDENCE IN EJECTMENT.

In ejectment to recover land conveyed by plaintiff to defendant when she was his wife, evidence as to whether the lands were plaintiff's homestead at the time of such conveyance was properly excluded as immaterial; such conveyance operating to vest a legal title in defendant regardless of whether the lands constituted the husband's homestead.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 844-848, 981; Dec. Dig. ⇨232.]

2. HOMESTEAD ⇨113—CONVEYANCE TO WIFE—RECOVERY BY HUSBAND—EJECTMENT.

Where a husband conveys the legal title to the homestead to his wife, by a deed in which the wife does not join, he cannot thereafter recover the premises from her in ejectment, though they are still impressed with his homestead right.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 182; Dec. Dig. ⇨113.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Ejectment by P. J. Tatum against M. F. Tatum. From a judgment for defendant, plaintiff appeals. Affirmed.

W. A. Gunter, of Montgomery, and C. E. O. Timmerman, of Prattville, for appellant. Eugene Ballard, of Prattville, for appellee.

MAYFIELD, J. Appellant sued appellee in ejectment to recover 120 acres of land.

The facts necessary to a discussion of the questions are few, and are as follows:

"The plaintiff introduced evidence showing that the title to the property in question had passed out of the United States very many years ago—more than 20 years ago—and that the land in 1880, or prior thereto, belonged to one Scott, who died intestate, leaving five children as heirs; that the defendant was one of these children, and inherited a one-fifth interest; that the plaintiff bought the interest of the other heirs, and married the defendant and lived on the place as his homestead for many years, that is, more than 20 years prior to 1900, and his family, consisting of the defendant, as his wife, and their children, lived on the place with him. It appeared in evidence that the plaintiff was sent to the penitentiary for homicide about 1903 or 1904, and remained there

6 years, and then returned and went back to his homestead, where his family continued to live; that a short time after the plaintiff's return the defendant abandoned the plaintiff and refused to allow him to remain on the place, and that the plaintiff some 2 years ago sued and obtained a divorce from the defendant a *vinculo matrimonii*; that prior to the date when plaintiff was sent to the penitentiary he sold and conveyed the said property to his wife, but the said wife did not in any manner join in said deed.

"The plaintiff offered to prove by competent witnesses that the value of the land in question at the time of said conveyance to his wife, the defendant, was less than \$2,000, but the court, on objection of the defendant, refused to allow such proof to be made, and the plaintiff excepted.

"The court held that the plaintiff must recover in the case upon the strength of his legal title, and that, as the plaintiff conveyed the land to his wife, although she did not in any manner join in the deed, it passed the legal title, and the question of homestead could not be raised, and the plaintiff could not recover after having made such a deed to his wife, and refused to allow the plaintiff to prove the value of the land at the time of the execution of the deed to his wife and that it was his homestead. The plaintiff excepted to this ruling of the court.

"The divorce was obtained from the defendant by the plaintiff 2 or 3 years before this trial. The deed made to the wife on the 18th day of March, 1893, was introduced in evidence, and it appeared that the wife did not in any manner join therein, and the plaintiff proved that at the time of the making of said deed he was living on said land with his wife and family, and the plaintiff proved on cross-examination, by defendant, that he had purchased the interest of the heirs in the said land, except his wife, and had lived on the land for more than 20 years prior to his divorce.

"On account of these adverse rulings of the court, the plaintiff took a nonsuit with a bill of exceptions."

We fully agree with the circuit judge in his rulings, and must affirm the judgment of the lower court. We cannot agree with counsel for appellant that the trial court disregarded the former decisions of this court in the cases of *Turner v. Bernheimer*, 95 Ala. 241, 10 South. 750, 36 Am. St. Rep. 207, and *Wallace v. Feibelman*, 179 Ala. 589, 60 South. 290. We are of the opinion that these two cases fully support the rulings of the trial court to which exceptions were reserved, and which induced the nonsuit.

[1] The conveyance by the husband to the wife of the lands in question passed the legal title if the lands were the homestead of the husband; and also passed the legal title if they were not the homestead. Evidence, therefore, as to whether the lands were or were not the homestead of the husband when he conveyed to his wife was wholly immaterial in this action, in which the legal title must prevail.

[2] The theory of the appellant is that, although the legal title passed to the wife, the lands were still impressed with the homestead rights of the husband; that is, that this right had never been alienated in the only mode by which the law authorizes an alienation. This may be true, but it does

not follow that the husband can recover the lands in ejectment from the wife, who not only had (and now has) a homestead right, as well as the husband, but has also the legal title.

The Constitution and statutes as to the alienation of the homestead were intended for the protection of the wife and children, rather than of the husband. While the land, after the conveyance by the husband to the wife, is still impressed with the homestead character, as to which the husband may have rights, the legal title having passed by the conveyance to the wife, the husband cannot thereafter recover the premises from her in an action of ejectment. The case of *Bassett v. Powell*, 178 Ala. 340, 60 South. 88, reviews the authorities, and we find nothing in any of the cases on the subject upon which to predicate error in the trial court's rulings complained of.

The judgment of the trial court is affirmed. Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 101)

E. A. FOY CO. v. HADDOCK. (No. 708.)

(Supreme Court of Alabama. Feb. 11, 1915.)

COMMERCE §40—SALE OF GOODS—FOREIGN CORPORATIONS—COMPLIANCE WITH STATUTE.

In a suit to establish a lien on a barn, a bill alleging a sale of lightning rods by complainant to defendant on a written order made by defendant and directed to complainant at its place of business in Ohio, and that such order was to be filled by a shipment of the lightning rods from such place of business, and delivered to defendant under such written order at his home in Alabama, showed an interstate transaction, and was not demurrable for failure to aver a compliance with the laws of the state to qualify complainant, a foreign corporation, to do business in the state, though it further alleged that the lightning rods were placed on defendant's barn on the day of the delivery, and were to be paid for when so placed, and that they became an improvement or repair upon the barn; this averment being evidently for the purpose of establishing a lien, and not to charge that the lightning rods were to be erected by the complainant under the terms of the contract of sale so as to become an inseparable obligation thereunder.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 29, 30; Dec. Dig. §40.]

Appeal from Chancery Court, Lauderdale County; W. H. Simpson, Chancellor.

Bill by the E. A. Foy Company against John H. Haddock to declare a lien on a barn and an acre of land. Judgment sustaining demurrer to the bill, and complainant appeals. Reversed, rendered, and remanded.

The case made by the bill is that complainant is a corporation organized under the laws of the state of Ohio, having its principal place of business at Cincinnati, in said state; that John Haddock is a resident citizen of Lauderdale county, and on Septem-

ber 4, 1911, the orator sold Haddock 143 feet of lightning rod to be used on the barn of defendant located on the land hereinafter described in repairing, altering, or beautifying same; that the lightning rod was delivered and placed on the barn to repair, alter, or beautify the same, for which defendant agreed to pay orator the sum of \$50.05, and on November 1, 1911, defendant became indebted to orator in that amount. The bill then proceeds to describe the acre of land on which the barn was located, and sets out as an exhibit a statement claiming a lien on the land and barn therein described, and filed and recorded in the office of the judge of probate. The allegation of the bill as to the sale is as follows:

"The said lightning rods were sold to defendant by orator on a written order made by defendant and directed to orator at its place of business in Cincinnati, Ohio, which said order was solicited by an agent of orator, and the order was to be filled by a shipment of said lightning rods from orator's place of business in Cincinnati, and delivered to defendant under said written order at his home in Lauderdale county, Ala., according to the terms of said written order therefor," etc.

The demurrers raise the proposition that complainant was a foreign corporation at the time it made the contract, and had not qualified to do business in this state, as required by the Constitution and statutes thereof, and that the contract alleged and set up constituted the doing of business in this case contrary to law.

George P. Jones, of Florence, for appellant.
R. T. Simpson, of Florence, for appellee.

ANDERSON, J. The amended bill shows nothing more than an interstate transaction involving the sale and delivery in Alabama of a certain number of feet of lightning rods, to be delivered at the residence of the respondent, and to be used upon his barn, and therefore brings the transaction within the influence of the case of *Dozier v. State of Alabama*, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264. In discussing this question it was said by Somerville, J., speaking for the court, in the case of *American Amusement Co. v. East Lake Co.*, 174 Ala. 526, 56 South. 961:

"It is evident that, had the transaction in question involved no more than the sale and delivery of the machinery by the plaintiff to the defendant in Alabama, it would have been an act of interstate commerce, to which the laws of Alabama are not, and could not be, applicable. But the contract was not for the sale of machinery. It was an entire contract for transporting and assembling (that is, building into a structure) certain materials on the defendant's premises."

The bill does aver that the lightning rod was placed upon the respondent's barn the day of the delivery, and was to be paid for when so placed, and that it became an improvement or repair upon said barn, and which was essential to the fixing of a lien

upon said barn and lot, and this averment was evidently for the purpose of showing a lien which the bill was seeking to enforce, and not to charge that it was to be erected by the complainant under the terms of the contract of sale so as to become an inseparable obligation thereunder, and thus bring the transaction under the influence of the case of *Muller v. First Nat'l Bank of Dothan*, 176 Ala. 229, 57 South. 762. Nor does the averment that the complainant was to be paid for the rods when placed upon the barn expressly charge or necessarily imply that it was a part of the complainant's contractual duty to erect the rods upon the barn as a part of the contract of sale and purchase.

As the bill shows an interstate transaction, and does not charge the doing of business in Alabama such as to take it from the protection of interstate matters by doing business in Alabama, it was not demurrable for failing to aver a compliance with the laws of this state as a condition precedent to a recovery of the purchase price of the rods and the enforcement of a lien for same.

The decree of the chancery court sustaining the demurrer to the bill is reversed, and one is here rendered overruling same, and the cause is remanded.

Reversed, rendered, and remanded.

MAYFIELD, SOMERVILLE, and THOMAS, JJ., concur.

(191 Ala. 13)

HOWERTON v. STATE. (No. 550.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. HOMICIDE \S 313 — VERDICT — DEGREE OF CRIME.

A judgment under an indictment for murder cannot be sustained unless the verdict finds the degree of the crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 671-675; Dec. Dig. \S 313.]

2. CRIMINAL LAW \S 815 — INSTRUCTIONS — IGNORING EVIDENCE.

Requested instructions which ignore the tendency of evidence are properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1922, 1986; Dec. Dig. \S 815.]

3. HOMICIDE \S 313—INDICTMENT—VERDICT—SUFFICIENCY.

Under an indictment charging that accused killed decedent by administering poison, a verdict, finding him guilty and sentencing him to the penitentiary for life, is fatally defective for not ascertaining the degree of murder.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 671-675; Dec. Dig. \S 313.]

Appeal from Circuit Court, Henry County; M. Solle, Judge.

Sam Howerton was convicted of murder, and he appeals. Reversed and remanded.

The facts in reference to the judgment and verdict sufficiently appear from the opinion.

The following charges were refused to defendant:

"(1) Unless you are reasonably convinced beyond a reasonable doubt that defendant con-

spired with Sylvia Cummings to poison Alice Howerton, than you cannot find defendant guilty.

"(2) Unless you believe beyond a reasonable doubt that Sylvia Cummings and defendant Sam Howerton conspired together to take the life of Alice Howerton, and that Alice Howerton's life was taken by Sylvia Cummings in carrying out said conspiracy, then you must acquit defendant."

W. L. Lee, of Columbia, D. C. Halstead, of Headland, and E. C. Glover, of Abbeville, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

THOMAS, J. The real question presented by this appeal is the sufficiency of the verdict to support a sentence of conviction of murder in the first degree. The indictment charged:

"That before the finding of this indictment Sylvia Cummings and Sam Howerton unlawfully and with malice aforethought killed Alice Howerton by administering to her poison, to wit, strychnine, against the peace and dignity of the state of Alabama."

Defendant, Sam Howerton, demanded and was granted a severance. On arraignment he pleaded not guilty. On the trial the jury rendered a verdict of guilt as follows:

"We, the jury, find the defendant guilty and sentence him to the penitentiary for a term of his natural life."

The statutes of the state require this court to "consider all questions apparent on the record or reserved by bill of exceptions," and to "render such judgment as the law demands." Code 1907, § 6264. For 50 years it has been the law that when the jury find the defendant guilty under an indictment for murder, "they must ascertain, by their verdict, whether it is murder in the first or second degree," and if the defendant confesses his guilt on arraignment, the court must proceed "to determine the degree of the crime, by the verdict of a jury." Code 1907, § 7087; Clay's Digest, 412, 413, §§ 1, 2.

[1] This court has uniformly held that no judgment of conviction, under an indictment for murder, can be sustained, unless the verdict of the jury expressly finds the degree of the crime of which the defendant is convicted. *Cobia v. State*, 16 Ala. 781; *Levison v. State*, 54 Ala. 520, 524; *Brown v. State*, 109 Ala. 70, 20 South. 103; *Parham v. State*, 147 Ala. 57, 68, 41 South. 1; *Gafford v. State*, 125 Ala. 1, 9, 28 South. 406; *Roberson v. State*, 175 Ala. 15, 18, 57 South. 829. That the murder was committed by means of poison can make no difference. *Johnson v. State*, 17 Ala. 618-627.

No error was committed by the court in ruling on the many objections and exceptions to evidence. It will subserve no good purpose to deal severally with them.

[2] The two charges refused ignored the tendency of the evidence to show that the defendant himself may have administered the fatal potion. On cross-examination Sylvia Cummings stated that:

"Sam told me that he and Tom Byrd had done the work, and that he had got the best night's sleep the night before that he had in a long time, and for me to go to the woods."

[3] The fact that the indictment charged that defendant killed Alice Howerton by administering strychnine did not relieve the jury of the requirement of the statute that on conviction they must ascertain by their verdict the degree of murder. For this defective verdict the judgment of conviction must be reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur.

(191 Ala. 36)

WYLIE v. FLOWERS. (No. 846.)

(Supreme Court of Alabama. Jan. 21, 1915.)

1. HOMESTEAD §57—TITLE UNDER HOMESTEAD LAWS—BURDEN OF PROOF.

Where plaintiff in ejectment claimed title through a widow alleged to have acquired title under the homestead laws on the death of her husband, the burden was on plaintiff to show that the land in controversy was the husband's homestead at his death, and that it did not exceed 160 acres in extent or \$2,000 in value, and that it was all the land owned by the husband at his death, or was duly set apart to the widow in lieu of homestead.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. §§ 83-85; Dec. Dig. §57.]

2. HOMESTEAD §57½—TITLE UNDER HOMESTEAD LAWS—FAILURE OF PROOF—DIRECTION OF VERDICT.

Where plaintiff in ejectment claimed title through a widow alleged to have acquired title under the homestead laws on the death of her husband, and there was no evidence that the land in controversy was all the land owned by the husband at his death, or that it was duly set apart to the widow in lieu of homestead, the court properly directed a verdict for defendant.

[Ed. Note.—For other cases, see *Homestead*, Cent. Dig. § 401; Dec. Dig. §57½.]

3. EJECTMENT §95—TITLE IN DEFENDANT—PROOF.

Where plaintiff in ejectment claimed title through a widow, alleged to have acquired title under the homestead laws on the death of her husband, defendant's evidence that the husband bequeathed the land to those under whom defendant claimed, and that the widow never disented therefrom or disputed the title of the devisees, but treated them as the owners of the fee pursuant to the will, showed title in defendant.

[Ed. Note.—For other cases, see *Ejectment*, Cent. Dig. §§ 280-295; Dec. Dig. §95.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Ejectment by Lollie Belle Wylie against Mary E. Flowers. From a judgment for defendant, plaintiff appeals. Affirmed.

H. H. McClelland, of Monroeville, for appellant. Stevens, McCorvey & Dean and F. J. Inge, all of Mobile, for appellee.

MAYFIELD, J. Appellant brought ejectment. The trial court directed a verdict for the defendant, which resulted in a judgment accordingly, and from this judgment the appeal is prosecuted.

[1] Appellant's sole claim of title was as heir of Martha Jane Alexander, who was the widow of Francis Alexander, the former undisputed owner. The sole claim that the widow had title was based on the theory that she acquired the absolute fee-simple title under the homestead laws of Alabama on the death of her husband. To show this, it was necessary to prove: (1) That the land sued for was the homestead of the husband at his death; (2) that it did not exceed in area 160 acres; (3) that it did not exceed in value \$2,000; and (4) that it was all the land owned by the husband at his death, or that it was set apart to the widow in lieu of homestead, as was authorized by the statutes. The burden of proof as to these facts of course devolved upon plaintiff, and she could not recover without sustaining the burden.

[2] There was no proof whatever of the fourth necessary fact, above specified, and without such proof, the plaintiff could not recover. There is no presumption that a man does, or does not, own land at his death; and when he is shown to have owned a homestead at his death, there is no presumption that the homestead was all the land he owned, or that he owned other land, in the absence of any proof by record, deed, parol, or otherwise. The trial court therefore correctly directed a verdict for the defendant, because of the entire failure of proof as to that material fact.

[3] Moreover, the proof showed that the husband disposed of the land by will, and that the widow never dissented therefrom or disputed the title of the devisees, but always treated them as the owners of the fee, in accordance with the provisions of the will. The defendant, therefore, did what she need not have done—showed title in herself.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 671)

BILES v. SCHULTZ. (No. 983.)

(Supreme Court of Alabama. Feb. 4, 1915.)
MECHANICS' LIENS \Leftrightarrow 93—REPAIRS ON BUILDING—COMPLIANCE WITH CONTRACT.

A person who had not substantially complied with his contract to make repairs on a building was not entitled to a lien thereon.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 124; Dec. Dig. \Leftrightarrow 93.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by Wm. A. Biles, etc., against C. A. Schultz. From a decree for defendant, complainant appeals. Affirmed.

Baugh & Emerson, of Birmingham, for appellant. George E. Bush, of Birmingham, for appellee.

SAYRE, J. Upon due consideration of the testimony in this cause, we are clear to an

agreement with the chancellor that complainant (appellant) did not substantially comply with his contract for repairs on defendant's building, and hence that he is not entitled to a lien. Let the decree be:
Affirmed.

ANDERSON, C. J., and McCLELLAN and GARDNER, JJ., concur.

(191 Ala. 672)

WILLIAMS v. STATE. (No. 973.)

(Supreme Court of Alabama. Jan. 14, 1915.)
CRIMINAL LAW \Leftrightarrow 1094—APPEAL—BILL OF EXCEPTIONS.

In the absence of a bill of exceptions, a conviction will be affirmed, where no error appears on the face of the record.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2807, 3204; Dec. Dig. \Leftrightarrow 1094.]

Appeal from Criminal Court, Jefferson County; William E. Fort, Judge.

Tom Williams was convicted of crime, and he appeals. Affirmed.

R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

McCLELLAN, J. This appeal rests on the record; no bill of exceptions being certified here. No error appears in the record. The judgment is therefore affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(191 Ala. 3)

CARTER v. STATE. (No. 118.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. **HOMICIDE** \Leftrightarrow 282—MURDER IN FIRST DEGREE—EVIDENCE—QUESTION FOR JURY.

Where the state's evidence tended to show that the homicide was unjustifiable, and defendant's evidence tended to establish an alibi, the question whether defendant was guilty of murder in the first degree was for the jury.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 574; Dec. Dig. \Leftrightarrow 282.]

2. **HOMICIDE** \Leftrightarrow 203—EVIDENCE—DYING DECLARATIONS.

Where preliminary proof was made that a statement by decedent was made under a consciousness of impending death, such statement was properly admitted in evidence as a dying declaration.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. \Leftrightarrow 203.]

3. **HOMICIDE** \Leftrightarrow 219—DYING DECLARATIONS—IMPEACHMENT.

A dying declaration may be impeached the same as though declarant had testified as a witness.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 460; Dec. Dig. \Leftrightarrow 219.]

4. **WITNESSES** \Leftrightarrow 269—CROSS-EXAMINATION—CREDIBILITY OF DECLARANT—DYING DECLARATIONS.

The exclusion of a question propounded on cross-examination, inquiring whether decedent, whose dying declaration was in question,

would have been entitled to belief as a witness, was error, though the witness had not testified on his examination in chief in reference to declarant's reputation or character.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 949-954; Dec. Dig. ¶ 269.]

5. WITNESSES ¶ 325—CROSS-EXAMINATION—CONTROL BY COURT—DISCRETION—IMPEACHMENT OF DECLARANT.

The discretionary power vested in the court to regulate the cross-examination of a witness does not justify a requirement that the cross-examiner shall make a witness his own, who has testified to a dying declaration, before eliciting from him testimony tending to impeach the declarant.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1098; Dec. Dig. ¶ 325.]

6. HOMICIDE ¶ 339—APPEAL—GROUND FOR REVERSAL—CROSS-EXAMINATION—CREDIBILITY OF DECLARANT.

The exclusion of a question propounded to a witness, who testified to a dying declaration, inquiring whether the declarant would have been entitled to belief as a witness, required a reversal, though other witnesses testified that declarant's general character and reputation for truth and veracity were bad, and that he would not have been entitled to belief in a court of justice.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. § 714; Dec. Dig. ¶ 339.]

7. CRIMINAL LAW ¶ 899—CROSS-EXAMINATION—EXCLUSION OF QUESTION—WAIVER OF ERROR.

Error in excluding a question propounded on cross-examination to a witness for the prosecution, which witness had testified to a dying declaration, inquiring whether declarant would have been entitled to belief as a witness, was not waived by defendant's failure to call such witness as his own witness in respect to declarant's unworthiness of belief.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2122; Dec. Dig. ¶ 899.]

Appeal from Circuit Court, Conecuh County; A. E. Gamble, Judge.

Martin Carter was convicted of murder in the first degree, and appeals. Reversed and remanded.

James A. Stallworth, of Evergreen, for appellant. W. L. Martin, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

McCLELLAN, J. [1] The appellant has been adjudged guilty of murder in the first degree. The victim was one Lett. The state's theory was that the homicide was of an entirely unjustifiable character. The defense was a denial of any participation of any kind, in the killing of Lett, by the accused; an alibi being offered to sustain his denial. Manifestly the question of guilt vel non was for the jury, under the evidence.

[2, 3] The substance of a dying declaration said to have been made by Lett, under affirmatively proven consciousness of his impending dissolution, was admitted in evidence. There is no room for argument against the propriety of the action of the court in admitting to the jury the matter of the dying declaration. The predicate was satisfactorily laid to allow the admission in evidence of all the declarant said descriptive of the cir-

cumstances attendant upon and surrounding his version of the tragedy. Where a dying declaration is properly admitted in evidence, it may be discredited or impeached just as if the declarant had testified as a witness in the proceeding. So it is competent to allow the declarant's credibility to be inquired into, his reputation for truth and veracity, and whether he would, if testifying as a witness in that behalf, be worthy of belief, in a court of justice. 21 Cyc. pp. 993, 994; Ency. on Evl. p. 1015; Carver v. U. S., 164 U. S. 694, 697, 17 Sup. Ct. 228, 41 L. Ed. 602; Lester v. State, 37 Fla. 382, 20 South. 232; Gambrell v. State, 92 Miss. 728, 46 South. 138, 17 L. R. A. (N. S.) 291, 131 Am. St. Rep. 549, 16 Ann. Cas. 147.

[4] The witness McCrory was called by the prosecution. He testified to a declaration by Lett, who had told him he was going to die. On cross-examination the witness testified, without objection, that Lett's general reputation and his reputation for truth and veracity were bad. He was then asked whether Lett would have been entitled to belief as a witness, in a court of justice. The state's general objection to the question was sustained. Perhaps the trial court entertained the opinion that the injection of the inquiry made by the question was not in order under a proper cross-examination; that it should have come on the defendant's initiative, the witness not having testified on his examination in chief in reference to the particular matter of Lett's reputation or character. If this was the ground of the court's ruling, it consisted with the quotation from *Phil. R. R. Co. v. Stimpson*, 14 Pet. 448, 461, 10 L. Ed. 535, made in our case of *Toole v. Nichol*, 43 Ala. 406, 419. That statement of doctrine is not the rule established in this jurisdiction. In *Fralick v. Presley*, 29 Ala. 457, 461, 65 Am. Dec. 413, it was said:

"This court decided, in the case of *Kelly v. Brooks*, 25 Ala. 523, that the party against whom a witness has been introduced and examined in chief has a right to examine him 'fully as to his knowledge touching any and all facts material to the case.' We think the rule thus laid down is sustained by principle and a preponderance of authority."

The *Stimpson* Case, *supra*, is there cited as sustaining the announcement made; but in this particular the pertinent doctrine of that case was evidently misunderstood. Nevertheless, we take the rule to be correctly stated in *Fralick v. Presley*; and its soundness, in principle, is further vindicated by the considerations stated and the pertinent rulings made in *Amos' Case*, 96 Ala. 120, 125, 11 South. 424; *Johnson v. Armstrong*, 97 Ala. 731, 735, 12 South. 72. The state of the law in this relation, elsewhere prevailing, may be seen by reference to *Jones on Evl.* (2d Ed.) § 820, and notes; *People v. Barker*, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501, 517, 518; 3 Ency. of Evl. p. 816 et seq. The ruling actually made in *Toole v. Nichol*, su-

pra, was invited by the inquiry whether a witness summoned by the opposite party, but not examined, could, as a matter of right in the other party, be cross-examined. It was well there held that no such right of cross-examination existed.

[5] But the exercise of the right to cross-examine is subject to the control of the trial court's sound discretion. *Huntsville Ry. Co. v. Corpening*, 97 Ala. 681, 687, 12 South. 295. While it (the right) cannot be defeated or denied, the trial court may, within sound discretion, regulate the exercise of the right, particularly as to the time and method for the exercise of the right. That the exercise of this sound discretion vested in the trial courts in this connection will not justify the imposition on the proposed cross-examiner of the condition that, in respect of the matter of his inquiry, he should make the witness his own, thus concluding him from discrediting the witness, is plainly ruled in *Johnson v. Armstrong*, supra.

So the trial court erred in disallowing the question propounded to the state's witness McCrory on his cross-examination, whereby the defendant sought to show that Lett, if he had testified as a witness, would not have been entitled to belief in a court of justice.

[6, 7] Was the error thus made without prejudice to the defendant? He was allowed, during the progress of the adduction of his testimony, to show, by a number of witnesses, that Lett's general character and his reputation for truth and veracity were bad; and that he would not have been entitled to belief in a court of justice. No witnesses were offered by the state to contradict this feature of the evidence presented by the defendant. Notwithstanding this state of the evidence on the issue of Lett's character, we cannot affirm that the error stated was innocuous. The effect of the error thus committed was not averted by the defendant's failure to call McCrory as his witness in respect of Lett's unworthiness of belief in a court of justice. *Johnson v. Armstrong*, supra. For this error the judgment is reversed and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and GARDNER, JJ., concur.

(191 Ala. 175)

HARTLEY et al. v. FREDERICK. (No. 147.) (Supreme Court of Alabama. Feb. 11, 1915.)

1. CANCELLATION OF INSTRUMENTS — FRAUD—SUFFICIENCY OF BILL.

A bill alleging that complainant was the sole heir at law of D., who died owning a house and lot devised to her by defendant's father, as well as personal property, that defendant became administrator of the estate, that a deed from complainant to defendant to all of the property of every description owned by D. was induced by defendant's representations that it was for the purpose only of transferring the house and lot, and that such house and lot had been deeded to

defendant by his father, and did not belong to D., and that such house and lot had not, in fact, been conveyed to defendant, and further alleging a lifelong and intimate family association between complainant and defendant, that she was reared in the same house with him, and loved and trusted him, that when she executed the deed she was 56 years old, in ill health, and weak in both judgment and will power, that she was naturally impressionable and sentimental, and that defendant was 52 years old, vigorous mentally and physically, and a successful man of affairs, alleged every element of fraud and deceit to entitle complainant to have the deed set aside.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. —37.]

2. DEEDS — FRAUD — ESTOPPEL — NEGLIGENCE.

That complainant, induced to execute a deed to defendant by his misrepresentations that he was the owner of the real estate by a deed from a former owner, and that the records would verify his statements, failed to investigate the state of the title for herself, did not defeat her right to have the deed set aside; as, where a fact represented is one peculiarly within the knowledge of the party making the representation, and of which the other party is ignorant, though the real facts appear on the public records, there is no obligation to examine the records, and the failure to do so does not affect the right of action, especially as the tendency of modern decisions is to relax the requirement of diligence, and to hold that a party guilty of intentional deceit should not be heard to say that the other party ought not to have believed him.

[Ed. Note.—For other cases, see Deeds, Dec. Dig. —74.]

3. CANCELLATION OF INSTRUMENTS — CONDITIONS PRECEDENT — RESTORATION OF CONSIDERATION.

Where money paid complainant by the administrator of an estate in which she was interested at the time of the execution of a deed to him in reliance on his misrepresentations that he had title by a deed from a former owner was received by complainant as an advancement representing the value of certain debts due the estate, she was under no obligation to return the money as a condition to rescinding her deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 33-38; Dec. Dig. —24.]

4. CANCELLATION OF INSTRUMENTS — CONDITIONS PRECEDENT — RESTORATION OF CONSIDERATION.

Even if such money were received as a consideration for the deed, it was sufficient for her to offer in a bill to set aside the deed to account for the money or be charged therewith as might be equitable.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. —37.]

5. CANCELLATION OF INSTRUMENTS — SUITS TO SET ASIDE DEED—NECESSARY PARTIES.

One of the grantees in a deed which the grantor was induced to execute by the fraudulent misrepresentations of the other grantee was a necessary party to a suit to annul the deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 55-64; Dec. Dig. —35.]

6. DEEDS — FRAUD OF ONE GRANTEE—EFFECT AS TO COGRANTEE.

Though one of the grantees named in a deed did not participate in the fraudulent misrepresentations of his cograntee, he was equally responsible and answerable therefor so long as he

stood as a grantee and beneficiary under the fraudulent deed.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 165-182; Dec. Dig. ¶ 70.]

Appeal from Chancery Court, Montgomery County; W. R. Chapman, Chancellor.

Bill by Mrs. Emma Frederick against J. H. Hartley and others to cancel and annul a deed of conveyance executed by complainant to respondents, and for an accounting. From a decree sustaining demurrers as to the allegation of undue influence, but overruling them on other grounds, respondents appeal. Affirmed.

As last amended, the bill alleges that complainant was and is the sole heir at law of her niece, Fanny Dearing, who died in the city of Montgomery about July 23, 1911, leaving city real estate worth about \$7,000, and personal estate worth about \$6,000; that J. H. Hartley became administrator of said estate, and, as such, came into possession of all the personal property. The deed in question was dated August 17, 1911, and conveyed to J. H. and T. H. Hartley, respondents herein, all the property of every description owned by Fanny E. Dearing at the time of her death, specifying in particular a house and lot in the city of Montgomery (the only real estate); two mortgage securities aggregating \$4,000; all furniture, diamonds, bric-a-brac, moneys due, and choses in action. The bill alleges that complainant executed the deed upon the representations made to her by the respondent J. H. Hartley that it was for the purpose only of transferring to him the house property in Montgomery, and that she signed it in reliance upon his representations as to its contents, not knowing that it purported to transfer anything else, and that she received from J. H. Hartley only \$4,000, which was paid to her the next day, not as a consideration for the deed, but as an advancement to her of the mortgaged debts which were not due until the year 1914. The inducements which led plaintiff to the voluntary relinquishment of the house property are thus stated:

(6) * * * That orator said she also loved the old home place, and that her niece, the said Fanny Dearing, had said that at her death it would belong to oratrix; that the said J. H. Hartley said, "No;" the place had been deeded to him by his father; that it was his by law, and that Mrs. Dearing had no right to leave it to oratrix; that the said J. H. Hartley, after much other general conversation in reference to family matters, suggested that he wanted oratrix to sign a transfer of the house to him; that Mr. Frederick, husband of oratrix, who was present, asked him why it was necessary for oratrix to make a transfer if the house already belonged to him. He replied, in substance, that it would prevent any dispute or misunderstanding about the title of the property, and it would save him the trouble and expense of proving in court that he owned it, and that oratrix, by making the transfer, would satisfy her own mind, and save herself the useless trouble and expense of trying to get the property; that he repeated that the property was his, and that it

was better that she give him a transfer of it; that she could always look to him to help her if she needed help, as if he was her brother; * * * he spoke of the affection he had for oratrix and his willingness to help her, of the property being his by law which he could prove, and the uselessness and expense and trouble of oratrix attempting to get the property, and of it being wrong for her to do so in view of their long years of friendship and their close family connections (other misrepresentations are here charged as to the amount and existence of personal property); that oratrix thereupon agreed to comply with his wishes and make a transfer to him of said house.

The bill alleges that several years later her suspicions were aroused by the unsatisfactory conduct of said Hartley with respect to receive, whereupon she came to Montgomery from her home in another state, and, upon consulting an attorney, learned for the first time of the character of the deed she had executed, and that J. H. Hartley had not, in fact, conveyed the house property to J. H. Hartley, Jr., but had died owning it, and that it had passed by his will to Frances E. Dearing, and that said respondent's statement to complainant was false. The bill further alleges a lifelong and intimate family association between oratrix and respondents; that she was reared in the same house with them, and loved and trusted them as brothers; that when she executed the deed in question she was 56 years old, and enfeebled of long-standing ill health, and was weak in both judgment and will power; that she was naturally impressionable and sentimental, and that J. H. Hartley was 52 years of age, vigorous, mentally and physically, and a successful man of affairs. The bill shows an offer by complainant to return the amount received by her, and a submission to the jurisdiction of the court in all respects. The chancellor held the bill sufficient in its allegation of fraudulent misrepresentation and complainant's reliance thereon, but that it was demurrable as showing undue influence as an independent ground of relief.

Steiner, Crum & Well, of Montgomery, for appellants. Hill, Hill, Whiting & Stern, of Montgomery, for appellee.

SOMERVILLE, J. [1] The bill of complaint alleges with clearness and precision every element of fraud and deceit which is necessary to entitle the complainant to the relief prayed for.

[2] The demurrant insists, however, that, on the facts shown by the bill, the complainant had no right to accept as true the claim of the respondent J. H. Hartley that he was the owner of the real estate in question by virtue of a deed made to him by his father; that complainant's intestate had no right to leave it to the complainant; and that the records would verify his statements; in short, that the complainant should have investigated the state of the title for herself,

and, failing to do so, cannot complain that she was deceived.

In support of this contention the demurrant cites the following:

"It is a general principle, however, that if no confidential relations exist between the parties, and if the facts misrepresented or concealed are not peculiarly within the knowledge of the party charged, and the other party has available means of knowing the truth by the exercise of ordinary prudence and intelligence, and nothing is said or done to prevent inquiry by him, he must make use of his means of knowledge or he cannot complain that he was misled." 20 Cyc. 32, b.

But the same authority states in the same paragraph that:

"The respective character, intelligence, experience, age, and mental and physical condition of the parties are considerations which may vary this rule or render it of small importance."

And further:

"On the other hand, if the fact represented is one which is susceptible of accurate knowledge, and the speaker is or may well be presumed to be cognizant thereof, while the other party is ignorant, and the statement is a positive assertion containing nothing so improbable or unreasonable as to put the other party upon further inquiry or give him cause to suspect that it is false, and an investigation would be necessary for him to discover the truth, the statement may be relied on."

So also the rule requiring investigation does not apply "if any relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other." 20 Cyc. 84 (iii).

Specifically, as to the availability of public records to show the true title, the authorities hold without conflict that:

"Where the fact represented is one peculiarly within the vendor's knowledge, and of which the person is ignorant, * * * although the real facts appear on the public records, the purchaser is under no obligation to examine the records, and his failure to do so does not affect his right of action." 20 Cyc. 57 (2), and cases cited.

With respect to a vendee, as the same authority points out, the tendency of the modern decisions is to relax the requirement of diligence, and to hold that a vendor guilty of intentional deceit should not be heard to say that the purchaser ought not to have believed him. 20 Cyc. 62 (D). We thoroughly approve of this tendency, and it is as applicable to vendors as to vendees. Indeed, it would seem to be a singular perversion of morals as well as of policy for a court to punish the venial faults of negligence and credulity by confirming a successful deceiver in the enjoyment of the fruits of his fraud. We have heretofore expressed our views somewhat forcibly upon this subject, and need not now repeat them. *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 South. 143.

From whatever angle this case is viewed, the allegations of fraud and deceit are sufficient.

[3, 4] If it be true, as alleged, that the \$4,-

000 paid to the complainant was received by her from the administrator as an advancement representing the value of the mortgage debts due the estate, she was under no obligation to return that amount to him as a condition to the rescission of her deed. And, even if it were received as a consideration for the deed, it is sufficient, under the circumstances shown, to offer to account for it or to be charged with it as may be equitable. There can be no practical difficulty in this regard.

[5, 6] T. H. Hartley, being a party to and beneficiary under the deed, is obviously a necessary party to the bill of complaint. And, although he does not appear to have actually participated in the fraudulent misrepresentations imputed to his correspondent, yet both in law and in equity he is equally responsible and answerable therefor so long as he stands as a grantee and beneficiary under the fraudulent deed. *Fowler v. Ala., I. & S. Co.*, 66 South. 672.

Upon these considerations, the decree of the chancellor overruling the demurrer will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(191 Ala. 195)

BIDWELL v. JOHNSON et al. (No. 839.)

(Supreme Court of Alabama. Jan. 21, 1915.

Rehearing Denied Feb. 11, 1915.)

1. CONSTITUTIONAL LAW — 48 — CONSTRUCTION OF STATUTE — PRESUMPTION OF CONSTITUTIONALITY.

Where a statute is fairly susceptible of two interpretations, it should be given that under which it will be constitutional.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. — 48.]

2. TRUSTS — 268 — ACTIONS — ATTORNEY'S FEES.

In view of Code 1907, § 5219, authorizing the allowance of attorney's fees in partition cases where the services were for the benefit of all, section 3010, providing that in all suits and proceedings in the probate and chancery courts where the administration of a trust is involved the court may ascertain a reasonable fee, to be paid to the solicitor representing the trust or common property, which shall be charged as part of the costs, authorizes, in a suit involving trust property, an award of fees in favor of counsel for the beneficiaries only where such counsel performed services for the benefit of the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 377; Dec. Dig. — 268.]

3. TRUSTS — 268 — SUITS — ATTORNEY'S FEES — ALLOWANCE.

A testator who devised property in trust for numerous legatees declared that settlements need not be made within the usual 12 months. The legatees, being desirous of obtaining their share, engaged counsel, who effected a compromise with the executrix, which was approved by the court. The legatees received about \$1,700 apiece. Held, that the fee of the counsel for the legatees which it was desired to charge as costs could not be based on the sums recover-

ed, and hence an award of \$2,000 was improper, where no benefit to the trust res was shown, save that a speedier settlement was effected.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 377; Dec. Dig. ¶268.]

Appeal from Chancery Court, Mobile County; Thomas H. Smith, Chancellor.

Suit by Howard D. Johnson and others against Jennie H. Bidwell as executrix. From a decree awarding counsel fees, defendant, executrix, appeals. Affirmed in part, and in part reversed and remanded.

Gregory L. & H. T. Smith, of Mobile, for appellant. Frederick G. Bromberg, of Mobile, for appellees.

GARDNER, J. Appellant, Jennie H. Bidwell, qualified as executrix of the last will of Rufus Dane, deceased, in the probate court of Mobile county. Inventory of the estate was duly filed by her, and the same was duly appraised. More than three years thereafter, no final settlement of her administration having been had, appellees, as some of the distributees of said estate, filed a motion in the probate court to require such final settlement. The court allowed the settlement to be made as a partial settlement only, as prayed by the executrix. It was ordered on the motion of appellees that the executrix be required to give bond. Subsequently on bill filed by appellees, the administration of the estate was removed into the chancery court and bond was made by executrix in response to motion of the appellees. Aside from some special bequests, not necessary here to note, there appears to have been 12 distributees of the estate, 7 of whom are appellees to this cause, who are represented by their counsel, F. G. Bromberg. Motions were made through their counsel for the removal of the executrix, but which were unsuccessful. There were also objections to her accounts and other motions and petitions filed, which need not be enumerated in detail, some of which appear not to have been pressed upon the court, and no testimony offered in support thereof. In February, 1914, all of the distributees interested in the estate entered into an agreement with the executrix whereby they accepted the sum of \$1,200 in full payment of their interest in said estate, which sum was to be above all unpaid court costs and commissions. This agreement of settlement appears to have been made without the knowledge or participation of the solicitor for the appellees, but he was instructed by them to carry the agreement into effect. After this was done counsel for appellee then moved the court for an order of reference to ascertain the reasonable sum to pay the solicitor for complainants in the cause for his services therein. The register reported the sum of \$2,000, which report was confirmed by the chancellor, and from his decree, ordering the payment of same as part of the court costs, this

appeal is prosecuted, and presents the sole question for our determination here.

Upon consideration of the agreement of settlement above referred to, by which each distributee accepted \$1,200 as in full payment of any balance due them, and which was to be above all court costs, we are of the opinion that if the fee for counsel for said contesting distributees was properly a matter that could, under the statute hereinafter quoted, be taxable as a part of the costs of the case, such order was not in violation of said agreement of settlement, as is insisted by counsel for appellant.

The executrix was represented throughout by counsel. One of the distributees of the estate was non compos mentis, but was duly represented by guardian ad litem, and counsel for appellees, F. G. Bromberg, was also counsel for said guardian ad litem. For his services in this capacity he was allowed \$100 by the register, and to this portion of the report no exceptions were reserved, and therefore no assignments of error were presented thereto, nor is the matter argued in brief for appellant. This allowance, therefore, is without contest, although counsel for appellee argues the same at some length in his brief.

[1, 2] Upon the reference before the register examination was had of an attorney of the city of Mobile of much experience and practice, who testified that the sum of \$2,000 would be a suitable compensation to be allowed complainants' solicitor. Among other things he testified in answer to question by counsel for appellees, as follows:

"Upon your statement made to me that through your efforts you had procured for each of the devisees \$500 in cash some time ago, and then a compromise which realized \$1,200 additional, I think there are seven heirs, and basing my opinion on those facts, I came to the conclusion that your services in recovering that sum and in making the compromise should be 15 per cent. on the first thousand dollars and 10 per cent. on the remainder; that being in accordance with the fee bill adopted by the Mobile Bar Association."

The cases relied upon by counsel for appellant as denying the allowance of any counsel fees for the solicitor for the appellees (*Foster v. Foster*, 126 Ala. 257, 28 South. 624; *Jordan v. Farrow*, 130 Ala. 428, 30 South. 338), were decided prior to the passage of the act approved February 2, 1903 (General Acts of Alabama 1903, p. 33), and of course prior to the Code provision which we now have (sections 3010 and 5219 of the Code of 1907). Section 3010 of the Code provides as follows:

"In all suits and proceedings in the probate courts and chancery and other courts of like jurisdiction, where there is involved the administration of a trust, or where there is involved the sale of property for distribution, or where there is a partition in kind of real or personal property between tenants in common, the court having jurisdiction of such suit or proceeding may ascertain a reasonable attorney's fee, to be paid to the attorneys or solicitors represent-

ing the trust, joint, or common property, or any party in the suit or proceeding, and is authorized to tax as a part of the costs in such suit or proceeding such reasonable attorney's fee, which is to be paid when collected as the other costs in the proceeding to such attorneys or solicitors as may be directed or ordered by the court."

Speaking to this section, it was said in the case of *Wilks v. Wilks*, 178 Ala. 151, 57 South. 776:

"This is a codification and improvement of the act of February 2, 1903. * * * We think it was not intended to authorize cestuis que trustent, or parties claiming to be cestuis que trustent, to employ at the expense of the trust attorneys or solicitors for the litigation among themselves of adversary claims as to their respective interests in the trust. In such questions the trust as a trust is not interested, nor would it be equitable that other cestuis—not sui juris perhaps, as is the case with some of the distributees here—should be taxed through the trust fund or estate to carry on litigations, or specific and separable branches of litigations, in which they are not interested, as may well be the case."

The above case concerned the administration of an estate. It was not there questioned but that the section had reference to such an administration, and we are persuaded that such a case presents the administration of a trust within the meaning of this provision of the Code.

It is insisted that a literal construction of the act would authorize the taxation of an attorney's fee for the payment of an attorney for any party to the suit, whether such services were for the common benefit of all or not. Such a construction would, in our opinion, make that provision of the section now under consideration of doubtful constitutional validity. *S. & N. A. R. R. Co. v. Morris*, 65 Ala. 199; *Smith v. L. & N. R. R. Co.*, 75 Ala. 461; *Birmingham W. W. Co. v. State*, 159 Ala. 120, 48 South. 658; *G., O. & S. F. R. R. Co. v. Ellis*, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 686.

It is recognized as an established rule of construction that it is the imperative duty of the court to uphold a statute when it is fairly susceptible of two interpretations, one which would uphold its constitutionality, and the other defeat it, though the adoption of the former be the less natural. *State ex rel. Collman v. Pitts*, 160 Ala. 133, 49 South. 441, 686, 135 Am. St. Rep. 79. Furthermore, such a construction as contended for by counsel would lead to inequitable and unjust results; and, as was said by this court in *Blakeney v. Blakeney*, 6 Port. 109, 30 Am. Dec. 574:

"To construe a statute according to its equity is nothing more than to give effect to it, according to the intention of the lawmakers, as indicated by its terms and purposes; hence it either be extended or restrained by an equitable construction." *Lane v. Kolb*, 92 Ala. 636, 9 South. 873.

Such an equitable construction was given to the statute in the case of *Wilks v. Wilks*, supra, wherein it was indicated that for such a fee to be taxed under this statute

out of the common fund it must have been for services rendered for a matter in which the trust as a trust is interested, or for the common benefit of all. Indeed, we take it that this is the construction so fixed by the Legislature in adopting the Code, as shown in section 5219, Code of 1907, wherein these words are found, "When the services are for a common benefit of all." See, also, *Northern v. Tatum*, 164 Ala. 368, 51 South. 17. This construction rests upon the principle akin to that recognized in such cases as *Strong v. Taylor*, 82 Ala. 213, 2 South. 760; *Grimball v. Cruse*, 70 Ala. 534; *Trustees v. Greenough*, 105 U. S. 527, 26 L. Ed. 1157; *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, 28 L. Ed. 915—wherein the principle is stated that where there is a common trust or fund and suit is instituted by one for the benefit of all, it is not just that one alone should bear the burden when others receive the benefit.

It can be readily seen that in the administration of a trust, instances may arise in which the distributees or beneficiaries may find the necessity to take the initiative in proceedings for the preservation or the recovery of a trust fund. But certainly under the construction which we have given this section, for any party to the suit to be allowed counsel fees, it must clearly appear that such services were rendered in good faith and upon good cause, and for the common benefit of all. The statute by its language clearly shows that much is left to the sound discretion of the court.

[3] In the instant case, from the sum allowed counsel for appellee, and from the testimony offered before the register, we are persuaded that the construction which we here accord the statute was not followed in the court below. From the quotation of the witness, offered by appellees, as to his compensation, it appears he proceeded upon the assumption that counsel had recovered \$1,700 for each of the distributees. We find no warrant for such an assumption in this regard. They were provided for by the will, inventory of the property was made by the executrix, and it was duly appraised. The assumption would proceed upon the theory that but for his services they would recover nothing. The record here leads us to no such conclusion. True, more than three years had elapsed since the granting of letters of executorship, and no final settlement had been made, but it appears that for this there was good cause, and it was so determined by the court, for the reason that testator indicated in his will that he thought it advisable to postpone a sale of his real estate for an expected enhancement in value, and it was expressly provided in the will that final settlement need not be made at the expiration of 12 months, if the executrix was of the opinion it would not be to the advantage of the estate. True, objections were filed to

claims held by the executrix against the estate, but these objections were held to be without merit.

Counsel for appellee has taken no pains to point out to us, in a rather voluminous record, wherein the trust fund was materially and actually increased in amount or volume by the services rendered, while, on the other hand counsel for appellant insist in their brief that there was no material increase therein. Counsel for appellee does insist, however, that the depositions of witnesses Lagomarsino and Ashe show that the executrix had secretly become the purchaser of some of the property of this estate, but it nowhere appears that the price paid and accounted for was inadequate, or was not the best price obtainable at that time.

One of the motions made by counsel for appellee seems to have been to require the executrix to pay over to Mrs. Carleton and Mrs. Rogers their share of a certain fund. It is too clear for discussion that such motions are for the benefit of those distributees individually, and not for the common benefit of all, a question in which the trust as a trust is in no way interested, and for such services the statute makes no provision.

The executrix, on motion of counsel for appellee, was required to give bond, and the estate was removed into the chancery court for administration. Doubtless such service in this case may be considered as for the benefit of all and properly chargeable under the provisions of this statute.

There were a series of motions and petitions filed in this cause, very few of which received favorable response from the court. In the allowance of fees for counsel for the parties, as in this cause, where as here the trust, through the employment by the executrix, is represented by counsel, it should be kept in mind that ordinarily there should be an estate or fund discovered, rescued or preserved, which would otherwise be beyond the reach of the parties interested, and that the parties should not be required to contribute to the expense of a barren litigation. *Strong v. Taylor*, supra.

We do not mean to indicate that in every case the proceedings should actually result in an increase of the estate or its preservation, before any fees should be allowed, but in such instances the above rule is applicable to ordinary cases, and should be borne carefully in mind by the court administering the trust, so that no injustice may be done in the exercise of the sound judicial discretion vested in the court by the statute. In such a case the court should be clearly convinced that the litigation or proceeding was in perfect good faith, and rested upon good and sufficient cause, such as the court itself would have advised instituted, and it must clearly appear of course, as previously shown, that such proceedings were for the benefit of all, or the common fund or estate.

In fixing the compensation in such cases as here presented, the trust estate being represented by counsel, the court should exercise the greatest caution, and while the fact that the proceeding was unsuccessfully made, under the rule we have just stated, may not necessarily deprive the counsel of all compensation, yet in cases of this character it should be given much weight by the court in fixing the allowance, for it can only be allowed at all upon the principle that the services performed were for the benefit of those distributees or beneficiaries not joining in the employment, and in a proceeding which the court has determined should have been prosecuted, and was prosecuted in good faith, and upon probable cause. We do not see that if these rules are observed the construction here given the statute will result in any of the evils prophesied by counsel, but if so, that would be a matter that would address itself to the lawmaking body.

Here, as before stated, the executrix was represented throughout by counsel, and, as disclosed by the evidence, for his services in the entire administration he received the sum of \$506, which he testifies was a reasonable compensation. Counsel for appellees, representing seven of the distributees, is allowed the sum of \$2,000. We think it clear from this record that the register in fixing the amount followed the testimony of the attorney, who testified for the appellees, and who fixed this sum as compensation, which testimony, as we think we have demonstrated, was based upon an incorrect assumption, and that the learned chancellor fell into error in the confirmation of such report, doubtless upon the well-known rule relating to the weight to be given the finding of the register on the facts.

The reference before the register upon this issue should have been confined solely to the services rendered by such counsel which were for the benefit of all or of a trust fund, and due account should have been given to the unsuccessful determination of many of the proceedings.

As previously stated, counsel for appellee has not pointed out to us wherein he has materially increased the estate. It may be that some of his efforts resulted in quickening the activities of the executrix to a more faithful discharge of her duties, and to a more careful regard for the rights and interests of the distributees, and had their influence in bringing about an advantageous settlement between the parties. If the court find that such was the case, this may be taken into consideration in determining the question of compensation, and as to whether or not any beneficial results followed any services rendered; but, as these are matters which were not inquired into and do not appear to have been considered upon the reference in this cause, we do not feel justified in here rendering a decree, but in the present state of the

record we think it proper to remand the cause that another reference may be held.

The decree of the chancery court, in so far as the same confirms the report of the register as to the fee for counsel for the guardian ad litem, and as to distribution of the estate, is affirmed; and as to that part of said decree confirming the report of the register allowing the sum of \$2,000 as a fee for counsel for appellees, the same is hereby reversed, and the cause is remanded to the chancery court, with the costs of this appeal to be taxed against the appellees.

Affirmed in part, and in part reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 1)

CARMACK v. STATE. (No. 562.)

(Supreme Court of Alabama. Jan. 21, 1915.)

JURY \Leftrightarrow 70—SELECTION OF JURORS—VENIRE—OBJECTIONS.

Under Act 1909, p. 317, requiring the court in capital cases to order the sheriff to summon not less than 50 nor more than 100 persons, including those drawn and summoned on the regular juries for the week set for the trial of the case, a venire fixing the number at 75, composed of the regular jurors for the week and 18 special jurors, must, on timely motion of accused, be quashed, where, on the organization of the regular juries for the week, the court excused 26 jurors on the venire to try the case and made no order requiring them to be re-summoned for the trial of defendant, so that the special venire was in effect reduced to 49, and where accused, on the overruling of the motion, objected to being put to trial on the ground that less than the required number of jurors had been summoned, a conviction must be reversed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 310-330, 340, 350; Dec. Dig. \Leftrightarrow 70.]

Appeal from Law and Equity Court, Lee County; Lum Duke, Judge.

Homer Carmack was convicted of murder, and he appeals. Reversed and remanded.

The record shows that defendant moved to quash the venire on the ground that the number of jurors summoned for his trial was less than the number fixed by the court for the venire, and less than 75 persons, and on other grounds not necessary to be here set out. The court overruled motion, and defendant objected to being put to trial on the ground that less than the required number of jurors has been summoned.

Albert E. Barnett, of Opelika, and Glenn & De Graffenried, of Seale, for appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. It appears that the special venire to try this case was fixed at 75, to be composed of the regular jurors for the week, together with 18 special jurors drawn by the court. It also appears that the trial

court, upon the organization of the regular juries for the week, excused 26 jurors who were upon the venire to try this case, and made no order requiring them to be re-summoned for the trial of this defendant, as provided by the act of 1909 (page 317). *Waldrop v. State*, 64 South. 80. It thus appears that by excusing these 26 jurors, and in not ordering them summoned to try this case, the special venire was in effect reduced to 49—less than the minimum number required by law. This question was gone over in the case of *Tennison v. State*, 66 South. 112, but a majority of the court held that the action of the court was not questioned by a proper and timely objection. Here, however, the record shows that the defendant did make a proper and seasonable objection to being placed upon trial with the venire in this condition; and we think that the trial court erred in so placing him upon trial.

There is no merit in the objections to the evidence as disclosed by what appears to be an incomplete bill of exceptions. The judgment of the law and equity court is reversed, and the cause is remanded.

Reversed and remanded. All the Justices concur, except DE GRAFFENRIED, J., not sitting.

(191 Ala. 454)

YARBROUGH v. P. H. & A. E. STEWART. (No. 139.)

(Supreme Court of Alabama. Jan. 21, 1915.)

1. LOGS AND LOGGING \Leftrightarrow 3—SALE OF STANDING TIMBER—RIGHT OF ENTRY.

Where an owner conveyed standing timber with a right of entry for removal, the right of entry was incidental and could not exist but from the ownership of the timber, and hence one to whom the grantee conveyed only his timber rights was a trespasser, without right of entry.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. \Leftrightarrow 3.]

2. LOGS AND LOGGING \Leftrightarrow 3—SALE OF STANDING TIMBER—RIGHTS OF PURCHASER.

One to whom the owner conveyed standing timber, with a right of entry for cutting and removal, was not authorized to enter to operate a turpentine orchard on the land.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. \Leftrightarrow 3.]

3. LOGS AND LOGGING \Leftrightarrow 3—SALE OF TIMBER—POSSESSION.

An owner who conveyed all the standing timber on his land, with a right of entry for removal, as against one to whom the grantee conveyed only his timber rights, was in actual possession of the land, and hence in actual possession of the timber thereon.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 6-12; Dec. Dig. \Leftrightarrow 3.]

Appeal from Circuit Court, Autauga County; W. W. Pearson, Judge.

Action by P. H. & A. E. Stewart against E. E. Yarbrough, for trespass to realty. Judgment for plaintiff, and defendant appeals. Affirmed.

W. A. Gunter, of Montgomery, and C. E. O. Timmerman, of Prattville, for appellant. Eugene Ballard, of Prattville, for appellee.

SOMERVILLE, J. The action is for trespass to plaintiff's land, and more specifically for "cutting and boxing the timber thereon, and burning over the straw, leaves, and undergrowth thereon, during the months of January and February, 1913." The plaintiff's evidence showed that he was in possession of the land in question; that the defendant did the acts charged; and that the land was thereby damaged to the extent of several dollars per acre. In answer to this, the defendant showed that the plaintiff executed a conveyance in 1909, granting to one Wright all the merchantable timber growing on this land, with a right of entry for cutting and removing the timber for seven years from May, 1909; that Wright conveyed his timber rights therein to one Booker, and Booker conveyed to one Callie Stewart. The defendant then offered to show by parol evidence that this Callie Stewart sold her timber rights to one Dake, who paid to her the purchase money and was put in possession of the timber; and that thereafter these timber rights passed by mesne written conveyances from Dake to this defendant.

[1] If it were conceded that Dake and his successors acquired an equitable title by his purchase from Callie Stewart, such a title is nevertheless not available to the defendant in this action, and his status here is that of a trespasser without right. It is suggested that his parol purchase at least gave him the rights of a licensee. But the right of entry was incidental merely, and could not exist apart from the ownership of the timber.

[2] Moreover, it appears that the defendant's entry and acts were not for the purpose of cutting and removing timber, but for the purpose of operating a turpentine orchard on the plaintiff's land, which he was not authorized to do, even had he been a legal grantee under Wright. *Dixie Grain Co. v. Quinn*, 181 Ala. 208, 61 South. 886, ninth headnote.

[3] The land being in the actual possession of the plaintiff, he had the actual possession also of the timber growing thereon. *Christopher v. Curtis-Attalla Lumber Co.*, 175 Ala. 484, 57 South. 837. And, for aught that is shown by the bill of exceptions, he was entitled to recover damages of the defendant for all of the injuries done by him to the land, including the timber and other growth.

As the plaintiff was clearly entitled to the general affirmative charge on the undisputed evidence, the errors assigned by the defendant are immaterial, and need not be considered.

Affirmed.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(191 Ala. 109)

YARBROUGH et al. v. TAYLOR. (No. 150.) (Supreme Court of Alabama. Jan. 21, 1915.)

APPEAL AND ERROR \S 954—REVIEW OF FINDINGS OF FACT—TEMPORARY INJUNCTION—DISSOLUTION.

On a bill to enjoin defendants from turpentine on plaintiff's land, where it appeared that defendants had a lease for three years, which had expired before the bill was filed, and it was in dispute whether the lease had been altered after execution, by inserting "and seven months" after the term "three years," the decision of the chancellor that the temporary injunction should not be dissolved would be affirmed, where the appellate court could not say that more injury would result from retaining the injunction until the final hearing on the merits than from dissolving it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. \S 954.]

Appeal from Chancery Court, Autauga County; W. W. Pearson, Chancellor.

Bill for injunction by Alice V. Taylor against E. El Yarbrough and others. Temporary injunction granted, and, from denial of a motion to dissolve, defendants appeal. Affirmed.

J. M. Tucker, of Prattville, and Rushton, Williams & Crenshaw, of Montgomery, for appellants. Glipson & Booth, of Prattville, for appellee.

MAYFIELD, J. Appellee filed her bill to enjoin appellants from boxing, skinning, and turpentine pine trees on the lands of appellee. The acting chancellor issued a temporary injunction on the filing of the bill. The appellants answered the bill, and moved to dissolve the temporary injunction; and a hearing, as to this motion, was had on the bill, demurrer, sworn answer, and affidavits in support of the bill and answer. On this hearing the chancellor overruled the motion and declined to dissolve the injunction, from which interlocutory orders and decrees respondents prosecute this appeal.

The right to the injunction is conceded to depend principally, if not exclusively, upon the question whether or not the respondents had a lease from appellee for the purpose of taking turpentine from the trees upon the land, which allowed them to turpentine the trees, at the time the bill was filed. There was no dispute about the fact that appellants did have such a lease for a term of three years, and that the three years had expired before the bill was filed. Appellants contend that the lease was for three years and seven months, while appellee contends that it was for three years only. The lease was introduced in evidence, and purported on its face to be for three years and seven months. The lessor (appellee here) claims that the written lease was altered after it was executed by inserting the phrase "and seven months" after the phrase "three years."

Most all the affidavits and the proof were as to whether there was an alteration, as above described, after the lease was executed. While the evidence is not by any means conclusive, we are not prepared to say that the judge or chancellor erred in his finding or in declining to dissolve the temporary injunction. We are not prepared to say that more injury will result from retaining the injunction until the final hearing than would result from dissolving it until the final hearing on the merits, when it can be dissolved finally, or made perpetual, as the rights of the parties may then be made to appear. *Harrison v. Yerby*, 87 Ala. 185, 6 South. 3; *Coleman et al. v. Elliott*, 40 South. 666.¹

Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 190)

SKIPPER et al. v. HOLLOWAY. (No. 552.)
(Supreme Court of Alabama. Feb. 11, 1915.)

1. DEEDS \Leftrightarrow 194—DELIVERY—PRESUMPTIONS.

The mere filing of a deed for record by the grantor is prima facie a delivery, acceptance of which will be presumed if the conveyance is beneficial to grantee.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. \Leftrightarrow 194.]

2. DEEDS \Leftrightarrow 194—DELIVERY—PRESUMPTIONS.

The presumption of delivery arising from recordation of a deed may be rebutted by satisfactory evidence that the grantor did not intend by filing the conveyance to make delivery; the question of delivery being one of intention.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 574-583, 623, 634; Dec. Dig. \Leftrightarrow 194.]

3. CANCELLATION OF INSTRUMENTS \Leftrightarrow 37 —
SUIT—BILL—SUFFICIENCY—GENERAL DEMURRER.

A bill to cancel a deed as a cloud upon plaintiff's title, which averred that, while the conveyance had been recorded, no delivery had been made, should, where the facts showing recalculation and custody of the deed after registration are equivocal, clearly charge that the grantor neither intended nor, in fact, delivered the conveyance, but the bill is sufficient as against general demurrer where it averred that no person, except the grantor, had any interest in the land, and that no one acquired any rights under the deed.

[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 66-80; Dec. Dig. \Leftrightarrow 37.]

Appeal from Chancery Court, Houston County; W. R. Chapman, Chancellor.

Bill by Angeline Holloway against Georgia B. Skipper and others to cancel a deed as a cloud upon title. Decree overruling general demurrer to the bill, and respondents appeal. Affirmed.

The deed sought to be canceled as a cloud was a certain deed drafted, signed, and acknowledged and filed for record by complainant in which respondents are named as gran-

tees. The theory of the bill is that this deed was never, in fact, delivered to the grantees so as to pass title to them, but that, recordation being in itself prima facie evidence of delivery, the deed is a cloud on complainant's title which she is entitled to have removed, and in support of this theory she alleges the following facts: That complainant is now in the actual possession of said lands described in said deeds, and was in possession of same at the time said deed was made, and ever since said deed was signed and recorded she has been in the continuous and actual possession of said lands, and is now in the actual possession of said lands described in said deed; that no suit to test the title or otherwise to said land or any part of it is now pending in any court between complainant and any or all of respondents; that complainant has never delivered said deed to respondents or any of them, and has never delivered said deed to any person for respondents, or for any of them, but has at all times retained, been in possession of, and held said deed from the time it was signed by her until this date, except for a few days when the same was in the probate office of Houston county, Ala., for record, and no person has ever been in possession of said deed except the probate judge of Houston county, Ala., and he was only in the possession of same for the purpose of recording the same; that complainant herself sent the said deed to the said probate office for record, and the probate judge took the said deed from her for record, and handled the same as her deed for record, and returned the same to her as her deed for record; that said deed was recorded as a deed belonging to complainant, as a paper or deed delivered to the probate judge as a deed or paper belonging to complainant, and the same was returned to her as a paper belonging to complainant, and no one else, and said paper has at all times been in the actual possession of complainant as belonging to her, and at no time has been delivered to any person as a paper belonging to anybody else except complainant; that said deed, as the same is recorded in the probate office of Houston county, Ala., is a cloud upon title of complainant, and no person has any interest in said lands except complainant, and no person acquired any rights in said land under said deed, and the respondents and all of them acquired no rights under said deed.

E. S. Thigpen and F. M. Gaines, both of Dothan, for appellants. Espy & Farmer, of Dothan, for appellee.

SOMERVILLE, J. [1] It is thoroughly well settled in this state that the mere filing of a deed for record by the grantor is prima facie a delivery of the deed to the grantee; and, if the deed is beneficial to the grantee, and imposes no burden upon him, his ac-

¹ Reported in full in the Southern Reporter; reported as a memorandum decision without opinion in 147 Ala. 689.

ceptance is presumed, even though he had, in fact, no knowledge of the existence of the deed. *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 53 South. 812, and cases therein cited.

[2] But the legal presumption of delivery in such a case may be defeated by competent and satisfactory evidence that the grantor did not intend by the act of filing to effectuate a delivery of the deed. Whether or not the grantor's prompt reclamation and subsequent retention of the deed in his own hands, without any recognition of its operation as a conveyance, may suffice for this purpose, has been mooted, but not determined by our decisions.

In *Elsberry v. Boykin*, 65 Ala. 336, 341, and again in *Fitzpatrick v. Brigman*, 130 Ala. 450, 456, 30 South. 502, it was said—apparently as obiter dictum in each case—that:

"If it is duly acknowledged and recorded, the presumption of delivery attaches, which can be repelled only by evidence of *actual dissent of the grantee*." (Italics ours.)

In *Alexander v. Alexander*, 71 Ala. 295, 298, it was said:

"The testimony equally shows that, when the deed was acknowledged and certified, * * * the grantor took possession of it himself, sent it to the registration office, and directed that, when recorded, it should be returned to him, and it was done. If it were necessary for the decision of this case, it may present a question of grave inquiry whether this fourth fact does not overturn the prima facie presumption of delivery which would otherwise arise out of the first three enumerated facts. Does it not (unexplained so far as this record informs us) show there was, in fact, no delivery at that time?"

In *Wells v. Am. Mort. Co.*, 109 Ala. 430, 443, 20 South. 136, 141, it was said:

"But when a deed is executed with all the formalities essential to perfect it, when grantor and grantee join in its execution, the grantee thereby manifesting acceptance of it, when the execution is acknowledged before an officer having authority, * * * and it is spread upon the public records as notice to all the world of its existence, if the fact of delivery be disputable, the evidence controverting it must be clear and convincing; it must appear that there was not, in fact, delivery, and that at the time of execution it was so understood."

It is to be observed, however, that the presence and joinder of the grantee in the execution of the deed differentiates the *Wells* case from the others.

Finally, in *Gulf Red Cedar Co. v. Crenshaw*, 169 Ala. 606, 613-615, 53 South. 812, 814, it was said:

"Of course, registration of the deed is not conclusive evidence of a delivery, and it may be refuted by other evidence. The fact of delivery rests upon intention, and is to be collected from all the acts and declarations of the parties having relation to it. * * * The fact [of the grantor's reclamation and control of the deed after registration] might afford an inference that the registration was not intended as a delivery, and would make it a question for the jury, in an action at law, in the ordinary case, as indicated in the *quære* in *Alexander v. Alexander*, supra; but this cannot be considered as an ordinary case, as the grantees were not *sui juris*."

[3] Conceding, without deciding, that the facts shown with respect to the grantor's registration and subsequent reclamation and custody of this deed may be sufficient to overcome the initial presumption of an intended delivery; yet, as the facts are equivocal on their face, the bill ought to clearly and directly charge the required conclusion, viz., that the grantor did not intend to deliver, and did not, in fact, deliver the deed to the grantees named. *Norton v. Randolph*, 176 Ala. 381, 58 South. 283, 40 L. R. A. (N. S.) 129. A special demurrer pointing out this omission would doubtless have been well taken. But the equity of the bill is amply sustained by the facts recited, in connection with the allegations of paragraph 5 that the respondents acquired no rights under the deed.

The bill is one for the cancellation of a cloud on complainant's title, and not for the quieting of an adverse claim under the code proceeding.

The general demurrer was properly overruled, and the decree of the chancellor will be affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and THOMAS, JJ., concur.

(191 Ala. 142)

THOMAS et al. v. HOLDEN. (No. 705.)
(Supreme Court of Alabama. Feb. 11, 1915.)
INSANE PERSONS ~~§~~—66—CANCELLATION OF INSTRUMENTS—SUFFICIENCY OF BILL.

Under Code 1907, § 3347, providing that whenever any person shall in good faith and for a valuable consideration purchase real estate from an insane person without notice of his insanity, such contract and conveyance shall not be void, but that such insane person may recover from the vendee or those claiming under him the difference between the market value of the real estate at the time of the sale and the price paid therefor, and shall have a lien on the real estate therefor, a bill to set aside a mortgage and deed by an insane person was demurrable where it failed to allege a lack of good faith on the part of the purchaser, the absence of a valuable consideration, or that the purchaser had notice of the grantor's insanity and failed to offer to do equity, or to pay the purchase price or reconvey the land.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 100-102, 104, 105; Dec. Dig. ~~§~~—66.]

Appeal from Chancery Court, De Kalb County; W. H. Simpson, Chancellor.

Suit by Janie Thomas and others against J. C. Holden. From a decree sustaining a demurrer to the bill, complainants appeal. **Affirmed.**

J. N. Quinones, of San Juan, P. R., for appellants. Davis & Baker, of Ft. Payne, for appellee.

THOMAS, J. The appellants, the children of J. W. Thomas and Janie Thomas, and J. W. Thomas suing by his next friend, Janie Thomas, filed a bill in the chancery court,

seeking to cancel a mortgage and the notes secured thereby, of date October 4, 1910, and a deed of date February 14, 1911, executed by J. W. Thomas and his wife, Janie Thomas, conveying to appellee, J. O. Holden, the lands described therein. The second paragraph alleges:

"That at and before the time of making said mortgage and the said deed (Exhibits A and B), said J. W. Thomas was insane and did not have sufficient mind to understand the business he was engaged in when executing said papers, and that since the execution of said papers he has been adjudged insane and is now confined in the insane asylum of this state at Tuscaloosa, Ala."

Several grounds of demurrer were interposed in the court below. The decree of the chancellor held that the third, fourth, fifth, sixth, and seventh grounds were well taken, and which ruling is assigned as error. The grounds of demurrer held to be good are as follows:

(3) The bill fails to allege a lack of good faith on the part of the respondent in the transaction set up. (4) The bill fails to allege the absence of a valuable consideration for the conveyance sought to be canceled. (5) The bill fails to allege that the respondent had notice of the alleged insanity of the complainant, J. W. Thomas, at the time of the transaction. (6) There is no offer to do equity on the part of the complainants. (7) The complainants pray that the purchase-money notes and the mortgage be canceled, but do not offer to pay the purchase price nor to reconvey the land to the respondent.

An act approved March 2, 1901 (Local Laws 1900-01, p. 1943), "To better protect bona fide purchasers of real estate from insane persons, without notice of such insanity," incorporated in the Code of 1907 as sections 3347 and 3348, is as follows:

(3347) "Conveyance by an Insane Person; Effect of.—Whenever any person shall in good faith, and for a valuable consideration, purchase real estate from an insane person without notice of such insanity, such contract and conveyance shall not be void, but such insane person may recover from the vendee or those claiming under him, the difference between the market value of such real estate at the time of the sale and the price paid therefor, with interest thereon, and shall have a lien on such real estate to secure the same, and the purchasers from such vendee, without notice of the insanity of the original vendor, shall be protected in like manner and have the benefits of this section."

(3348) "Contracts of Insane Person Void.—Except as provided in the preceding section, all contracts of an insane person are void, but he and his estate shall be liable for necessities furnished him which may be recovered upon the same proof and upon the same conditions as if furnished to an infant."

The notes and the mortgage securing the same, together with the deed sought to be canceled, were executed after the passage of this act, and are governed by its terms.

67 SO.—63

Mitchell v. Baldwin, 154 Ala. 346, 45 South. 715; Code 1907, §§ 3347, 3348. It will be noted that the cases of Mitchell v. Baldwin, supra, Galloway, Trustee, v. Hendon, 131 Ala. 280, 31 South. 603, Wilkinson v. Wilkinson, 129 Ala. 279, 30 South. 578, and Dougherty v. Powe, 127 Ala. 577, 30 South. 524, were dealing with conveyances made before the passage of the act of March, 1901, or its incorporation in the Code of 1907.

In Walker v. Winn, 142 Ala. 560, 39 South. 12, 110 Am. St. Rep. 50, 4 Ann. Cas. 537, the indorsement of a promissory note by the payee, who was insane, was held to confer no right to the indorsee. It will be observed that the question of a purchase from, or of a conveyance by, an insane person of real estate, with a construction of sections 3347 and 3348 of the Code, was not before the court. The record shows that the note was made and indorsed before the statute of March 2, 1901, was approved. The expression in the opinion in Walker v. Winn, supra, "Whatever may be the rulings by the courts of other jurisdictions upon the question, this court is fully committed to the doctrine that the contract of an insane person is absolutely void," did not apply to a purchase of real estate in good faith and for a valuable consideration from an insane person without notice of such insanity.

The case of Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372, cited by appellant's counsel, was in trover for a promissory note pledged to the defendant by the plaintiff when he was insane. There was no statute in Massachusetts like the Alabama statute.

In Head v. Lane, 65 South. 343, it was held that where the life tenant with absolute power of disposition, with remainder over, sold the property when insane, such conveyance, under the Code of 1907 (section 3348), was a nullity, and that after his death a court of chancery would give the remaindermen relief against such a conveyance. The life tenant had the absolute power of disposition a valid execution of which would defeat the estate of the remaindermen. Because of the disability of insanity, it was held that there could be no valid exercise of this power of disposition.

The relief provided for in the act of March 2, 1901, and in section 3347 of the Code, was where the insane person dealt *with his own estate*, and not in the execution of a power.

The decree of the chancellor was in accordance with the views here expressed, and it is therefore affirmed.

Affirmed.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 146)

MacPHERSON et al. v. HOOD et al.
(No. 984.)

(Supreme Court of Alabama. Feb. 4, 1914.)
APPEAL AND ERROR \S 907 — **PRESENTATION FOR REVIEW — RECORD — PRESUMPTION — OMISSION OF DEPOSITIONS.**

Where, in the formal applications of the solicitors for both parties, for submission of the cause, depositions are mentioned as being in relation to the subjects on which the submission should be had, and the decree does not negative the idea that the submission includes the depositions, it will be presumed on appeal, where such depositions are omitted from the record, that the decree was sustained by the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. \S 2899, 2911-2915, 2916, 3673, 3674, 3676, 3678; Dec. Dig. \S 907.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Bill by J. F. MacPherson and others, as trustees of the First Cumberland Church, against L. D. Hood and others, as officers of the Fifth Avenue Presbyterian Church, to require said respondents to show by what right or title they claim to have any interest in the property of the Cumberland Presbyterian Church, and to authorize complainants to take possession of said property and sell the same, and, after discharging the just debts thereof, to pay the balance over to the accredited treasurer of the First Presbyterian Church in the city of Bessemer. Judgment dismissing the bill, and complainants appeal. Affirmed, with amendment.

C. L. Odell, of Bessemer, for appellants. Pinkney Scott, of Bessemer, for appellees.

McCLELLAN, J. From a final decree, of date July 11, 1914, dismissing the bill filed by the appellants against appellees, among others, this appeal is prosecuted. The only errors assigned are addressed to the result made effective by this decree.

The complainants' note of testimony for the final submission of the cause made the depositions of several named persons matters for the court's consideration in arriving at its judgment in the premises. In the formal applications of the solicitors for both parties litigant, for submission of the cause, addressed to the clerk and register of the court, depositions are mentioned as being of the subjects on which the submission for final decree should be had. Sims' Chan. Prac. \S 561. The decree itself does not exclude or negative, by any of its recitals, the idea that the submission included as subjects of the court's consideration the depositions mentioned in the complainants' note of testimony and depositions referred to in the application of complainants to the clerk and register to submit the cause to the court. It has long been the established practice in this jurisdiction that the omission from the record, on appeal from a decree rendered on pleadings and proof, of matters of evidence embraced

in the submission of the cause, gives rise and effect to the presumption that the decree was sustained by the proof. *Toon v. Finney*, 74 Ala. 343; *Winter v. City Council*, 79 Ala. 481, 490; *Wood v. Wood*, 119 Ala. 183, 185, 24 South. 841; *Jefferson v. Sadler*, 155 Ala. 537, 46 South. 969; *Hale v. T. C. I. & R. R. Co.*, 183 Ala. 507, 62 South. 783; *Jordan v. Hardie*, 131 Ala. 72, 79, 31 South. 504. This presumption results from the obligation the appellants assume to affirmatively show error in the decree assailed.

The record on appeal in this cause does not contain any depositions. Consistent with the stated presumption that the decree was supported by the evidence before the trial court it may well be that vital features of the bill were disproven. The note of submission for complainants is effective to show that the matter of depositions noted thereon were before the court. *Wood v. Wood*, 119 Ala. 185, 24 South. 841.

It is an idea common to the solicitors that the submission was on bill and answers only. The record does not, as indicated, sustain that notion. The cause here must be viewed as the record shows it.

The decree is accordingly affirmed, though amended to provide that the dismissal should be without prejudice. The costs of the appeal will be taxed against appellants.

Affirmed, with amendment.

ANDERSON, C. J., and **SAYRE** and **GARDNER, JJ.,** concur.

(191 Ala. 96)

HYNES et al. v. UNDERWOOD et al.
(No. 956.)

(Supreme Court of Alabama. Jan. 14, 1915.
Rehearing Denied Feb. 4, 1915.)

1. HOMESTEAD \S 150—**JURISDICTION TO SET APART—LETTERS OF ADMINISTRATION.**

Where letters of administration have been granted on an estate, the probate court has no jurisdiction to set apart a homestead under Code 1907, \S 4224, authorizing the setting apart of exemptions before administration; and a decree so doing is void.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 294-305; Dec. Dig. \S 150.]

2. JUDGMENT \S 346 — **VOID JUDGMENT — RIGHT TO EXPUNGE FROM RECORD—TIME.**

A void judgment may at any time be expunged from the records by the court rendering the same.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. \S 678; Dec. Dig. \S 346.]

3. HOMESTEAD \S 150—**SETTING ASIDE—SUIT TO VACATE—EVIDENCE—PROBATE PROCEEDINGS.**

Where, in an action to vacate a judgment setting apart a homestead under Code 1907, \S 4224, complainant contended that the judgment was void because letters of administration had been previously granted, the probate court records of the proceeding in which the homestead was set apart should have been received in evidence.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. \S 294-305; Dec. Dig. \S 150.]

Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge.

Suit by Will Hynes and others against Paralee Underwood and others. From decree for defendants, complainants appeal. Reversed and remanded.

Nathan L. Miller and Needham A. Graham, Jr., both of Birmingham, for appellants. Allen, Bell & Sadler, of Birmingham, for appellees.

This opinion was prepared for the court by Mr. Justice DE GRAFFENRIED:

1. On the 18th day of June, 1908, letters of administration were regularly issued by the probate court of Jefferson county to Robert J. Wheeler upon the estate of Felix Hynes, deceased. On the 7th day of July, 1909, one Josephine Hynes, claiming to be the widow of said Felix Hynes, filed her petition in the probate court of said county, praying that certain real estate be set apart to her as a homestead. The petition alleges that no letters of administration had been granted upon the estate of said Felix Hynes, and that the said lands were all of the lands that belonged to said Felix Hynes, and that they were worth not exceeding \$2,000, and the petition showed that they consisted of an undivided interest in a lot in the city of Birmingham.

At the time of the filing of this petition the records of the probate court of Jefferson county show that Robert J. Wheeler was then the administrator of the said estate of Felix Hynes, and that he was acting as such, and they also show that, when Robert J. Wheeler filed his petition praying for letters of administration upon said estate, he stated that the lot which is described in the petition of Josephine Hynes was all of the property which belonged to the said Felix Hynes at the time of his death. In other words, the records of the probate court of Jefferson county show conclusively that the statement in the petition of said Josephine Hynes that no letters of administration upon the estate of Felix Hynes, deceased, had been granted to any one is untrue. On the contrary, as we have already said, the records of said court show conclusively that when Josephine Hynes filed said petition, letters of administration upon the estate of Felix Hynes, deceased, had been granted to said Robert J. Wheeler, and that the administration of said estate was then pending in said court.

[1] 2. The petition of Josephine Hynes for allotment of homestead was filed under section 4224 of the Code. This section cannot be appealed to when letters of administration have been granted upon an estate. The probate court has no jurisdiction to set apart a homestead under the provisions of said section when letters of administration have been granted upon an estate, and, if it does so, its decree is coram non jure and void.

This is made plain by the decision of this court in *Miles v. Lee et al.*, 180 Ala. 439, 61 South. 915. An examination of that case will disclose the reasons which underlie this construction of said section 4224 of the Code.

[2] 3. The records of the probate court of Jefferson county therefore show that the probate court, in rendering its decree setting apart a homestead to Josephine Hynes, proceeded under a statute which gave it no jurisdiction, and that the said decree, for that reason, is void. *Miles v. Lee et al.*, supra.

When the records of a court show that one of its judgments is void, the court rendering such judgment will expunge such judgment from its records at any time. *Martin v. Atkinson*, 108 Ala. 320, 18 South. 888; 3 Mayf. Dig., p. 1176, § 873; *Chamblee v. Cole*, 128 Ala. 649, 80 South. 630; *Brooks v. Johns*, 119 Ala. 412, 24 South. 845; 3 Mayf. Dig. p. 1177, § 883.

[3] In our opinion, the records of the probate court of Jefferson county, which were offered in evidence, and which should have been received in evidence by the court, show, for the reasons above stated, that the decree of said court setting aside to Josephine Hynes as a homestead the lands described in the petition of said Josephine Hynes, which appears in this record, is null and void.

The decree of the court below refusing to vacate said decree is therefore reversed, and the cause is remanded to the court below for further proceedings in accordance with this opinion.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN, SAYRE, and DE GRAFFENRIED, JJ., concur.

(191 Ala. 372)

HALLETT MFG. CO. v. H. CURJEL & CO.
(No. 844.)

(Supreme Court of Alabama. Jan. 21, 1915.)

1. SALES \S 175—CONTRACT—DELIVERY.

Under a contract by which plaintiff agreed to sell, and defendants to buy, 2,500 logs, to be delivered in three equal installments, between Nov. 1, 1913, and April 1, 1914, providing that defendants shall give four weeks' notice of the time each delivery is to be made, but must call for and accept the first delivery by January 1, 1914, defendants having, December 28, 1913, notified plaintiff that they did not want any of the logs it was preparing to deliver as the first installment, it could make delivery thereof any time before April 1, 1914, so that though December 29, 1913, they demanded that delivery thereof be made within four weeks, plaintiff was not in default in tendering delivery on February 2, 1914.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 435; Dec. Dig. \S 175.]

2. SALES \S 153—CONTRACT—DELIVERY.

The provision of a contract for sale by plaintiff to defendants of logs, to be delivered f. a. s. Mobile, that if at any time plaintiff is authorized to make a delivery of logs there be no vessel in port ready to receive them, they shall thereafter be held and handled entirely at the expense of defendants, who must accept and pay for them as though delivery had been made

f. a. s. at Mobile, is intended entirely for plaintiff's protection, so that, the steamer to which defendants directed plaintiff to make delivery not being ready at the stated time to receive them, plaintiff was not required to tender them to defendants themselves, but could hold them till the steamer was ready.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 358-366; Dec. Dig. ¶ 153.]

Appeal from Law and Equity Court, Mobile County; Saffold Berney, Judge.

Action by the Hallett Manufacturing Company against H. Curjel & Co., as a partnership and individuals, for breach of contract to purchase logs. Judgment for defendant on demurrers to the complaint, and plaintiff appeals. Reversed, rendered, and remanded.

The second count is as follows:

"Plaintiff claims of defendant \$5,000 for the breach of an agreement entered into by them on April 22, 1913, in substance as follows: 'The said Hallett Manufacturing Company agrees to sell and said H. Curjel & Co. agrees to purchase 2,500 hickory logs ranging in diameter from 8 to 14 inches, but averaging not more than 12 inches in diameter, at the price of \$42.50 per thousand superficial feet, and to be delivered and paid for as follows: The said logs shall be delivered f. a. s. Mobile, Ala., in three shipments of approximately 833 logs each, between November 1, 1913, and April 1, 1914. The said Curjel & Co. shall give four weeks written notice of the time that each delivery is to be made, but must call for and accept the delivery of at least one-third of said logs by January 1, 1914. The said Hallett Manufacturing Company shall be entitled to four weeks time after the making of each delivery before it can be compelled to make the next delivery. Should the said Curjel Company not give notice requiring the delivery of all of said logs by April 1, 1914, the said Hallett Manufacturing Company shall have the right to deliver the same at any time within three days before or after April 1, 1914, and the said Curjel & Co. must accept said delivery although they may not have requested the same. If at any time that the said Hallett Manufacturing Company is authorized to make a delivery under this contract of any of said 2,500 logs there is no vessel in port ready to receive the same, the said logs shall thereafter be held and handled entirely at the expense of the said H. Curjel & Co., who must accept and pay for the same in all respects as though delivery had been made f. a. s. at Mobile. Each and every delivery of logs made pursuant to the terms thereof shall be paid for in cash as soon as the delivery is made.' To which said agreement there was subsequently added, on the 2d day of June, 1913, the further provision that the said logs should measure 10 feet and upwards in length. And plaintiff says that on, to wit, December 26, 1913, it notified defendants that it then had up the rivers tributary to Mobile the logs necessary to make a delivery under the aforesaid contract, and was about to send boats and barges therefor, and defendants then advised plaintiff, in substance, that they would not want any of the logs which plaintiff was so preparing to bring down, but three days thereafter, and on, to wit, December 29, 1913, defendant made written demand upon plaintiff for the delivery, within not more than four weeks, of the first installment of logs under said contract. In the meantime, plaintiff, relying upon the aforesaid previous statement of defendants, had so made its arrangements for the bringing down of the said logs that they probably would not reach Mobile within four weeks, but notwithstanding the same, plaintiff hurried the bringing down of the said logs to Mobile, and on or

about February 2, 1914, had them ready for delivery at Mobile, and then offered to deliver to defendants 833 logs of the kind, quality, and sizes called for by said contract, and defendants offered to accept them if plaintiff would deliver them on credit, but plaintiff declined to extend such credit to defendants, and they refused to accept or pay for said logs, although defendants only use for said logs was to export them and there had been available no means or opportunity for shipping them at any time between January 25, and February 2, 1914. And plaintiff avers that by so refusing to accept and pay for said logs, defendants breached the said contract.

"Plaintiff further avers that by letter dated January 24, 1914, defendants asked for a delivery on February 23, 1914, of the second installment of 833 of the logs covered by the contract, and for delivery on March 23, 1914, of the third installment of similar quantity of said logs, and by letter of February 18, 1914, requested that the said February delivery be made to the steamship Asian, to which plaintiff agreed. Plaintiff then had the logs necessary for such delivery on wharves and barges at Mobile, and was and continued ready, willing, and able to make said delivery, and notified defendants that the delivery would be made as soon as the said steamship was willing to receive the same. The said steamship was then engaged in loading at Mobile a general cargo, and plaintiff kept in touch with the agent of said steamship who was in control of such loading, and found that said steamship would be ready for and would receive such delivery, on but not before February 17, 1914, and plaintiff was able, ready, and willing to then and there make such delivery. However, on February 26, 1914, defendant notified plaintiff in writing that they considered the contract breached by the plaintiff's failure to make said delivery, and expected to hold it liable for any damage which defendants might suffer thereby, and thereupon defendants refused to receive and pay for any logs under the said contract, the defendants taking the position that plaintiff had breached the contract, and that defendants were no longer liable thereunder. And plaintiff alleges that thereby defendants again breached their aforesaid contract. And plaintiff further alleges that by reason of the aforesaid breaches it has been greatly damaged, wherefore it sues and claims of defendants the aforesaid sum of \$5,000."

The demurrers to the second count raise the questions discussed in the opinion. The demurrers which are directed to the entire count are on the ground that the complaint shows on its face that plaintiff company did not comply with its own contractual obligations in tendering to defendant the several installments of logs.

Stevens, McCorvey & Dean, of Mobile, for appellant. Clarke, Brown & Howard, of Mobile, for appellee.

SOMERVILLE, J. Conceding, without deciding, that, with respect to the delivery of the several installments of logs, the date of such deliveries being fixed by the reasonable demands of the defendants, time was of the essence of the contract, yet we think it is perfectly clear that neither of the assignments of breach, as set out in the complaint, was subject to the demurrer.

[1] As to the first installment, it was the duty of the defendants to call for and accept a delivery to be made not later than January 1st, and the call should have been made not

later than December 4th. The complaint alleges that the defendants notified the plaintiff as late as December 26th that they did not want any of the logs which the plaintiff was then preparing to deliver as a first installment in compliance with the contract. This being true, the plaintiff was, as to this installment, relieved of the primary obligation to deliver in accordance with the demand of the defendant, and thereafter the plaintiff was authorized to make the delivery under the general provision of the contract at any time "between the 1st day of November, 1913, and the 1st day of April, 1914." We hold that the defendants having breached their own obligation in the premises could not, by their demand made on December 29th, impose upon the plaintiff the duty of delivering this installment within four weeks of that date and, further, that the tender of this installment on February 2d was a compliance by the plaintiff with the obligation then resting upon it, as modified by the prior default of the defendants.

[2] As to the tender of the second installment, the demurrer makes the point that, the designated transport steamer not being ready on the exact date to receive and load the logs, it was the duty of the plaintiff to tender the logs to the defendants themselves. It is obvious, however, that the provision that, if there were no vessel in port ready to receive any installment, "the said logs shall thereafter be held and handled entirely at the expense of the said H. Curjel & Co., who must accept and pay for the same in all respects as though delivery had been made f. a. s. at Mobile," was intended for the protection of the plaintiff alone; and we hold that the allegations of the complaint show a full compliance by the plaintiff with his obligations under the contract. We think, moreover, that even had the designated steamer been ready to receive the logs on February 23d, a delivery to the steamer on February 27th would, under all the circumstances, have constituted prima facie a substantial compliance with the contract.

The judgment of the trial court will be reversed, and a judgment will be here rendered overruling the demurrer to the complaint.

Reversed, rendered, and remanded.

ANDERSON, C. J., and MAYFIELD and GARDNER, JJ., concur.

(191 Ala. 16)

PATTERSON et al. v. STATE. (No. 792.)

(Supreme Court of Alabama. Jan. 11, 1915.)

1. HOMICIDE \S 22—INSTRUCTIONS—"LYING IN WAIT"—"MURDER IN FIRST DEGREE."

Under Code 1907, \S 7084, providing that every homicide perpetrated by lying in wait is "murder in the first degree," where the court, in a prosecution for murder, charged that if the defendants lay in wait for the deceased, and killed him with a gun while lying in wait, they were

guilty of murder in the first degree, such instruction was proper; "lying in wait" meaning being in ambush for the purpose of murdering another.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. \S 35-38; Dec. Dig. \S 22.]

For other definitions, see Words and Phrases, First and Second Series, Lying in Wait; Murder in First Degree.]

2. CRIMINAL LAW \S 829—APPEAL—HARMLESS ERROR—REFUSAL OF REQUESTED INSTRUCTION.

Where a requested instruction that the jury might disregard testimony of a witness if they found from the evidence that he had made contradictory statements as to material facts in the case was refused, but others substantially embodying it were given, any error in the refusal was not prejudicial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 2011; Dec. Dig. \S 829.]

3. CRIMINAL LAW \S 656—TRIAL—REMARKS OF JUDGE—REPRIMAND OF WITNESS.

Where the judge, following a question to a witness, stated that it looked like a man who had been justice of the peace ought to have sense enough to answer the questions asked, the statement being a reprimand addressed solely to the witness and not to the jury, and having no bearing upon his credibility, was within the court's proper function.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1524-1533; Dec. Dig. \S 656.]

4. WITNESSES \S 393—IMPEACHMENT—PREVIOUS INCONSISTENT TESTIMONY.

In a prosecution for murder, where, after cross-examination of the defendants, the prosecution offered in evidence, for purposes of impeachment, a stenographic report of their previous inconsistent testimony before the coroner's jury, it being shown by the stenographer that he had taken down only part of the testimony, but that what he had taken down was correctly reproduced, and where the defendants objected to the admission of the report because it did not contain all the testimony, those parts of the report which tended to contradict defendants' testimony at the trial were admissible.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. \S 1252-1257; Dec. Dig. \S 393.]

5. CRIMINAL LAW \S 695—TRIAL—GENERAL OBJECTION TO EVIDENCE.

In a prosecution for murder, where defendants objected generally to the admission in evidence, to impeach their testimony on cross-examination, of a stenographer's transcript of portions of their testimony before the coroner's jury, and parts, at least, of such transcript were admissible, the whole was admissible, since the duty to separate by specific objection the inadmissible from the admissible parts rested upon the defendants alone, not upon the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. \S 1633-1638; Dec. Dig. \S 695.]

Appeal from Circuit Court, Cullman County; A. H. Alston, Judge.

Clyde Patterson and others were convicted of murder, and they appeal. Affirmed.

F. E. St. John, of Cullman, and Callahan & Harris, of Decatur, for appellants. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State.

McCLELLAN, J. The appellants were adjudged guilty of the murder of Robert Miller, and are sentenced to imprisonment during

their lives. Robert Miller and Rube Carter were shot to death, from a roadside, while traveling in a wagon. A clear case of assassination was made by the proof. The issue was whether appellants, father and son, were among the guilty agents. There was evidence which, if credited, supported the jury's finding. Able counsel appeared in their defense below and appear on this appeal, presenting in full brief the grounds upon which insistencies for reversible errors are rested. In the order of their discussion by appellant's counsel in brief, we will treat in the opinion the asserted errors.

[1] At the instance of the prosecution the court gave the following special instruction to the jury:

"I charge you, gentlemen of the jury, that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendants were lying in wait for the deceased, Robert Miller, and killed him by shooting him with a gun while lying in wait, then they would be guilty of murder in the first degree."

This instruction was in accord with the pertinent language and legal effect of the statute (Code, § 7084), as well as with Mitchell's Case, 60 Ala. 28, 29.

According to Bouvier, "lying in wait" means "being in ambush for the purpose of murdering another." Such is the significance of the phrase, as employed in the quoted instruction.

[2] Appellants complain of the refusal of the court to give the jury this charge:

"The court charges the jury that if the witness Mac Miller willfully and intentionally swore falsely that he did not have the conversation with Dr. Baird, as testified to by Dr. Baird, then they may discard all the testimony of Mac Miller."

The substance of the just quoted request for instruction was sufficiently contained in the following charges given at the defendant's instance:

"The court charges the jury that if they find from the evidence that Mac Miller has made contradictory statements as to material facts in this case or any of such facts, the jury may look to these contradictory statements in order to determine what credence they will give to the testimony of Mac Miller. * * *

"If the jury believe from the evidence that the witness Mac Miller swore willfully falsely in one particular, the jury are authorized to disregard the evidence of said Mac Miller. * * *

"If the witness Mac Miller has been impeached, then the jury may disregard the entire testimony of said Mac Miller, unless it be corroborated by other testimony not so impeached. * * *

So, even assuming (for the occasion only) that there was error in refusing the quoted request for instruction, it was without prejudice to the appellants.

[3, 4] On the cross-examination of defendants' witness W. H. Waldrop, following a simple question propounded to him, the bill recites this matter:

"Thereupon the presiding judge stated to the witness in the presence of the jury, and while the witness was on the stand, that it looks like

a man who had been a justice of the peace ought to have sense enough or intelligence enough to answer the questions asked."

The evident purpose was to reprimand the witness for a failure to answer the "questions asked," and to promote the orderly, prompt taking of the testimony on the trial. The statement of court had no bearing or effect upon the credibility of the witness or upon the credence to be accorded or that might be accorded the testimony the witness had given or would thereafter give. The statement was addressed to the witness, not to the jury, and was within the court's function to control, within proper limits, the examination of witnesses. There was no error in the utterance of the quoted remarks to the witness. None of the cases cited on brief are authority for a contrary conclusion. After the defendants (appellants) had been cross-examined by the prosecution, during which examination each was asked questions touching his testimony before the coroner's jury, the prosecution offered in evidence the stenographic report made of their testimony on that occasion. It was shown by the testimony of the stenographer who made the report that he did not take down parts of what defendants stated before the coroner's jury, being directed by the state's representative to omit certain matters which he described. The stenographic report was shown to be a correct reproduction of what it purported to reproduce. The bill recites:

"The defendants objected to the introduction of said testimony on the ground that all of said testimony was not taken down by the stenographer who took down said testimony before the coroner's jury."

This was the only objection made to the admission in evidence of the stenographic report. All others were thereby waived.

[5] It is manifest that at least parts of the stenographic report were relevant and admissible under the familiar rule for impeaching a witness by showing statements, previously made, contradictory of testimony he has given on the hearing or investigation in progress. Those parts of the stenographic report which tended to contradict the testimony given by the defendants on the trial were admissible. The objection was addressed to the whole of the report offered. If any part of it was admissible, then the objection was due to be overruled. Hill v. State, 146 Ala. 51, 41 South. 621; Longmire v. State, 130 Ala. 66, 30 South. 413. There was no duty on the court to separate the admissible parts of the report from the inadmissible. It was the obligation of the objector to point out in his objection the parts that were inadmissible. In support of the contention for error in this particular, appellants' counsel cite the following decisions delivered here: Tharp v. State, 15 Ala. 755, 756; Horton v. State, 53 Ala. 488, 495; Magee v. Doe ex dem. Hallett, 22 Ala. 699; Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485. All of these decisions relate to previ-

ously given testimony of a witness who had since died. In such cases it is essential that the entire testimony of the deceased witness shall be proffered as evidence. The purpose there is the substitution of the attainable—the reproduction—for that which is made unattainable by the death of the witness. The rule there applicable has no application to circumstances here under review. No error appearing, the judgment must be affirmed.

Affirmed.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 215)

LEE v. JEFFERSON COUNTY BLDG. & LOAN ASS'N et al. (No. 397.)

(Supreme Court of Alabama. Feb. 4, 1915.)

MORTGAGES — DEMURRER TO BILL — RIGHT TO PRESENT.

A respondent without interest in the property could not by demurrer question the sufficiency of the bill as one for the enforcement of complainant's statutory right of redemption against another respondent, a purchaser at a foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1833-1844; Dec. Dig. ¶¶ 616.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Suit by Florence Lee against the Jefferson County Building & Loan Association and another. From decree sustaining a demurrer to the bill, complainant appeals. Reversed and remanded.

Erle Pettus, of Birmingham, for appellant. George E. Bush, of Birmingham, for appellees.

GARDNER, J. One C. W. Lee (now deceased) executed two mortgages to the respondent Jefferson County Building & Loan Association on certain real estate described in the bill of complaint, the first mortgage being executed in March, 1907, and the second in May, 1907, each to secure a loan of \$500. These two mortgages were foreclosed on April 13, 1912; the said company becoming the purchaser at the foreclosure sale.

The complainant, Florence Lee, who was the widow of the said C. W. Lee, files this bill, the prime purpose of which appears to be the enforcement of the statutory right of redemption. The bill makes a party respondent also one Ella Dial, who filed a demurrer to the bill assigning separate grounds going to the insufficiency of the bill as one to exercise the statutory right of redemption. Respondent Jefferson County Building & Loan Association does not appear to have offered any demurrer to the bill, nor to have answered the same.

From the decree of the chancellor sustaining the demurrer of the respondent Ella Dial, complainant prosecutes this appeal.

The bill alleges that the respondent Ella Dial, in March, 1912 (which was prior to the foreclosure), paid to the respondent loan association the sum of \$514.80, which she derived from the estate of C. W. Lee, deceased, whether rightfully or wrongfully from said estate the bill does not sufficiently disclose. It is alleged that said Ella Dial entered into a contract with the said loan association in regard to such sum, which contract is made an exhibit to the bill. Referring to the contract, we would judge that said respondent Ella Dial had set up some independent claim of title or right to the possession of the property described in the mortgages, but that it had been adjudged in a trial had for that purpose that she had no title thereto nor right to possession thereof, and that the contract entered into was merely for the purpose of protecting the said Ella Dial in the sum paid by her to said association, in the event she did not succeed in her efforts to acquire the property.

The bill, in short, shows that the respondent Jefferson County Building & Loan Association was the purchaser of this property at the foreclosure sale, and there is nothing in the bill to show that said association has either parted with the title thereto or contracted to do so. There is no contract of sale whatever shown in the bill. The statutory right of redemption is to be exercised against the purchaser at the sale, or his vendee. It cannot be contended that the respondent Ella Dial is in any sense the vendee of said purchaser so far as this bill discloses, and, indeed, it does not appear from this bill that she has any title, either legal or equitable, to this property. Therefore the bill shows that the statutory right of redemption could be exercised only against the said respondent association. Said association has not seen fit to offer any demurrer to the bill. The respondent Ella Dial, being without interest in the property, is in no position to raise the question of the insufficiency of the bill as one for the enforcement of the statutory right of redemption against the said association. This can be done by the association alone, and for this conclusion we deem citation of authority unnecessary.

The bill may be defective as one seeking the enforcement of the statutory right of redemption, and, indeed, as we read the brief of counsel for appellant, this seems to be practically conceded, but, if so, it is a matter which cannot be presented upon the demurrer of the respondent Ella Dial.

The bill also seems to seek an accounting against the said Ella Dial, and it may be conceded that the bill is wholly insufficient as one for that purpose; yet the demurrer does not seem to take the point, nor is the question presented that said respondent is not a necessary or proper party to the cause.

The demurrer of the respondent Ella Dial goes to the whole bill. Its sufficiency as one

for the exercise of the statutory right of redemption can only be questioned by the respondent association, and it therefore follows that the learned chancellor fell into error in sustaining the demurrer of respondent Ella Dial to the bill.

The question as to whether or not by the bill sufficient excuse is shown for failure to make tender (section 5748, Code of 1907; *Johnson v. Davis*, 180 Ala. 143, 60 South. 799; *Dozier v. Farrior*, 65 South. 365), and other questions as to its sufficiency as a bill for the exercise of statutory right of redemption, are therefore not presented to us, nor, indeed, are these questions discussed at any length by counsel for appellant in his brief, and, in fact, the averments of the bill seem to leave too much to conjecture as to what are the facts, and we are therefore in no position to enter into a discussion of any of these matters upon this appeal. The decree of the chancery court is reversed, and the cause remanded.

Reversed and remanded.

ANDERSON, C. J., and MAYFIELD and SOMERVILLE, JJ., concur.

(191 Ala. 166)

CLARK et al. v. SMITH et al. (No. 898.)

(Supreme Court of Alabama. Jan. 14, 1915.)

APPEAL AND ERROR \Leftrightarrow 782—DISMISSAL—VOID DECREE.

Under Code 1907, §§ 5203, 5222, and section 5231, as amended by Laws 1909 (Sp. Sess.) p. 124, making jurisdiction of bills for a sale of land for division or for partition of land among joint owners or tenants in common depend upon the county in which the land is located, the chancery court of Jefferson county had no jurisdiction of such bill where the entire land was in Bibb county, and any decree entertained on the averments of the bill was coram non iudice and void, so that an appeal therefrom would be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3123, 3124; Dec. Dig. \Leftrightarrow 782.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Charlton G. Smith and others against Julia F. Clark and others. Decree overruling demurrer to bill, and defendants appeal. Dismissed.

Frank S. White & Sons, of Birmingham, for appellants. Percy, Benners & Burr, of Birmingham, for appellees.

McCLELLAN, J. This is a bill whereby a sale for division, or, failing that, partition, of land among joint owners or tenants in common, is sought. It appears from the averments of the bill that the entire lands lie in Bibb county, Ala.; whereas, this bill was filed in the chancery court of Jefferson county, Ala.

Jurisdiction in such cases is determined by the location with respect to county of the

lands sought to be sold for division or to be partitioned. Code, §§ 5203, 5222, and section 5231, as amended by the act of 1909 (Acts Sp. Sess. 1909, p. 124). *Trucks v. Sessions*, 66 South. 79. If the lands constituting a single tract lie in two or more counties, the jurisdiction of the equity courts of any one of the counties may be appropriately invoked to partition or sell for division. Code, § 3093, is not applicable; for the particular jurisdiction under inquiry is governed by the statutory system provided for the sale of lands for division among joint owners or tenants in common. The decisions delivered in *Ashurst v. Gibson*, 57 Ala. 584, and in *Reeves v. Brown*, 103 Ala. 537, 15 South. 824, concerned bills wherein the foreclosure of mortgages was sought; and hence were cases governed, as respected the jurisdiction invoked, by the substance of Code, § 3093.

On the face of the bill, the chancery court of Jefferson county is without jurisdiction in the premises. Any decree entertained on the averments of this bill by the chancery court of Jefferson county would be void for want of jurisdiction.

The decree overruling the demurrer was coram non iudice, and void. The appeal is therefore dismissed.

Appeal dismissed.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 148)

BLANTON v. BLANTON. (No. 922.)

(Supreme Court of Alabama. Jan. 14, 1915.)

1. DIVORCE \Leftrightarrow 93—BILL—SUFFICIENCY.

Complainant's bill for divorce, which merely averred that defendant, her husband, obtained a certificate that she was crazy so as to get rid of her, will not be dismissed on the ground that she was incapacitated and could not sue.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. \Leftrightarrow 93.]

2. DIVORCE \Leftrightarrow 93—PLEADING—BILL—SUFFICIENCY.

Where a bill for divorce fairly apprised the court and defendant of the grievances, it is not subject to demurrer for tautology, though it did not exactly comply with Code 1907, § 3094, requiring bills to contain a clear statement of facts relied on without unnecessary repetition.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 292-307; Dec. Dig. \Leftrightarrow 93.]

Appeal from Chancery Court, Lamar County; W. H. Simpson, Chancellor.

Bill by Mollie Blanton against John Blanton. From a decree for complainant, defendant appeals. Affirmed.

Ray & Cooner, of Jasper, for appellant. Walter Nesmith, of Vernon, for appellee.

SAYRE, J. [1] Appellant moved to dismiss appellee's bill for divorce upon the ground that it therein appeared that appellee was insane, and for that reason could not maintain her bill. The bill, in its original

shape, did not show appellee's incapacity. It was the evident purpose of the bill to charge that appellant falsely pretended that appellee was crazy, and the inference is that he did this in order to have some excuse for getting rid of her. The averment is that appellant obtained a "certificate that she was crazy." From what source or authority the certificate was obtained is not averred, and hence it does not appear that it afforded any competent evidence that appellee was insane or in any degree mentally deranged. The fact, which appellee intended to get before the court in some sort, was proper for consideration, along with other wrongs catalogued in the bill, and there was no error in refusing to dismiss the bill on the ground stated by appellant.

[2] In holding that the motion to strike the bill on the ground, in substance, that it was not framed with as much brevity as consisted with perspicuity and a presentation of appellee's case in an intelligible form, and that it was "sadly overburdened with elocution and tautology," was overruled without error. We will not be understood as affirming that the bill is a model of perspicuous brevity in accord with the letter of section 5322, which applies to complainants at law, nor even that it nicely measures up to the requirements of a bill in equity according to section 3094 of the Code, which provides that:

"The bill must contain a clear and orderly statement of the facts on which the suit is founded, without prolixity or repetition."

It apprised the court of appellee's grievances by direct averments, made with a fair degree of order, and the court committed no error in entertaining it in its shape.

We are also of opinion that the demurrer to the amended bill as a whole, and to divers parts thereof, was properly overruled. Further discussion of the bill and the objections taken against it would be unprofitable. There was no error, and the decree below is affirmed.

Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(191 Ala. 87)

PHILLIPS v. GAITHER et al.

(Supreme Court of Alabama. Jan. 14, 1915.)

1. WILLS §329—CONTEST—INSTRUCTIONS—UNDUE INFLUENCE—WEIGHT OF EVIDENCE.

On the issue of undue influence raised in a will contest, a charge that the paper propounded for probate could not be found to be the result of undue influence, unless the jury was satisfied, by a preponderance of the evidence, that it was not such a will as testator desired to make, was erroneous, as exacting too high a degree of proof.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 774, 776-778, 786, 787; Dec. Dig. § 329.]

2. WILLS §158—VALIDITY—"UNDUE INFLUENCE"—COERCION OR FRAUD.

Where a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true expression of intent, the courts will relieve against it on the ground of "undue influence" which is equivalent to coercion or fraud, and must have an effect upon the testator's mind equivalent to that of coercion or fraud, must, in short, destroy its freedom of choice and action; such coercion need not be physical duress, but may be moral only, and such fraud need not be actual, but may be constructive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 385, 386; Dec. Dig. § 158.]

For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. WILLS §332—CONTEST—ALTERNATIVE INSTRUCTION—UNDUE INFLUENCE OR FRAUD.

A charge that the paper propounded for probate could not be found the result of undue influence unless the jury was satisfied that it was not such a will as testator desired to make, and that it was procured by coercion "or" fraud, in the disjunctive, signified that the conceptions of coercion and of fraud were substantially equivalent, and was not positively erroneous.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 785; Dec. Dig. § 332.]

4. TRIAL §256—INSTRUCTIONS—REQUESTED INSTRUCTIONS.

If the contestant against whom a charge was given apprehended prejudice therefrom, he should have requested an explanatory instruction.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 628-641; Dec. Dig. § 256.]

5. WITNESSES §267—CROSS-EXAMINATION—WILL CONTEST.

In will contests a wide latitude must be allowed to parties in the cross-examination of witnesses; such matter resting measurably within the discretion of the trial court.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 923-930; Dec. Dig. § 267.]

Appeal from Probate Court, Jefferson County; J. P. Stiles, Judge.

Georgia D. Gaither and Arthur A. Adams, as executors named in the will of Virginia Z. Siddons, filed said will for probate, and L. W. Phillips contested same. Judgment for proponents, and contestant appeals. Reversed and remanded.

The grounds of contest were: (1) That the will was not duly executed; (2) testatrix was of unsound mind; and (3), that it was the product of undue influence of various named parties.

At the request of proponent, the following charge was given:

"(1) On the question of undue influence, the court charges the jury that they cannot find that the paper propounded for probate in this cause was the result of undue influence, unless the jury is satisfied by a preponderance of the evidence that it was not such a will as Virginia Z. Siddons desired to make, and that it was procured from her by coercion or fraud."

J. M. Chilton, of Montgomery, and W. K. Terry and W. T. Stewart, both of Birmingham, for appellant. A. & F. B. Latady, of Birmingham, for appellees.

SAYRE, J. [1] Our cases make the giving of charge 11, requested in writing by proponents, error; and we are unable to say, upon consideration of the entire record, that this was not prejudicial to contestant or reversible error. On the question of undue influence the charge exacted of contestant too high a degree of proof. *McBride v. Sullivan*, 155 Ala. 166, 45 South. 902; *Moore v. Heinke*, 119 Ala. 627, 24 South. 374; *Torrey v. Burney*, 113 Ala. 496, 21 South. 348; *Emerson v. Lowe Mfg. Co.*, 159 Ala. 350, 49 South. 69; *Southern Ry. Co. v. Riddle*, 126 Ala. 244, 28 South. 422.

[2-4] Contestant, appellant here, complains also of the charge that it required of him proof that the will had been procured by coercion or fraud. In this particular the charge is open to criticism as an illuminating statement of the law to the jury in a case like this. In quite a number of our cases that undue influence which will suffice to set aside a will is spoken of as amounting to, or the equivalent of, coercion or fraud—that is, we take it, undue influence, to vitiate a will, must have an effect upon the testator's mind equivalent to that of coercion or fraud, must, in short, destroy its freedom of choice and action. This is the implication of the expressions used. Coercion of the sort here in question need not be physical duress, it may be moral only; the fraud need not be actual; it may be by construction of law. The disjunctive used in such expressions signifies, not an alternative between unlike things or ideas, but that the two conceptions are substantially equivalent; and, properly understood, they are substantial equivalents, for where a transaction is the result of "moral, social, or domestic force," exerted upon a party, controlling the free action of his will and preventing any true expression of intention, the courts will relieve against the transaction on the ground of undue influence, a species of fraud. 2 Pom. Eq. Jur., § 951; *Councill v. Mayhew*, 172 Ala. 295, 55 South. 314. We will not say, however, that this feature of the charge, if it stood alone as the subject of appellant's complaint, would constitute reversible error. The charge is not positively erroneous in this particular; it needs perhaps some explanation, some further unfolding of the idea contained, but, if contestant apprehended prejudice on this account alone, he should have requested an explanatory instruction.

[8] We have found no other reversible error in the record. Most of the assignments of error addressed to rulings on the evidence are patently without merit. In cases of this kind a large degree of latitude must be allowed to parties in the cross-examination of witnesses, whereas the court below appears in a few instances to have applied the rule of relevancy rather strictly against contestant. However, that is a matter resting

measurably within the discretion of the trial court, and we are not prepared to say there was any reversible error in that regard.

For the sole error pointed out the judgment is reversed, and the cause remanded for a new trial.

Reversed and remanded.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(191 Ala. 189)

KILGORE v. TENNESSEE COAL, IRON & R. CO. (No. 777.)

(Supreme Court of Alabama. Jan. 14, 1915.)

APPEAL AND ERROR §78—ORDERS APPEALABLE—SETTING ASIDE VERDICT.

An order of the chancellor setting aside the verdict of a jury, taken on the certification of an issue of fact for trial in the circuit court before a jury, is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 426, 434, 464-477, 480, 481; Dec. Dig. §78.]

Appeal from Chancery Court, Walker County; A. H. Benners, Chancellor.

Action by J. R. Kilgore against the Tennessee Coal, Iron & Railroad Company. Verdict taken under certification of an issue of fact for trial in the circuit court before a jury set aside, and plaintiff appeals. Dismissed.

Gunn & Powell and Bankhead & Bankhead, all of Jasper, for appellant. A. F. Fite, of Jasper, for appellee.

McCLELLAN, J. This appeal is sought to be effected upon and from an interlocutory order of the chancery court setting aside, on motion, the verdict of a jury which was taken under the certification of an issue of fact for trial in the circuit court before a jury. Such an order is not appealable. *Ex parte Colvert*, 65 South. 964.

The motion to dismiss the appeal must be sustained.

Appeal dismissed.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 671)

Ex parte J. R. KILGORE & SON. (No. 8.)

(Supreme Court of Alabama. Feb. 11, 1915.)

CARRIERS §227—CARRIERS OF LIVE STOCK—ACTION FOR DAMAGES—EVIDENCE.

The provision in a bill of lading limiting the valuation and amount of recovery in the event of liability is available to the carrier without a special plea, where the bill of lading has been offered in evidence by the plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 232, 953-956; Dec. Dig. §227.]

Certiorari to Court of Appeals.

Action by J. R. Kilgore & Son against the Illinois Central Railroad Company. Judgment for plaintiff was reversed by the Court

of Appeals (67 South. 707), and plaintiff petitions for certiorari. Denied.

Bankhead & Bankhead, of Jasper, for appellant. Davis & Fite, of Jasper, for appellee.

GARDNER, J. Petition for certiorari to Court of Appeals to review the decision of said court in the case of Illinois Central Railroad Co. v. J. R. Kilgore & Son, 67 South. 707. By the petition, review of the decision in said case is sought only as to one question, viz., whether or not the provision in the bill of lading limiting valuation, and therefore amount of recovery in event of liability, is available to the defendant to the original suit, without a special plea, the bill of lading having been offered in evidence by the plaintiff. We do not deem a discussion of the question necessary, as we conclude the opinion of the Court of Appeals in response to the application for rehearing in this case is sufficient answer to this petition, and we content ourselves with a reference thereto. Whether additional reasons might have been given we need not stop to inquire.

The writ is denied. All the Justices concur.

(191 Ala. 210)

BRAASCH et al. v. WORTHINGTON et al.
(No. 894.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. WILLS \Leftrightarrow 229—CONTEST—PERSONS ENTITLED—INTEREST.

Under Code 1907, § 6196, giving the right to contest a will to any person interested therein, or who, if the testator had died intestate, would have been an heir or distributee of his estate, and section 6207 giving the right to contest a will by a bill in chancery to any person interested in any will who has not contested it under the provisions of section 6196, the right to contest is given only to one who has some direct legal or equitable interest in decedent's estate, which will be injuriously affected by the establishment of the will, and legatees, who are children of a living heir of testator, are not entitled to contest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 550-554; Dec. Dig. \Leftrightarrow 229.]

2. WILLS \Leftrightarrow 284—CONTEST—BILL—DEMURRER—MISJOINDER OF COMPLAINANTS.

Where some complainants in a bill to contest the will and to remove the estate into chancery for administration had no interest in the will, except as legatees, and were therefore not entitled to contest, and the court had already, on another petition, assumed jurisdiction over the administration of the estate, it was proper to sustain a demurrer as to the entire bill for misjoinder of parties complainant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 643; Dec. Dig. \Leftrightarrow 284.]

Anderson, C. J., and McClellan and Mayfield, JJ., dissenting.

Appeal from Chancery Court, Cullman County; W. H. Simpson, Chancellor.

Action by Louis Braasch and others against Attie B. Worthington and others. Decree for the defendants on demurrer to

the bill for misjoinder of complainants, and complainants appeal. Affirmed.

Brown & Griffith, of Cullman, for appellants. George H. Parker and F. E. St. John, both of Cullman, and Eyster & Eyster, of New Decatur, for appellees.

SOMERVILLE, J. This proceeding is by a bill in chancery under section 6207 of the Code, and joins as complainants an heir at law of the decedent testatrix and several children of another heir at law, who is still living; all of the complainants being named as legatees in the will.

The prayer of the bill is for the removal of the administration of the estate into the chancery court; that the administrator de bonis non be required to file an inventory, and collect assets for distribution; that the will be canceled and set aside, and assets distributed, and for general relief.

The chancellor sustained a demurrer to the bill on the ground of a misjoinder of parties complainant, and the only meritorious question presented by the appeal is whether or not a legatee under a will is, by virtue of that fact alone, he having no interest in the estate of the decedent, entitled to contest the will. If not, then there is a misjoinder of parties, and the demurrer was properly sustained.

[1] The right to contest the validity of a will when propounded for probate is given by our statute to "any person interested therein or * * * any person who, if the testator had died intestate, would have been an heir or distributee of his estate." Code 1907, § 6196. The right to contest a probated will within 12 months by bill in chancery is given to "any person interested in any will, who has not contested the same" under the provisions of section 6196 et seq. We think there can be no doubt but that a contest in chancery, under section 6207, may be instituted by any person who could have contested the probate of the will under section 6196, but has neglected to do so. If so, then the suppletory clause in section 6196, "or any person who, if the testator had died intestate," etc., adds nothing to the preceding general clause, other than a precise designation of the principal class of persons who are "interested" in the will. What persons are "interested" in the will in the qualifying sense intended by the statute has been several times considered by this court.

Referring to section 55 of the act of 1806 (Clay's Digest, § 15, p. 598), which is the original of section 6207 now in force, and which authorizes "any person interested in such will," to contest in chancery, the court said:

"The statute also provides a new mode, by which the heir at law or the next of kin can contest the will." Johnston v. Glasscock, 2 Ala. 218.

Again, construing section 1989, Code of 1876 (now section 6196, Code 1907), the court denied the petitioner's right, as a creditor of the decedent's estate, to contest his will, and said:

"This interest, of course, was not, and could not be, affected in any degree by any testamentary disposition of the property. * * * He had no interest to be jeopardized by establishing the will, and none that would have been conserved by defeating its probate. He was therefore not a 'person interested therein,' or 'one who, if the testator had died intestate, would have been an heir or distributee of his estate.'" *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349.

In a later case, where the contesting petitioner was only a creditor of the decedent's husband, it was correctly ruled, upon the most convincing reasoning, that he was not "interested" in the will, and not entitled to contest it. *Lockard v. Stephenson*, 120 Ala. 641, 24 South. 996, 74 Am. St. Rep. 63. But the learned writer of the opinion, discussing who might contest the will, though not named therein, said, arguendo:

"These persons are those 'who, if the testator had died intestate, would have been an heir or distributee of his estate,' clearly demonstrating that the Legislature construed the words 'interested therein' as referring to and including only such persons as took an interest in the estate of testatrix under and by virtue of the provisions of the will."

This language was criticized as unnecessary, and was in effect repudiated in the recent case of *Elmore v. Stevens*, 174 Ala. 228, 57 South. 457, where it was held that the vendee of an heir at law was "interested" in the will in the statutory sense. Prior to the *Elmore* Case it had been held that the heir of an heir at law was "interested," and the court said:

"In this case the widow, being the sole heir, owns the identical property which her husband held, which was an *interest in the property* left by his mother, and the right of contest is based on *that interest*." (Italics supplied.) *Rainey v. Ridgway*, 148 Ala. 524, 41 South. 632.

See, also, *Hays v. Bowdoin*, 159 Ala. 600, 604, 49 South. 122.

It is clear, we think, that the phrases "any person interested therein," in section 6196, and "any person interested in any will," in section 6207, do not mean simply any person who is named as a beneficiary in the will, but rather any person who has a direct interest in the estate disposed of by the will; in other words, the "interest" intended is not literally an interest in the will itself, but *in its operation*.

The theory of the complainants is that every legatee or devisee under a will is ipso facto "interested therein" in such sense as to be entitled to contest it. Of the unsoundness of this contention we have not the slightest doubt. The true principle was clearly and vigorously stated in *Montgomery v. Foster*, 91 Ala. 613, 8 South. 349, as quoted above. A contestant of a will must

have some direct legal or equitable interest in the decedent's estate, in privity with him, whether as heir, purchaser, or beneficiary under another will, which would be destroyed or injuriously affected by the establishment of the contested will. As legatee merely, he cannot contest the will for the collateral purpose of diverting the estate to another person (a parent, for example) from whom he may hope to receive a gratuity in excess of his legacy. The authorities to this effect are numerous, and we find none in opposition. *Selden v. Ill. Trust, etc.*, Bank, 239 Ill. 67, 87 N. E. 860, 130 Am. St. Rep. 180, and note collecting the cases; 40 Cyc. 1243, and cases cited.

It may be noted here that the Supreme Court of Mississippi has held that if a contestant, who is an heir as well as legatee under the will takes more under the will than without it, he has no interest entitling him to contest its validity. *Biles v. Dean* (Miss.) 14 South. 536.

Our conclusion is that Ethel, Elizabeth, George, and Mary Forbes, not having any interest in the testator's estate other than as legatees under the will, have no right to contest it, and are improperly joined as complainants in this case, in so far as the bill contests the validity of the will.

[2] Under a separate petition filed for the purpose, the court had already ordered the removal of the administration and assumed jurisdiction thereof. Hence the original bill was functus officio in every aspect, except that of testamentary contestation, and the demurrer for misjoinder of parties was properly addressed to the entire bill, and was properly sustained.

The dictum quoted from the case of *Lockard v. Stephenson*, supra, and set out in the first headnote of the report of that case, is not in accord with the law, and is disapproved and overruled. It results that the decree of the chancellor must be affirmed.

Affirmed.

SAYRE, GARDNER, and THOMAS, JJ., concur. ANDERSON, C. J., and McCLELLAN and MAYFIELD, JJ., dissent, and adhere to the doctrine of *Lockard v. Stephenson*, above disapproved and overruled.

(191 Ala. 48)

HOLTON et al. v. ROGERS. (No. 558.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. INFANTS ~~vs.~~—39 — SALE OF REALTY UNDER ORDER OF COURT—JURISDICTION—SUFFICIENCY OF PETITION.

Under Code 1907, § 4411, providing that the court of probate may authorize a guardian to sell any property of his ward and direct the investment of the proceeds in other property, and section 4412, providing that to obtain such order of sale the guardian must make application in writing, describing the property sought to be sold and stating the facts showing that the interest of the ward would be promoted by

the proposed sale and reinvestment, a petition, alleging that the petitioner was the guardian of her minor children; that they had an interest in real property consisting of an undivided two-thirds interest in 60 acres of land therein described and of about the value of \$200; that such land could be sold for \$10 an acre; that other land could be purchased in lieu thereof for \$5 an acre which was just as productive, the difference in price being due to the distance from a market; and that it would be greatly to the advantage of such minors if she were permitted to sell the land and reinvest in other lands—was sufficient to give the probate court jurisdiction to authorize a sale for reinvestment, and the order of sale could therefore not be collaterally attacked.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. § 39.]

2. INFANTS § 39—SALE OF REALTY UNDER ORDER OF COURT—COLLATERAL ATTACK.

Where the probate court had jurisdiction to order a sale of infants' real property for reinvestment, its order could not be collaterally attacked, in an action of ejectment, because of errors or irregularities.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. §§ 85-89; Dec. Dig. § 39.]

Appeal from Circuit Court, Houston County; H. A. Pearce, Judge.

Ejectment by R. D. Holton and another against J. M. Rogers. Judgment for plaintiffs, and defendant appeals. Affirmed.

Plaintiffs were the children of Jake Holton, who died testate in October, 1900, residing in what was then Henry, but is now Houston, county, and at the time he resided upon and occupied the lands sued for as a homestead, which did not exceed in value \$2,000, and his personal property did not exceed \$1,000 in value. He left a widow, who afterwards married and became Lena Deal, mother of plaintiffs, and who afterwards was appointed guardian of said plaintiffs. Her petition to sell the land is as follows: (1) That she is the mother of Robert D. Holton and Mattie D. Holton, minors under the age of 14 years, who reside with petitioner in said state and county. Petitioner further represents that said minors (naming them) have an estate in their own right of about the value of \$200, the same consisting of an undivided two-thirds interest in and to the 60 acres of land situated in this county. On this petition letters of guardianship were issued to said Lena Deal. Later, after stating the facts as above and describing the real estate, it is alleged that petitioner is the widow of said J. M. Holton, and that her wards were the minor children of said Holton, deceased, and of petitioner; that said real estate descended to petitioner and her said wards, share and share alike, as the widow and minor children of said J. M. Holton, under the statute of exemptions, the said 60 acres of land being all of the real estate owned by the said Holton at the time of his death. Petitioner avers that at the present time she can sell said real estate at and for the sum of \$10 per acre, and that she can purchase other lands

in lieu thereof for the sum of \$5 per acre, which said last-named lands are just as productive as the lands set out in this petition, the difference in the price of said land as compared with the above-named land being that the lands she desires to purchase are a little further from the market than the lands she desires to sell, and on which she and her wards reside. Petitioner avers that with the proceeds of the land of her said wards she can obtain twice as much land, which, as above stated, is as productive and fertile of soil as the lands they now own, and that it would be greatly to the advantage of her said wards, if it will permit her to sell said land and reinvest in other lands. Then followed the usual prayer for the appointment of a guardian ad litem, the taking of testimony, setting a day to hear the petition, and such other proceedings and orders as might be necessary. The petition was granted, and an order of sale entered, a report of the sale made, showing that J. M. Rogers became the purchaser of the two-thirds interest in and to the land, the report was confirmed, and the deed was executed to said J. M. Rogers.

Espy & Farmer, of Dothan, for appellant.
E. H. Hill, of Dothan, for appellees.

MAYFIELD, J. Appellants sued appellee in ejectment to recover possession of 60 acres of land. The trial court on the whole evidence directed a verdict for defendant, which resulted in a judgment for defendant, from which plaintiffs prosecute this appeal.

[1] There is but one material question involved on the appeal, to which question all others are subsidiary. That question is whether or not the proceedings in the probate court, by the guardian, to sell the lands in question, were void in such sense as to be so declared on collateral attack. The trial court ruled that the proceedings could not be declared void on collateral attack.

The reporter will set out the petition of the guardian for the sale of the land.

The statutes of this state confer jurisdiction on the probate courts to sell lands of their wards for several purposes, to pay debts, for maintenance, for reinvestment, and probably others. The sale in this instance was under section 4411 of the Code, for reinvestment. This section reads as follows:

"The court of probate may authorize the guardian to sell any property of the ward, and direct the investment of the proceeds in bonds, notes, or bills of exchange at interest on mortgage security, or in other property or securities, in the name of the ward."

Section 4412 of the Code provides what the petition or application of the guardian shall contain, which is as follows:

"To obtain such order of sale the guardian must make application in writing, verified by affidavit, describing the property sought to be sold, and stating the facts showing that the interest of the ward would be promoted by the proposed sale and reinvestment."

[2] We think it certain that the application in this case contained a statement of all of the facts necessary to confer jurisdiction on the court to proceed with the sale. This being true, errors or irregularities thereafter intervening between the filing of the application or the acquiring of jurisdiction, and the decree or order of sale in accordance with the petition, cannot be successfully assailed on a collateral attack like this action of ejectment to recover the lands. If irregularities or errors there be, they should be corrected on appeal or in some direct attack upon the proceeding, and not by a collateral attack. This has too long been the law of this state and is too firmly imbedded in our jurisprudence to be now departed from. It has too long been a rule of property, and too many titles now depend upon it, to change it.

A case very much like this and one that cannot be distinguished from it was that of *Daughtry v. Thweatt*, 105 Ala. 615, 16 South. 920, 53 Am. St. Rep. 146. In that case it was said:

"The proposition is that he could not proceed to an order of sale without notice to the ward, and without the appointment of a guardian ad litem to represent her. The proceeding the statute authorizes has in it no element of an adversary suit in personam. All such proceedings under analogous statutes authorizing the court of probate, or the judge of the court of probate, to license or confer power on executors, or administrators, to make sales of lands, or of personal property, since the case of *Wyman v. Campbell*, 6 Port. 219 [31 Am. Dec. 677], have been regarded as proceedings in rem and jurisdiction of the thing, and not of the person, as imparting validity to the proceeding when collaterally assailed. 1 Brick. Dig., 939, §§ 351, 352. The jurisdiction of the judge of probate must have attached, or there could not have been notice to, or the appointment of, a guardian ad litem for the ward. The one or the other would have been but movements, in the exercise of the jurisdiction, attaching on the filing of the application for the sale. The notice and appointment of the guardian ad litem would have been vain and nugatory if the application had not shown good cause for the sale. Without the application there would not have been jurisdiction of the subject-matter, and jurisdiction of the person, however plenary, could not have rendered the order of sale valid."

"We must not be understood as assenting to the proposition that notice to the ward, or the appointment of a guardian ad litem for her, was essential to the regularity of the proceeding. The statute makes no such requirement, and for the obvious reason, as we have said, that an adversary proceeding in personam is not contemplated. The application for the sale made by the guardian in her representative capacity, not in any individual right, would seem to be but the application of the ward, speaking and acting through her legal representative. Notice to the ward could only inform her of the pendency of her own proceeding, and warn her of a decree or order sought to meet her necessities or interests. *Mohr v. Manierre*, 101 U. S. 417 [25 L. Ed. 1052]. A guardian ad litem could have no duty or office to perform which the law had not devolved on the general guardian. Whenever a guardian ad litem is deemed necessary for the representation of the ward in the court of probate, the statutes provide expressly for his appointment. In the proceeding for the sale of lands under the statute to which we have refer-

red, there is no authority for, or the requirement of, such an appointment. This question the necessities of the case do not require us to decide, and we prefer to rest our conclusions on the settled doctrine, which has so long prevailed in this state, touching the character and validity of sales made under the orders or decrees of the court of probate."

It is true that it is insisted in this case that the averments of the petition, or application as the statute calls it, were not sufficient to call into exercise the jurisdiction of the probate judge or court, or necessitate or authorize the proceedings which culminated in the sale. In this contention, however, we cannot agree with counsel for appellant. As before stated, we are of the opinion that the averments were sufficient. It was not necessary to aver in terms or in so many words that the lands to be purchased were more valuable than the ones to be sold. The averments to this end were sufficient, and we must presume that the court would not have ordered the sale and a reinvestment, unless "the interest of the ward be promoted by the sale and reinvestment." This is what the statute requires.

Affirmed.

ANDERSON, C. J., and SOMERVILLE and THOMAS, JJ., concur.

(21 Ala. 34)

SALTER v. FOX et al. (No. 919.)

(Supreme Court of Alabama. Jan. 14, 1915.)

1. EJECTMENT ¶9—GROUNDS OF ACTION—RIGHT TO POSSESSION.

In ejectment by husband and wife, where it appeared that the wife alone was entitled to possession of the land, it was error to refuse the defendant his requested general affirmative charge, since, as ejectment is a possessory action, the right to possession at the time suit is instituted by coplaintiffs must be in all of them, which rule has not been changed by Code 1907, § 3839.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 16-29; Dec. Dig. ¶9.]

2. ADVERSE POSSESSION ¶116—INSTRUCTIONS—NATURE OF HOLDING.

In ejectment, where the court refused the defendant's requested charge that if the defendant had had possession of the land in controversy for a period exceeding 10 years, then the verdict should be for him, such refusal was proper; the charge being faulty in that its conclusion was predicated on bare possession, not on adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 66; Dec. Dig. ¶116.]

Appeal from City Court of Bessemer; J. C. B. Gwin, Judge.

Ejectment by G. W. and Nancy Fox against J. M. Salter. Judgment for plaintiffs and defendant appeals. Reversed and remanded. See, also, 67 South. 439.

The first deed exhibited was that of William Vines and others to Nancy Fox, executed December 27, 1890, acknowledged and recorded, and filed for record. The second deed was that of Nancy Fox and G. W. Fox

to Fulton Snow, to become his at the death of the grantee, Nancy Fox, executed December 9, 1905. The next deed was from Fulton Snow and wife to G. W. Fox, in warranty executed February 10, 1906. It appears from the record that the controversy was over a piece of land between the land sued for and the land deeded by G. W. and Nancy Fox to James Salter on December 27, 1890, and by James Salter and wife to J. M. Salter on October 24, 1899, which the Salters claim to have held by adverse possession. The court refused the following charge to defendant:

"(2) The court charges the jury that if you believe from the evidence in this case that defendant has had the piece of land in controversy in this case in his possession under his fence for a period of 14 years or exceeding 10 years, then your verdict must be for defendant."

Pinkey Scott, of Bessemer, for appellant.
Goodwyn & Ross, of Bessemer, for appellees.

MCCLELLAN, J. [1] Statutory ejectment, by appellees against appellant. The deed from Nancy Fox and her husband, G. W. Fox, to Fulton Snow, of date December 9, 1904, effected to reserve in Nancy Fox the use and enjoyment, *the possession*, of the land during her life, thereby postponing the right to *possession* of the land until her death. *Abney v. Moore*, 106 Ala. 131, 135, 18 South. 60. In consequence, the conveyance of Fulton Snow and wife to G. W. Fox, of date February 10, 1906, operated to vest the title in G. W. Fox, subject to the stated reservation of possession in Nancy Fox. In order for a plaintiff to prevail in ejectment the right to the possession, at the time suit was instituted, must be in the plaintiff. Ejectment is a possessory action. Where two or more plaintiffs seek the recovery of the possession of lands, all must be entitled to recover, else none can recover. *Whitlow v. Echols*, 78 Ala. 206, 211; *Dake v. Sewell*, 145 Ala. 581, 585, 39 South. 819. G. W. Fox was without right to the possession of the land in suit; that right being in his coplaintiff only. Hence, G. W. Fox was not entitled to recover; and, he being due to fail, the defendant was entitled to the general affirmative charge requested by and refused to him. Section 3839 of the Code of 1907 has not changed the rules to which we have adverted. There is nothing in that statute disclosing a legislative intent to allow persons not entitled to the possession to recover in ejectment or to permit some, less than all, of the plaintiffs to prevail. The effect of the statute amended in the codification of 1907 is illustrated in the cases of *Grant v. Nations*, 172 Ala. 83, 55 South. 310, and *Nichols v. Nichols*, 179 Ala. 611, 60 South. 855, among others.

There is no merit in the other errors assigned and urged in brief for appellant.

[2] Charge 2 was patently faulty, in that the conclusion thereof was predicated of a mere possession, not an *adverse* possession.

The judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 29)

BRANNON v. STATE. (No. 4.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. CRIMINAL LAW — FINDINGS OF COURT OF APPEALS—REVIEW ON CERTIORARI.

A finding of the Court of Appeals that a conviction was sustained by evidence could not be reviewed by the Supreme Court on application for certiorari.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3001; Dec. Dig. —1179.]

2. CRIMINAL LAW — APPEAL—INVITED ERROR—INSTRUCTIONS.

A defendant cannot complain on appeal of a general charge in his favor as to one count of the indictment, where such charge has been given on his written request.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. —1137.]

3. CRIMINAL LAW — REFUSAL OF INSTRUCTION—INCONSISTENT RULINGS.

That the court's refusal to give a general charge for defendant as to the third count of the indictment was inconsistent with the erroneous giving of defendant's requested general charge as to the first count was not error of which he could complain on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3007-3010; Dec. Dig. —1137.]

Certiorari to Court of Appeals.

Jim Brannon was convicted of crime, and, the conviction having been sustained by the Court of Appeals, he applies for certiorari. Certiorari (in 67 South. 634) denied.

Allen, Bell & Sadler, of Birmingham, for appellant. W. L. Martin, Atty. Gen., for the State.

SAYRE, J. [1] The first count of the indictment charged in Code form that defendant was a vagrant. The fourth, on which defendant was convicted, charged that he was a keeper, proprietor, or employé of a gambling house. Evidence under the fourth count went equally as well to support the charge of the first. The Court of Appeals has found that there was such evidence. We do not review that court on findings of that character. Such has been our ruling consistently followed. We must assume, therefore, that there was evidence to support the verdict.

[2, 3] In the trial court defendant had, on request in writing, the general charge in his favor as to the first count. This was error of which defendant cannot complain. A similar charge as to the third count was refused. In this the trial court was inconsistent, of course, and upon this inconsistency defendant thinks he should have had a reversal at the hands of the Court of Appeals.

But we are not of that opinion. If the court had given inconsistent instructions in respect of any one count, there would be some considerable point in the suggestion of error. But each count stood upon its own bottom and constituted a separate and distinct charge. That the court erred in favor of defendant in one instance was no reason why the error should be repeated in the other. The court could not be required or even expected to persist in error. There was nothing wrong in the court's putting itself right as to the fourth count. This may seem rather too plain to need formal statement; but this expression of our view is made as the proper result of our due consideration of the case made on the application for certiorari. If, as defendant contends, he was convicted on evidence insufficient to support the finding, his last resort under the Constitution and the statute creating the Court of Appeals was in that court.

The application for certiorari must be denied.

Certiorari denied. All the Justices concur.

(191 Ala. 163)

VAN HOUTAN v. BLACK et al. (No. 939.)

(Supreme Court of Alabama. Jan. 14, 1915.
Rehearing Denied Feb. 4, 1915.)

1. GUARDIAN AND WARD §86—SALE OF REALTY—CONFIRMATION BY COURT—SUFFICIENCY OF PETITION.

To invoke the jurisdiction of the probate court to confirm a sale of an infant's undivided interest in real property, a petition must be filed stating, however imperfectly, a case within the statute; and, while it is enough to sustain the proceeding against collateral attack that the necessary facts are stated colorably or inferentially they must be stated in some way, and the relief sought must be within the power of the court.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 340-344; Dec. Dig. §86.]

2. GUARDIAN AND WARD §106—SALE OF REALTY—VALIDITY OF DECREE OF PROBATE COURT.

A decree of the probate court, confirming a sale of an infant's interest in real property which is beyond the limited power of such court to make, cannot be sustained on the ground that the statute under which the court acted, or supposed itself to be acting, was dubious in its meaning, and that the court therefore had a right to determine its own jurisdiction, as the law of every case is fixed, and parties are conclusively presumed to know such law.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. § 390; Dec. Dig. §106.]

3. GUARDIAN AND WARD §42—SALE OF REALTY—JOINDER IN SALE BY OTHER TENANTS IN COMMON.

Under Code 1907, § 5253, providing that when any minor shall hold an interest in land as tenant in common with others and there shall be no valid authority to sell such interest vested in any person by the terms of any instrument under which such minor holds such interest and a sale shall not be prohibited or restricted by such instrument, the guardian of such minor may join the other tenants in com-

mon in selling such land, publicly or privately, for a division of the proceeds, where an owner of an undivided interest in land devised a part of such undivided interest to each of his minor children, their guardian could not join with the other owners of such undivided interest in a sale thereof, the entire fee not having been included in such sale, as the provision of the statute is for a form and method of partition, which cannot ordinarily be had of an undivided interest, and while the Legislature might provide therefor, it cannot be assumed that it intended to so provide, especially as the average purchaser is not easily tempted to buy a fractional interest in property.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 173-185, 191; Dec. Dig. §42.]

4. STATUTES §176—CONSTRUCTION—EXTRINSIC FACTS—EFFECT OF CONSTRUCTION.

That many titles to land acquired in good faith depend upon a construction of a statute contrary to its plain meaning cannot require the adoption of such construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 255; Dec. Dig. §176.]

Appeal from Chancery Court, Jefferson County; A. H. Benners, Chancellor.

Bill by Abraham Van Houtan against H. H. Black and others, to quiet title to certain land. Judgment for respondents, and complainant appeals. Affirmed.

The answer of Black admits that complainant is the owner of an undivided $101/105$ interest in and to the lands described in the bill, and that he, the defendant, is the owner of an undivided $4/105$, and he derives his title as follows: John T. Shugart, while in life was seised and possessed of an undivided $1/15$ interest in and to real estate, and left surviving him his widow, Alice D. Shugart, and seven named children. That Shugart left a last will and testament, a copy of which is attached and marked "Exhibit A," and under said will Forest, Florence, Alice, and John Shugart each received an undivided $1/105$ interest in and to the real estate described. That by decree of the court of chancery of Jefferson county, Ala., on December 18, 1909, in a case in which Alice D. Shugart and others were complainants, and Roland T. Shugart was respondent, it was decreed that the respective interests of the said minor children of the said John T. Shugart should be sold. The sale was made, reported, and regularly confirmed, and the court made and executed a deed to Curtis S. Shugart, the purchaser, conveying to him all the right, title, and interest of said minor children. The answer then recites a judgment in the city court of Birmingham against Jackson and Lydia Jones against Curtis S. Shugart, execution on said judgment, a levy of the same on Shugart's interest in the land, notice of said levy, etc., sale under it, and sheriff's deed regularly made to defendant H. H. Black. The answer was made a cross-bill, and it was asserted that the land could not be equitably divided, and partition was sought. Complainant claims through a deed

executed to him by Alice D. Shugart, guardian of the four above-named minors, under a petition by her setting forth the age of the minors, the description of the land, and the interest of each of the minors therein, and it is alleged that there was no valid authority to sell said interest of said minors vested in any person by the terms of any instrument under which said minors hold such interest, and that such sale was not prohibited or restricted by such or any instrument. Petitioner further represents that, as guardian of said minors, she has joined with the other tenants in common of said land, viz., Roland and Mamie Shugart, and on her own personal behalf, into a written agreement for the private sale of said above-described land to Abraham Van Houtan for a division of the proceeds thereof for the sum of \$500 in cash for the entire interest in the said property of the said tenants in common, and that the price agreed to be paid for the same was fair and reasonable, and that it is to the interest of said minors that the said sale be consummated and confirmed, and that all the purchase money is now in her hands for distribution. A day was set for hearing this petition, and a guardian ad litem appointed, and on the hearing, the court adjudged and decreed that the sale be, in all things, confirmed, and that the guardian execute and deliver to Abraham Van Houtan a conveyance of the interest of each of said minors in said real estate. A deed followed, executed by Alice D. Shugart individually and as guardian and as executrix, and the deed was also signed by Roland and Mamie Shugart.

Sinnott & Keene and M. Lee Bonner, all of Birmingham, for appellant. Burgin, Jenkins & Brown, of Birmingham, for appellees.

SAYRE, J. Bill by appellant to settle the title to a fractional interest in a certain tract of land. Appellant claimed the interest in suit by virtue of a guardian's deed and the provisions of article 3 of the chapter on Partition, Code of 1907. Appellee Black claimed through a subsequent proceeding in the chancery court. Relief was awarded to appellee on his cross-bill, in which he contended that the proceeding under which appellant claimed was void for lack of jurisdiction in the probate court.

In the probate court the guardian of four minor children, who along with adult children of John T. Shugart, deceased, owned an undivided $\frac{4}{108}$ interest in the land, represented that she on behalf of the minors had joined with the other owners of said fractional interest in a sale of that interest at a fair and reasonable price, and asked the court's approval of what she had done. The sale was thereupon approved and confirmed by decree of the probate court at the end of a proceeding which followed the form of the statute. It thus appears by necessary inference that in her agreement for a sale, or her sale subject to the court's approval the guard-

ian did not join with "the other tenants in common," if by its requirement that there shall be such joinder the statute intends that the entire fee must be made to pass by such proceeding.

[1, 2] "One proposition may be laid down at the outset. It is that, inasmuch as the authority of the guardian to make, and of the court to permit, an absolute sale of the infant's lands is limited to the grant of powers conferred by the Legislature, the terms of such grant should be carefully followed. Sales made in utter disregard of the precautions wisely interposed by law are absolutely worthless." Schouler, Dom. Rel. § 361. To invoke the jurisdiction of the probate court under the statute it was necessary that a petition be filed stating, however imperfectly, a case within the purview of the statute. *Whitlow v. Echols*, 78 Ala. 207. It is enough to sustain the proceeding on collateral attack that the necessary facts are colorably or inferentially stated; but they must be stated in some way, and the relief sought must be within the power of the court. Any argument that would sustain a decree without the limited power of the court to make, on the ground that the statute under which the court acted, or supposed itself to be acting, was dubious in its meaning, and that hence the court had the right to determine its own jurisdiction, is specious at best, and necessarily unsound. The law of every case is fixed. It is for the courts only to declare authoritatively the law as it is, however painful or uncertain the process often is. Parties charged with notice of the record of such proceedings must be conclusively presumed to know the law involved, for otherwise there could be no security of rights, no end of litigation.

[3] Section 5253 of the Code, the section of article 3 of the chapter on Partition which declares the right conferred by that chapter, the rest being given to process and procedure, provides as follows:

"In all cases in which any person of unsound mind or any minor shall hold an interest as tenant in common with others in one or more parcels of land or realty in this state, and there shall be no valid authority to sell such interest vested in any person by the terms of any instrument under which such person of unsound mind or such minor holds such interest, and such sale shall not be prohibited or restricted by such instrument; it shall be lawful for the guardian of such minor or person of unsound mind to join the other tenants in common in selling any such parcel of land or realty for a division of proceeds thereof, such sale to be made either publicly or privately, and upon such terms as to payment and security for unpaid installments as such guardian may deem to the interest of his ward, subject, however, to such sale being set aside as hereinafter provided."

We have already virtually stated the question to be whether the authority given by the statute to the guardian contemplates a grant of such authority in cases only where a disposition of the entire fee is to be made. The statute provides the guardian with no authority to sell the land of his ward, or to enter

into an agreement for sale subject to the court's approval, except to sell "such parcel of land or realty for a division of the proceeds thereof." In other words, the provision is for a form and method of partition. Now, the rule followed by the courts, to quote the language of Judge Freeman in 30 Cyc. p. 180, is that:

"There can be no partition of an undivided interest. The estate sought to be partitioned must be such that, if a parcel is assigned to any party, his estate therein will be an estate in severalty; and, if a sale is directed, its effect must be to transfer to the purchaser a like estate."

Parties sui juris may, by contract, arrange a partition in kind, or a sale for division in lieu of partition, with a different result, and so, it may be conceded, may the Legislature provide; but, in view of the rule of the courts, it is not to be assumed, in the absence of some language of that import, that the Legislature has intended so to provide, for that would make confusion worse confounded, and foster a future of complicated and burdensome litigation. *Ware v. Vignes*, 35 La. Ann. 288.

[4] If this were the case of one minor owning an undivided interest, the rest of the estate being divided among several owners sui juris, there could be no reason to doubt that it would be necessary for the guardian of the infant owner to join with all the other tenants in common in order to sell the land for a division of the proceeds thereof under the authority of the statute. There is good reason for this limitation upon the power granted to guardians. The average purchaser is not easily tempted to buy a fractional interest in property, especially so where the interest is small and the policy of the enactment, while allowing private sales, is to safeguard the interest of minors by requiring the joinder of adult tenants in common and a sale of the entire parcel of land or realty. Neither the latter nor the spirit of the enactment was observed in the transaction under consideration. The effort was to extend the statutory provision to a case not within its letter or policy, and we are agreed with the chancellor that the effort was abortive, and that the purchaser acquired no title. *Moore v. Gulf Refining Co.*, 124 La. 607, 50 South. 596. Appellant states in his brief that many titles, acquired in good faith, depend upon his construction of the law. We are not advised as to that, though it is scarcely probable that many titles have become involved in the peculiar predicament here shown during the brief life of the statute. At any rate, that consideration cannot be permitted with judicial sanction to work a change in what appears to be the plain meaning of the statutes. Affirmed.

ANDERSON, C. J., and McCLELLAN and DE GRAFFENRIED, JJ., concur.

(191 Ala. 7)

WILSON v. STATE. (No. 858.)

(Supreme Court of Alabama. Jan. 14, 1915.)

1. HOMICIDE \S 153 — EVIDENCE — CIRCUMSTANCES—FINDING OF SKELETONS.

In a prosecution of defendant for murdering his wife, who was last seen entering, with her baby, the house where defendant lived, evidence of the finding three years thereafter, about a mile and a half from where defendant lived, of two skeletons, one that of an adult and the other that of a small child, given with testimony as to the condition and position in which the skeletons were found, was relevant and competent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 284; Dec. Dig. \S 153.]

2. WITNESSES \S 269—EXAMINATION—CROSS-EXAMINATION—SCOPE OF DIRECT EXAMINATION.

Where a witness for the state, in a prosecution for wife murder, who testified to finding certain bones, had stated on direct examination that he did not know defendant's wife, and had seen her only once since she was a child, it was not error to sustain an objection to the question on cross-examination whether, in his judgment, the teeth that were found were those of defendant's wife.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. \S 949-954; Dec. Dig. \S 269.]

3. HOMICIDE \S 174 — EVIDENCE — DECLARATIONS OF ACCUSED.

In a prosecution for wife murder, where it was shown that defendant's wife and baby had disappeared at the same time, and that the skeletons of an adult and a small child were found together, evidence that defendant, when he picked up a bone of the small skeleton, stated: "Here is the baby's rib. You had better take this one"—was not objectionable as illegal, irrelevant, and immaterial.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 359-371; Dec. Dig. \S 174.]

4. CRIMINAL LAW \S 448—EVIDENCE—CONCLUSIONS OF WITNESS.

In a prosecution for wife murder, where a witness for the state had testified to finding certain signs and tracks on the farm of defendant's father, the day after the wife disappeared, testimony that he was on the farm hunting some hogs of his was not objectionable as a statement of a conclusion or intention of the witness.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1035-1039, 1041-1043, 1045, 1048-1061; Dec. Dig. \S 448.]

5. HOMICIDE \S 169 — EVIDENCE — CIRCUMSTANCES—SEPARATION FROM WIFE.

In a prosecution for wife murder, evidence that defendant and his wife had separated, and that the two oldest children were living with him, was relevant and competent.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 341-350; Dec. Dig. \S 169.]

6. HOMICIDE \S 174—EVIDENCE—ADMISSIONS—VOLUNTARY STATEMENTS.

In a prosecution for wife murder, incriminating statements by defendant, which under the circumstances were voluntarily made, are admissible.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. \S 359-371; Dec. Dig. \S 174.]

7. CRIMINAL LAW \S 777—INSTRUCTIONS—DUTY OF JURY.

In a prosecution for homicide, a requested instruction that the jury are not to consider anything, except facts, was properly refused.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. \S 1878-1882; Dec. Dig. \S 777.]

8. CRIMINAL LAW — 805 — INSTRUCTIONS — DUTY OF JURY.

In a prosecution for homicide, a requested instruction that the jury are not concerned about the moral uplift of the county and are not there to set examples, but to try the case according to the evidence and let consequences take care of themselves, was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1958, 1989; Dec. Dig. ¶ 805.]

9. CRIMINAL LAW — 782 — INSTRUCTIONS — EVIDENCE.

In a prosecution for homicide, a requested charge that the mere fact that deceased met her death violently is no evidence against defendant was properly refused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1847, 1849, 1851, 1852, 1877, 1878, 1880-1882, 1906, 1907, 1909-1911, 1960, 1966, 1967; Dec. Dig. ¶ 782.]

10. CRIMINAL LAW — 889 — VERDICT — RETURN FOR CORRECTION — FORM OF CORRECTION.

In a prosecution for homicide, where the jury returned a verdict finding the defendant guilty in the first degree, as charged in the indictment, "and fix his punishment by imprisonment," it was not error for the court to have the jury correct their verdict, so as to find the defendant guilty in the first degree, as charged in the indictment, and "we fix his punishment at imprisonment."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2109, 2110, 2112; Dec. Dig. ¶ 889.]

Appeal from Circuit Court, Blount County; J. E. Blackwood, Judge.

Bill Wilson was convicted of murder in the first degree, and he appeals. Affirmed.

The verdict as returned was as follows:

"We, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment, and fix his punishment by imprisonment in the penitentiary for life."

The court remarked:

Your verdict is not in exact form. You should say: We, the jury, find the defendant guilty of murder in the first degree, as charged in the indictment, and we fix his punishment at imprisonment in the penitentiary for life.

The jury retired and returned the latter verdict properly signed. The defendant, before the jury retired for the last time, then and there excepted to the action of the court in thus charging the jury.

The charges refused are as follows:

(11) You are not to consider anything, except facts in this particular case.

(12) You are not concerned about the moral uplift of this county or any other county, and you are not here to set examples, you try this case according to evidence and let consequences take care of themselves.

(14) The mere fact that Jennie Wilson met her death violently is no evidence against defendant.

Russell & Johnson, of Oneonta, for appellant. R. C. Brickell, Atty. Gen., and T. H. Seay, Ass't Atty. Gen., for the State.

GARDNER, J. The appellant was convicted of the murder of his wife, Jennie Wilson, and his punishment fixed by the jury at imprisonment in the penitentiary for life.

The state relied upon circumstantial evidence both as to the fact that Jennie Wilson was murdered and as to the guilty party. The only questions argued by counsel in brief relate to objections and exceptions as to the admissibility of evidence.

There was evidence introduced by the state to show: That defendant and his wife had separated, and that defendant had gone to the home of his father and had the two older children with him. That his wife was left with the younger child, a baby some 19 months old. That after the separation, some time in the fall of 1908, she was seen with her baby and a basket on her arm, going into the home of defendant's father, where defendant was then living with his two children, and that this was the last time she was seen or heard of, in that county.

A witness, one Jim House, testified that he accompanied her as far as the gate on the above occasion, and that he had not seen her since that time.

"In inquiries of fact dependent for their solution on circumstantial evidence, no general rule can be laid down which will define with unerring accuracy what collateral facts are relevant and admissible in any particular case; yet, while it is proper to guard strictly against the undue multiplication of issues, whatever tends to shed light on the main inquiry, and does not withdraw the minds of the jury from that inquiry, by obtruding on their minds matters which are foreign, or of questionable pertinency, is, generally, relevant and competent evidence." *Mattison v. State*, 55 Ala. 224, first headnote.

[1] The facts, as testified to by witness Dolphus Tidwell and his son, relating to their finding, on the river bank under an overhanging cliff or high bluff, two skeletons of human beings, one that of an adult and the other that of a small child; that these two skeletons were together and were found as if laid down in a sitting position; that they "were covered with rocks and the kind of stuff you will find under bluffs, and not much deep, * * * and the bones seemed to be covered in a basket, or cane matting, and it was so rotten that it crumbled;" that at the same time they also found some of the teeth; that this was in 1911; and that the place was about 1½ miles from where defendant lived, and that there was no road or trail there—were clearly relevant and competent.

Numerous objections to questions eliciting the above were properly overruled. A treatment of the objections in detail we deem unnecessary.

[2] It is insisted that there was error in the court's sustaining the objection of the state to the question asked witness A. W. Tidwell on recross-examination: "Will you tell the jury, in your judgment, whether or not those were Jennie Wilson's teeth?" This was on recross-examination, and the witness had just previously stated that he did not know Jennie Wilson, had seen her but one

time since she was a child. It is quite manifest that there was no error in this ruling.

[3] Witness House testified to finding some bones under the bluff also, some of which he carried away, and identified on the trial, and further testified: "Bill Wilson picked this rib up and handed it to me under the bluff." The state then asked the witness, "State to the jury what he said;" and this was objected to by the defendant as calling for "illegal, irrelevant, and immaterial evidence," and the overruling of this objection is insisted upon as error. The witness answered: "He says, 'Here is the baby's rib;' says, 'You had better take this one along.'"

The grounds of objection specified as illegal, irrelevant, and immaterial, were clearly without merit.

[4] The witness House, who testified that he accompanied Jennie Wilson to where defendant lived, as previously stated, further testified that the next morning he met defendant in his father's field, and defendant denied that his wife had been to the house; and witness further testified to certain tracks that led on a path to a "scramble place," and that he saw some signs of blood and "a cloth that women use with their children." In this connection the witness was asked what he was doing over there, to which he replied he was hunting some hogs of his that had gotten into Mr. Wilson's field. This was objected to. There was no error in overruling this objection. It does not call for any conclusion or intention of the witness, as is insisted, but merely for the statement of a fact explanatory of his presence there at that time.

[5] That defendant and his wife had separated, and that he had the two oldest children, the fruits of their marriage, were of course relevant and competent circumstances to be considered by the jury, in connection with all the other evidence in the case.

[6] The statements made by defendant in the two conversations as testified to by witnesses Tate and Rogers, while tending to incrimination, were nevertheless, as shown by the attendant circumstances, the character of the conversations, the relation of the parties to the conversations, and what was said at the time, entirely gratuitous on the part of the defendant, and it sufficiently appears affirmatively that they were voluntarily made. *Watts v. State*, 177 Ala. 24, 59 South. 270; *Green v. State*, 168 Ala. 90, 53 South. 286; *Bush v. State*, 136 Ala. 85, 33 South. 878; *Price v. State*, 117 Ala. 113, 23 South. 691.

There was no error in overruling the objection of defendant to the above testimony. A review in detail of each objection to testimony, and of each assignment of error, is unnecessary and would serve no good purpose. Suffice it to say that we have carefully examined each question presented on the evidence, and find no reversible error in the rulings of the court thereon.

[7-9] The refused charges, as well as the exceptions taken to a part of the oral charge, are not argued by counsel as error; but, mindful of our duty in cases of this character, we have also examined these, and we find nothing in them to merit discussion, and no reversible error.

[10] Nor was there error in the action of the court in having the jury correct their verdict as to a matter of form, as disclosed by this record.

We find no reversible error in the record, and the judgment of the circuit court is accordingly affirmed.

Affirmed.

ANDERSON, C. J., and McOLELLAN and SAYRE, JJ., concur.

(191 Ala. 80)

MILES v. MEADE et al. (No. 149.)

(Supreme Court of Alabama. Feb. 11, 1915.)

1. EXECUTORS AND ADMINISTRATORS — SETTLEMENT—CHARGES.

An administrator of his father's estate, who was also the executor of his mother's will, could not be legally charged, on his settlement as administrator, with funds received and then held as executor, when there had been no settlement or disposition of the funds as executor, as he could not be charged as such until he received the funds in such capacity or so disposed of them as to constitute a devastavit or was guilty of such negligence as to the funds as to charge him with having received them; the fact that both administrations were pending in the same court not changing such result, as the two proceedings were separate and distinct, and the interested parties might not be the same in each, and as the court in one proceeding could not determine the parties in or the extent of their interest in the other proceeding.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2061; Dec. Dig. § 475.]

2. EXECUTORS AND ADMINISTRATORS — CREDITOR AS ADMINISTRATOR—PAYMENT OF DEBTS.

Where a creditor of an estate is appointed administrator, and receives funds of the estate sufficient to satisfy his debt, the law presumes that he will apply them to the payment of his debt, and, where a debtor of the estate is appointed administrator, the law charges him with the amount of the debt as assets in his hands as administrator; but the rule does not apply where one person acts in two representative capacities, and is debtor as to one and creditor as to the other.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 2061; Dec. Dig. § 475.]

3. EXECUTORS AND ADMINISTRATORS — SETTLEMENT — PAYMENT TO DISTRIBUTEES — "PROCEEDING IN REM."

Under Code 1907, § 2476 et seq., requiring the court or the probate judge to audit the account of an administrator and to require him to make proof of the correctness of each item on the credit side of the account, a proceeding for final settlement by an administrator, with a contest by the distributees, is partly in the nature of a "proceeding in rem;" and hence it is immaterial that a motion to charge him with funds

wrongfully paid to the distributees is made by one of such distributees.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2025-2040; Dec. Dig. § 472.

For other definitions, see *Words and Phrases*, First and Second Series, *In rem*.]

Appeal from Probate Court, Montgomery County; Charles B. Teasley, Judge.

Final settlement of the estate of George G. Miles, by the administrator, with contest by Bessie Miles Meade and others, distributees. From the judgment of the court refusing to allow credits and charging the administrator with certain sums, he appeals. Reversed and remanded.

George G. Miles, Jr., was appointed administrator with the will annexed of the estate of his father, George G. Miles, Sr., May 3, 1912, and at the same time qualified as executor of the last will and testament of his mother, Mattie H. Miles, who died prior to her husband. On January 19, 1914, the appellant, as administrator, filed his accounts and vouchers in the probate court of Montgomery county for a final settlement of the administration of the estate of his father. The court showed that he had a balance on hand at the time of the partial settlement in December, 1913, of \$1,547.87, and he sought credit on this account for amounts advanced by him to the legatees and distributees aggregating \$1,544.16. It is shown without conflict that the estate of George G. Miles, Sr., at the time of the final settlement, still owed debts aggregating over \$7,000, represented in the greater part by notes made or indorsed by decedent in his lifetime, which notes were held by Montgomery Bank & Trust Company, and other debts, the amount of which is not given. The said George G. Miles had never made a settlement or accounting as executor of the estate of his mother, although the record shows that there was then pending in the probate court of Montgomery county proceedings to that end; he having filed his accounts and vouchers for such final settlement. These proceedings show that Mattie Miles owed no debts, and that he had collected, as executor, the sum of \$3,862.97 on the estate on a policy of insurance issued on the life of said George G. Miles, payable to said Mattie H. Miles, her heirs, executors, and administrators, and that the said executor had used the proceeds so collected by him some time before this settlement. Bessie Miles Meade was one of the legatees and distributees of the estate of George G. Miles, Sr., and filed a contest of said items of credit claimed by the administrator, and filed a motion to charge administrator with the sum of \$1,931.48, being one-half of the proceeds of the policy above referred to, and the court sustained the motion to charge the administrator with such sum, and also refused to allow the administrator

credit for any of the advancements made by him to himself and the other distributees of the estate.

John R. Tyson and J. Lee Holloway, both of Montgomery, for appellant. Rushton, Williams & Crenshaw, of Montgomery, for appellees.

MAYFIELD, J. This appeal involves two questions: First. Can a person who is both administrator of A.'s estate, and executor of the last will of B., be legally charged, on his settlement as administrator, with funds which he received and then holds as executor, there having been no settlement or disposition of the funds as executor? Second. If an administrator, without an order of court, has prematurely paid to a distributee of the estate money which is liable to the claims of creditors of the estate, can he be charged with the money so paid, on final settlement of the estate, on motion of the distributee to whom the payment was wrongfully made? We answer the first question in the negative; the second in the affirmative.

[1] As to the first question, the mere fact that funds which the representative holds as executor may or will ultimately come into his hands as administrator, will not authorize the court, in his settlement as administrator, to so charge him. He cannot be charged in this capacity until he has received them in such capacity or otherwise, or has so disposed of such funds as to constitute a devastavit, or is guilty of such neglect as to such funds as that he would be chargeable with having received them or their value. Neither does the mere fact that both administrations are pending in the same court change the result in this case. The two proceedings are nevertheless separate and distinct, and should be so treated. All the parties interested may not be the same; and the court, on a hearing on one proceeding, would not be authorized to determine who all the interested parties are, in the other proceeding, nor the extent of their interest in the other proceeding; nor could it even bind the parties in the one proceeding as to what their interest was or would be in the other proceeding. These would be matters *res inter alios acta*.

We have been unable to find a case where an administrator was sought to be charged with funds which he held as executor, or vice versa; but we find cases where he was sought to be charged with funds which he held as guardian, and in other representative capacities, and in every instance of this kind it was held that he could or should not be so charged, until the funds came into his hands as administrator, or there were such steps taken by him, touching the funds, as would amount to a devastavit thereof.

In the case of *McPhillips v. McGrath*, 117 Ala. 562, 23 South. 724, the court, speaking

of liability for a fund held by a register, said:

"The question, in principle, is not distinguishable from that which occurs when a personal representative—an administrator or executor—unites with his relation that of guardian for infant distributees or legatees. In such case, before he is relieved from duty and liability in the primary capacity of personal representative, and duty and liability as guardian attaches, there must be separation of the assets he intends to take and hold as guardian from the assets of the estate; there must be, as to such assets, a termination of authority as personal representative, and to them authority and duty as guardian must attach. *Davis v. Davis*, 10 Ala. 299; *Whitworth v. Oliver*, 39 Ala. 286."

In the case of *Davis v. Davis*, above, the court said:

"Where the offices of executor and guardian are united in the same person, he holds the estate in his hands as executor, and does not hold anything as guardian which is not separated from the assets of the estate and placed to his account as guardian. To ascertain the amount in his hands as executor to which the ward is entitled, it is obvious a settlement of his accounts as executor would be necessary."

This doctrine has been followed in a long line of cases, and it appears to be founded on reason.

In the case of *Hutton v. Williams*, 60 Ala. 107, it is said:

"The general principle is that, if the offices of executor or administrator and of guardian are united in the same person, and the guardian, in that capacity, can acquire possession only from the executor or administrator, as guardian he does not hold the assets until they are separated and distinguished from the assets held as executor. *Davis v. Davis*, 10 Ala. 299. The principle involves the existence, at the same time, of two distinct fiduciary relations."

If the administrator had treated the funds in question as funds of the estate of the father, he might be liable as administrator therefor; but if he received the funds as executor, and holds them as such, and nothing appears to amount to a devastavit as administrator, then he should be charged, not as administrator, but as executor. We do not mean to now decide that a settlement as executor would, in all cases, or in any possible event in this case, be necessary in order to charge appellant, as administrator, with funds which he received as executor; but it must be made to appear that he has received the funds as administrator, or has so acted, or so failed to act, that he can be charged as having received the funds as administrator (which is not made to appear in this case); and it follows that the probate court erred in so charging him on his settlement as administrator.

[2] We do not doubt the correctness of the proposition insisted upon by appellee that, if a creditor of an estate is appointed administrator of the estate, and receives funds of the estate sufficient to satisfy his debt, the law presumes that he will apply the proceeds to the payment of his debt, and that, if he is a debtor of the estate, and is appointed administrator thereof, the law charges him with

the amount of the debt as assets in his hands as administrator. But this rule does not apply where one person occupies two offices, or acts in two representative capacities, and is debtor as to one and creditor as to the other.

[3] The second proposition: If this were a suit strictly inter partes, the distributee having received money from the administrator as her distributive share of the estate, she would be estopped from having the administrator charged again with this amount so paid, even if it were wrongfully so paid. She would not be allowed to receive and keep the money so paid, and then charge the administrator with having wrongfully paid it to her. This, however, is not a proceeding strictly inter partes; it is one in the nature of a proceeding in rem, but is not wholly such. Section 2476 et seq. of the Code make it the duty of the court or of the probate judge to audit the account of the personal representative, and to require him to make proof of the correctness of each item on the credit side of the account. So it is immaterial that the motion to charge the administrator with funds wrongfully paid to the distributees was made by one of the distributees who had wrongfully received such funds. The court was not only authorized to so charge the administrator, but it is by statute made the duty of the court so to do. While the administrator may have some redress against the distributees so receiving the funds to which they were not entitled, it cannot be accorded on the final settlement by omission to charge him with the funds so wrongfully paid out. This would deprive creditors and other distributees of funds to which they are by law entitled, and the probate court should not decline to so charge the administrator merely because moved so to do by one who had wrongfully received the funds. The rights and duties of an administrator as to advancing to distributees are well stated in the case of *Dickie v. Dickie*, 80 Ala. 57, 59, where it is said:

"The administrator was allowed a credit for money advanced to the widow. The duty and authority of an administrator are to receive and collect the assets of the estate, pay the debts and expenses of administration, and distribute the residuum among those entitled. Money advanced to a distributee during the administration is not money paid on account of the estate; and the allowance on his account as administrator of a credit for money so advanced is unauthorized. Such mingling of accounts tends to produce confusion, and to render it difficult, if not impracticable, to ascertain and equalize the shares of the several distributees. The money advanced to the widow should have been disallowed as a charge against the estate, and charged against her distributive share after it had been ascertained. *Willis v. Willis*, 9 Ala. 330; *Parker v. McGaha*, 11 Ala. 521."

It follows that there was no error in charging the administrator on settlement with the amount paid the distributee, although it was so charged on the motion of such distributee.

For the error in charging the administrator with the funds which he received as executor, the judgment is reversed, and the cause is remanded.

Reversed and remanded.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

(191 Ala. 205)

McQUIDDY v. KING et al. (No. 910.)

(Supreme Court of Alabama. Jan. 14, 1915.)

BANKS AND BANKING §250 — NATIONAL BANKS — ENFORCEMENT OF UNPAID SUBSCRIPTION—STATE LAW.

Code 1907, § 3744, authorizing a judgment creditor of a corporation to enforce payment by a stockholder of his unpaid subscription, is not available to a judgment creditor of a national bank, as its enforcement would impair the remedy of Rev. St. U. S. § 5141 (U. S. Comp. St. 1913, § 9678), giving the bank the right to sell the stock of a delinquent shareholder for the satisfaction of the amount due thereon.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 932-939; Dec. Dig. § 250.]

Appeal from City Court of Birmingham; H. A. Sharpe, Judge.

Bill by J. C. McQuiddy, doing business under the firm name and style of McQuiddy Printing Company, against S. P. King and others, to require them to satisfy the judgment against the National City Bank of Birmingham out of unpaid subscriptions to the stock of said bank. Decree for respondents and complainants appeal. Affirmed.

The bill alleges the recovery of the judgment against the National City Bank of Birmingham, execution thereon, and returned no property found, the filing of a certificate of the organization of the National City Bank of Birmingham with the Comptroller of the Currency of the United States currency department, which is alleged to have created said bank a body corporate in September, 1908, that each of the respondents subscribed for a number of shares of the capital stock of the National City Bank of Birmingham, and that the several subscriptions of respondent to said capital stock of said corporation remain wholly unpaid, and are subject to the payment of complainant's said judgment.

Robert C. Redus, of Birmingham, for appellants. Nathan L. Miller, Needham A. Graham, Jr., H. C. Miller, John S. Kennedy, Forney Johnston, and Haley & Haley, all of Birmingham, for appellee.

McCLELLAN, J. Laying aside other less important questions presented, the controlling inquiry is whether the provisions of section 3744 of the Code (1907) of Alabama is available to a judgment creditor of a national bank to enforce the payment by a stockholder therein of his unpaid subscription to the capital stock of such a bank. In

Davis v. Elmira Bank, 161 U. S. 275, 16 Sup. Ct. 502, 40 L. Ed. 700, it was said:

"National banks are instrumentalities of the federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a state, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the federal government to discharge the duties, for the performance of which they were created."

In Easton v. Iowa, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452, it was said:

"Our conclusions, upon principle and authority, are that Congress, having power to create a system of national banks, is the judge as to the extent of the powers which should be conferred upon such banks, and has the sole power to regulate and control the exercise of their operations; that Congress has directly dealt with the subject of insolvency of such banks by giving control to the Secretary of the Treasury and the Comptroller of the Currency, who are authorized to suspend the operations of the banks and appoint receivers thereof when they become insolvent, or when they fail to make good any impairment of capital; that full and adequate provisions have been made for the protection of creditors of such institutions by requiring frequent reports to be made of their condition, and by the power of visitation by federal officers; that it is not competent for state Legislatures to interfere, whether with hostile or friendly intentions, with national banks or their officers in the exercise of the powers bestowed upon them by the general government."

Section 5141 of the Revised Statutes of the United States provides:

"Section 5141. Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount then due thereon, with the expenses of advertisement and sale; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association."

There is no federal statute providing the remedy created by our section 3744; nor are we advised of any federal statute affording any other remedy against a delinquent stock-

holder than that defined in section 5141, ante.

The question is, whether the visiting of the provisions of our statute (section 3744) upon the federal creature and its stockholders would interfere with or embarrass the operation and effect of the statutory expression of the federal authority. The learned trial judge thus concisely and conclusively sets down in his opinion the considerations which must lead to the pronouncement of affirmance here:

"The bank itself is given the right to sell the stock of a delinquent shareholder for the satisfaction of the amount due thereon (U. S. Rev. St. § 5141) and this remedy is apparently for the purpose of enabling the banking association to maintain its capital in accordance with its charter obligations, and for the benefit of all creditors and all its members. This purpose could be defeated and the capital diminished if a creditor were allowed to intercept unpaid subscriptions by subjecting the amounts due thereon to his individual debt against the bank in the manner attempted by this bill of complaint in this cause. For the maintenance of this bill there seems to be no authority, unless under section 3744 of the Code of Alabama, which prescribed a mode of procedure in favor of judgment creditors against delinquent shareholders, and wherewith this bill conforms. Though this statute purports in terms to apply to all corporations it is to be construed as inapplicable to national banks; otherwise it would appear as an invasion of the province of federal legislation, and to the extent of any inconsistency with that legislation it would be abortive. The bill is without equity, and the decree sustaining demurrers will stand."

The decree is affirmed.
Affirmed.

ANDERSON, C. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

(191 Ala. 93)

FIELDS v. WOODS. (No. 982.)

(Supreme Court of Alabama. Jan. 14, 1915.)

**1. EXECUTORS AND ADMINISTRATORS — 32—
REVOCATION OF APPOINTMENT—PETITION—
JOINDER WITH PETITION FOR APPOINTMENT.**

One petitioner for the revocation of letters of administration on the ground that the administratrix was not entitled thereto can join in the same petition a prayer for her own appointment as administratrix.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 191-212; Dec. Dig. —32.]

**2. EXECUTORS AND ADMINISTRATORS — 32—
REVOCATION OF APPOINTMENT—EVIDENCE.**

Where it is shown that one claiming to be the widow of intestate had been previously married to another, who was still living, and there was no evidence that she had been divorced, the appointment will be revoked.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 191-212; Dec. Dig. —32.]

**3. EXECUTORS AND ADMINISTRATORS — 20—
QUALIFICATIONS — PERSONS ENTITLED TO
OBJECT.**

An administratrix, whose appointment was revoked because she was not the lawful wife of intestate, cannot introduce evidence in the proceedings, affecting the reputation of the pe-

titioner for revocation of the former appointment and the appointment of herself, since, if respondent is not the widow, she has no interest in the estate or in the qualifications of the petitioner for letters of administration.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 83-105; Dec. Dig. —20.]

Appeal from Probate Court, Fayette County; E. P. Goodwin, Judge.

Petition by Beatrice Woods against Zoray Fields, for the revocation of letters of administration theretofor issued to respondent and for the appointment of petitioner as administratrix of the estate of Dock Fields, deceased. Judgment for the petitioner, and respondent appeals. Affirmed.

J. M. Holliman, of Fayette, and E. L. All and J. A. Simpson, both of Birmingham, for appellant. McNeill & Monroe, of Fayette, for appellee.

MCOLLELLAN, J. This is an appeal from the order of the probate court of the county of Fayette, revoking letters of administration issued to Zoray Fields (Cooper, appellant) on the estate of Dock Fields, deceased. The petition leading to this action was filed by Beatrice Woods. She was therein alleged to be and was conclusively shown to be a niece and next of kin, through her mother, who had died, of Dock Fields, deceased.

[1] In the petition for revocation of the letters issued to appellant, there was incorporated a prayer that she (Beatrice) be appointed administratrix of Dock Fields' estate. It is insisted here, as upon objection to the petition taken in and denied by the court below, that the blending in one petition of allegations and prayers for revocation of letters of administration and for the issuance of letters of administration to the petitioner effects the improper joinder of a double purpose. The question thus made was, in effect, decided adversely to appellant in *Curtis v. Williams*, 33 Ala. 570. There is no inconsistent or complicating status made by such joinder in petitions of this kind. The correct practice is that pursued in this instance.

[2] The controlling issue was one of fact, viz., whether Zoray was the lawful wife of Dock Fields at the time he died. Zoray had alleged, in her petition for appointment as administratrix of Dock Fields' estate, that she was his surviving widow, and upon that allegation letters of administration were issued to her. Her appointment was effected before the expiration of 40 days from the date of Dock Fields' death. If she was not his widow, manifestly her appointment was improvident, and due to be revoked.

If it were assumed (but for the occasion only) that the trial court erred in every ruling on the evidence made the subject of assignments 2 to 7, inclusive, the result on this appeal would not be changed, because the undisputed legal testimony conclusively estab-

lished the fact that Zoray was lawfully married to one Cooper in the state of Mississippi in August of the year 1906. *Bynon v. State*, 117 Ala. 80, 82, 23 South. 640, 67 Am. St. Rep. 163. There was no evidence tending to show a lawful dissolution of the bonds of matrimony binding Zoray to Cooper in consequence of that marriage. It was not shown that Cooper had since died. Indeed, by legal evidence, he was shown to have been living at a recent date, in another state. His mere separation from Zoray did not, of course, dissolve their union. Being Cooper's wife, she could not have been Dock Fields' wife, or his widow upon his death. Her illicit relations with Dock Fields could not contribute to give her a better standing in respect of the matter under consideration.

[3] The last assignment of error is based upon the court's action in declining to allow counsel for Zoray to show the bad repute of Beatrice for chastity. If Zoray was not the widow of Dock Fields, and hence improvidently appointed the administratrix of his estate, she was without interest or concern in Beatrice's qualification (if such the stated matter would tend to affect) as her successor.

There is no prejudicial error in the record. The judgment must be affirmed.

Affirmed.

ANDERSON, O. J., and SAYRE and DE GRAFFENRIED, JJ., concur.

MEMORANDUM DECISIONS

Ex parte AMERICAN AUTOMOBILE INS. CO. (No. 583.) (Supreme Court of Alabama. Feb. 4, 1915.) Stokely, Scrivner & Dominick, of Birmingham, for petitioner.

SAYRE, J. Certiorari to Court of Appeals to review judgment and decision of that court in the case of American Automobile Insurance Company v. Watts, 67 South. 758. Writ denied. All the Justices concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. MORRISON. (No. 918.) Supreme Court of Alabama. Nov. 26, 1914.) Appeal from City Court of Birmingham; C. W. Ferguson, Judge. Tillman, Bradley & Morrow, of Birmingham, for appellant. J. H. McNeal, of Birmingham, for appellee.

PER CURIAM. Appeal dismissed by appellant.

BROWN et al. v. MITCHELL et al. (No. 764.) (Supreme Court of Alabama. Feb. 3, 1915.) Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

PER CURIAM. Dismissed by appellant.

Ex parte GARDEN. (No. 699.) (Supreme Court of Alabama. Feb. 11, 1915.) Certiorari to Court of Appeals. Petition for certiorari by R. A. Carden to review a decision of the

Court of Appeals affirming a refusal to tax costs to defendant in an action by petitioner against the Louisville & Nashville Railroad Company. Petition denied. Riddle & Ellis, of Columbiana, for petitioner. Brown, Leeper & Koenig, of Columbiana, opposed.

MAYFIELD, J. The petition for certiorari to the Court of Appeals is denied. We find no error in the decision of the Court of Appeals. *Carden v. Louisville R. Co.*, 66 South. 921. The opinion of that court, by Pelham, P. J., is full and correct, to which we feel that we can add nothing. Application denied. All the Justices concur.

Ex parte F. B. FISK COTTON CO. (No. 158.) (Supreme Court of Alabama. Jan. 21, 1915.) Certiorari to Court of Appeals. Steiner, Crum & Weil, of Montgomery, for petitioner. Ball & Sanford, of Montgomery, opposed.

GARDNER, J. Certiorari to Court of Appeals to review the judgment and decision of that court in the case of Albany Warehouse Company v. F. B. Fisk Cotton Company, 67 South. 728. Writ denied.

GOWAN et al. v. MULLINS et al. (No. 542.) (Supreme Court of Alabama. Dec. 17, 1914.) Appeal from Chancery Court, Chilton County; W. W. Whiteside, Chancellor.

PER CURIAM. Appeal dismissed.

HIGGINBOTHAM v. LANGSTON. (No. 713.) (Supreme Court of Alabama. Jan. 14, 1915.) Appeal from Circuit Court, Calhoun County; Hugh D. Merrill, Judge.

PER CURIAM. Affirmed on certificate.

Ex parte HOOD et al. (No. 159.) (Supreme Court of Alabama. Feb. 7, 1915.) Certiorari to Court of Appeals. Ball & Sanford and Walton H. Hill, all of Montgomery, for petitioners. Steiner, Crum & Weil, of Montgomery, opposed.

PER CURIAM. Petition for writ of certiorari to Court of Appeals to review the judgment and decision of that court in the case of Horace Hood et al. v. Commercial Germania Trust & Savings Bank, 67 South. 721. Writ denied.

JACKSON v. JOHNSON. (No. 140.) (Supreme Court of Alabama. Jan. 21, 1915.) Appeal from Chancery Court, Autauga County; W. W. Whiteside, Chancellor. Suit for injunction by J. L. Johnson against S. W. Jackson, as executor, etc. Decree for complainant, and defendant appeals. Affirmed. Eugene Ballard and P. E. Alexander, both of Prattville, for appellant. W. A. Gunter, of Montgomery, for appellee.

MAYFIELD, J. The suit is to enjoin the foreclosure of a mortgage upon the ground that it was fully paid. Much evidence was taken on the question of payments, and the chancellor, on final hearing, set aside the finding of the register that the mortgage was not paid, and found that it was fully paid, and awarded the relief prayed. From such decree respondent prosecutes this appeal. There were only two questions which were really litigated, and they were as to whether or not two payments, one for \$235, of October 13, 1910, and one for \$115, of December 2, 1910, had been made. The chancellor found that the first-mentioned amount was paid, but that the second, or the full amount of the second, was not paid, but did find that the whole mortgage debt and interest was paid. In this finding we fully agree with the chancellor. The original receipts

are sent up here for our inspection, and they sustain the finding of the chancellor. Many witnesses were examined, but it would do no good to discuss the evidence, or to give the reasons which impel our conclusion. Suffice it to say we agree with the chancellor in his opinion and decree, and the decree is affirmed. Affirmed.

ANDERSON, C. J., and SOMERVILLE and GARDNER, JJ., concur.

JONES v. DIMMICK. (No. 146.) (Supreme Court of Alabama. Jan. 21, 1915.) Appeal from City Court of Montgomery; Gaston Gunter, Judge. Steiner, Crum & Well, of Montgomery, for appellant. Tyson, Wilson & Martin, of Montgomery, for appellee.

PER CURIAM. Appeal dismissed by agreement.

LONG v. WHITT. (No. 574.) (Supreme Court of Alabama. Feb. 11, 1915.) Appeal from City Court of Selma County; J. W. Mabry, Judge. Pettus, Fuller & Lapsley, of Selma, for appellant.

PER CURIAM. Appeal dismissed for want of prosecution.

McDUFFIE v. MURPHY (two cases). (Nos. 541, 542.) (Supreme Court of Alabama. Jan. 22, 1915.) Appeal from City Court of Andalusia; Ed T. Albritton, Judge.

PER CURIAM. Affirmed on certificate.

MONTGOMERY COUNTY v. CITY OF MONTGOMERY (five cases). (Nos. 86, 88, 89-91.) (Supreme Court of Alabama. Dec. 17, 1914.) Appeal from City Court of Montgomery; Gaston Gunter, Judge. A. H. Arrington and John R. Tyson, both of Montgomery, for appellant. W. A. Gunter, of Montgomery, for appellee.

PER CURIAM. Reversed and rendered on the authority of 67 South. 311.

MAYFIELD and SAYRE, JJ., dissent.

PINEHURST CO. v. CITY OF TUSCALOOSA. (No. 974.) (Supreme Court of Alabama. Feb. 10, 1915.) Appeal from Circuit Court, Tuscaloosa County; Bernard Harwood, Judge. Clarkson & Morrisette, of Tuscaloosa, for appellant. Oliver, Verner & Rice and Brown & Ward, all of Tuscaloosa, for appellee.

PER CURIAM. Appeal dismissed by agreement.

POWELL v. NANCE. (No. 747.) (Supreme Court of Alabama. Dec. 17, 1914.) Appeal from Probate Court, Madison County; W. T. Lawler, Judge. Lanier & Pride and Spragins & Speake, all of Huntsville, for appellant. R. E. Smith and S. S. Pleasants, both of Huntsville, for appellee.

PER CURIAM. Appeal dismissed by agreement.

RANDALL v. ASHLAND BAPTIST CHURCH. (No. 663.) (Supreme Court of Alabama. Jan. 14, 1915.) Appeal from Clay County Court; E. J. Garrison, Judge.

PER CURIAM. Appeal dismissed by appellant.

ROBINSON v. STEERS. (No. 781.) (Supreme Court of Alabama. Feb. 8, 1915.) Ap-

peal from Circuit Court, Morgan County; D. W. Speake, Judge.

PER CURIAM. Affirmed on certificate.

SLEDGE v. STATE. (No. 565.) (Supreme Court of Alabama. Feb. 11, 1915.) Appeal from Law and Equity Court, Marengo County; E. S. Lyman, Judge. William L. Martin, Atty. Gen., for the State.

PER CURIAM. Dismissed on motion of the Attorney General.

SMITH v. SMITH et al. (No. 765.) (Supreme Court of Alabama. Feb. 3, 1915.) Appeal from Chancery Court, Marshall County; W. H. Simpson, Chancellor.

PER CURIAM. Dismissed for want of prosecution.

SOUTHERN BELL TELEPHONE & TELEGRAPH CO. v. FLOYD. (No. 24.) (Supreme Court of Alabama. Feb. 26, 1915.) Appeal from City Court of Birmingham; Charles W. Ferguson, Judge. Stokely, Scrivner & Dominick, of Birmingham, for appellant. McArthur & Howard, of Birmingham, for appellee.

PER CURIAM. Settled between the parties, and appeal dismissed.

Ex parte STATE. (No. 157.) (Supreme Court of Alabama. Jan. 21, 1915.) Certiorari to Court of Appeals. R. C. Brickell, Atty. Gen., and T. H. Seay, Asst. Atty. Gen., for the State. John R. Tyson, of Montgomery, opposed.

SOMERVILLE, J. Petition for certiorari to Court of Appeals to review the judgment and decision of said court in the case of State of Alabama v. T. E. Lovejoy, 67 South. 738. Writ denied.

DE GRAFFENRIED, J., not sitting.

Ex parte TARRANT. (No. 588.) (Supreme Court of Alabama. Feb. 11, 1915.) Keith & Wilkinson, of Selma, for petitioner. William L. Martin, Atty. Gen., for the State.

THOMAS, J. Certiorari to review the judgment and decision of the Court of Appeals in the case of Frank Tarrent v. State, 67 South. 626. Writ denied. All the Justices concur.

Ex parte THOMPSON. (No. 987.) (Supreme Court of Alabama. Nov. 30, 1914.) G. M. Thompson, of Birmingham, for petitioner. M. L. Ward, of Birmingham, and Arthur G. Esslinger, of Fairfield, opposed.

PER CURIAM. Petition for writ of mandamus, directed to Hon. E. C. Crowe, judge of the Tenth judicial circuit, to require him to set aside an order or judgment restoring the case of Massey v. Thompson to the trial docket. Writ denied.

Ex parte THOMPSON. (No. 717.) (Supreme Court of Alabama. Jan. 14, 1915.) Riddle, Ellis & Riddle, of Columbiana, for petitioner. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Petition for writ of certiorari to review certain contempt proceedings had before Hon. Hugh D. Merrill, judge of the Seventh judicial circuit. Petition denied.

TONEY v. STATE. (No. 559.) (Supreme Court of Alabama. Nov. 19, 1914.) Appeal from Circuit Court, Russell County; M. Sollie, Judge. Glenn & De Graffenried, of Seale, for

appellant. R. C. Brickell, Atty. Gen., and W. L. Martin, Asst. Atty. Gen., for the State.

PER CURIAM. Errors confessed. Reversed and remanded.

Ex parte WALKER. (No. 985.) (Supreme Court of Alabama. Nov. 30, 1914.) Pinkney Scott, of Bessemer, for petitioner. Joe C. Hail, of Birmingham, opposed.

PER CURIAM. Petition for mandamus to require Hon. J. C. B. Gwin, judge of the Bessemer city court to hear and determine the cause of Walker v. Fifth Avenue Presbyterian Church. Writ denied.

Ex parte WESTERN UNION TELEGRAPH CO. (No. 858.) (Supreme Court of Alabama. Jan. 21, 1915.) George H. Fearons, of New York City, William C. Fitts, of Washington, D. C., and Leigh & Chamberlain, of Mobile, for petitioner. Gregory L. & H. T. Smith, of Mobile, opposed.

GARDNER, J. Petition to review opinion and decision of the Court of Appeals of Alabama in the case of Western Union Telegraph Company v. Louissell, 66 South. 839. Writ denied. All the Justices concur.

Ex parte WESTERN UNION TELEGRAPH CO. (No. 991.) (Supreme Court of Alabama. Jan. 21, 1915.) Certiorari to Court of Appeals. Forney Johnston and W. R. C. Cocke, both of Birmingham, for petitioner. Brown & Ward, of Tuscaloosa, opposed.

PER CURIAM. Petition by the Western Union Telegraph Company for certiorari to review the judgment and decision of the Court of Appeals affirming the judgment of the lower court in the case of Western Union Telegraph Company v. Lena Hollins. Writ denied.

Ex parte WILLOUGHBY. (No. 992.) (Supreme Court of Alabama. Jan. 21, 1915.) Certiorari to Court of Appeals. Horace C. Wilkinson and G. R. Harsh, both of Birmingham, for petitioner. Tillman, Bradley & Morrow, of Birmingham, opposed.

SOMERVILLE, J. Certiorari to review the judgment and decision of the Court of Appeals, affirming the trial court in the case of Willoughby v. Birmingham Railroad, Light & Power Co. Writ denied.

DE GRAFFENRIED, J., not sitting.

BARBER v. STATE. (No. 356.) (Court of Appeals of Alabama. Feb. 2, 1915.) Appeal from Circuit Court, Coffee County; H. A. Pearce, Judge. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The defendant was indicted, tried, and convicted of an assault with intent to murder, and appeals on the record without a bill of exceptions. We find no error disclosed by the transcript in this case, and no question is presented by the transcript that merits discussion. Affirmed.

BATTLE v. CITY OF ANNISTON. (No. 274.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. S. W. Tate, of Anniston, for appellee.

PER CURIAM. Affirmed on certificate.

BLACK v. STATE. (No. 292.) (Court of Appeals of Alabama. Feb. 4, 1915.) Appeal from Circuit Court, Limestone County; A. H. Als-

ton, Judge. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed.

BRASWELL v. STATE. (No. 177.) (Court of Appeals of Alabama. Dec. 17, 1914.) Appeal from Circuit Court, Lowndes County; A. E. Gamble, Judge. R. L. Goldsmith, of Hayneville, for appellant. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

DAVIS v. MYRICK LUMBER CO. (No. 281.) (Court of Appeals of Alabama. Jan. 14, 1915.) Appeal from City Court of Gadsden; John H. Disque, Judge.

PER CURIAM. Dismissed for want of prosecution.

DEAN v. STATE. (No. 306.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from City Court of Gadsden; James A. Bilbro, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

ELLIS v. FORD. (No. 327.) (Court of Appeals of Alabama. Feb. 4, 1915.) Appeal from Probate Court, Madison County; W. T. Lawler, Judge. Betts & Betts, of Huntsville, for appellee.

PER CURIAM. Affirmed on certificate.

EVERAGE v. HUDSON & THOMPSON. (No. 307.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Law and Equity Court, Covington County; Ed T. Albritton, Judge.

PER CURIAM. Appeal dismissed by appellant.

GACHET v. STATE. (No. 284.) (Court of Appeals of Alabama. Jan. 21, 1914.) Appeal from Circuit Court, Barbour County; M. Sollie, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

GRANT v. STATE. (No. 554.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from Criminal Court, Jefferson County; William E. Fort, Judge. R. C. Brickell, Atty. Gen., for the State.

BROWN, J. There is an absence of any sort of diligence on the part of appellant in the prosecution of this appeal, and the motion of the Attorney General to dismiss the appeal for want of prosecution is granted. Appeal dismissed.

GRIFFIN v. STATE. (No. 312.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. E. H. Hill, of Dothan, for appellant. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

HARE v. STATE. (No. 342.) (Court of Appeals of Alabama. Feb. 2, 1915.) Appeal from Circuit Court, Covington County; H. A.

Pearce, Judge. W. L. Martin, Atty. Gen., for the State.

THOMAS, J. There is no bill of exceptions, no brief for appellant, no error apparent on the face of the record, and the judgment of conviction is consequently affirmed. Affirmed.

HUMPHREY v. STATE. (No. 341.) (Court of Appeals of Alabama. Feb. 2, 1915.) Appeal from Circuit Court, Covington County; H. A. Pearce, Judge. W. L. Martin, Atty. Gen., for the State.

PELHAM, P. J. The transcript contains no bill of exceptions, and the time for signing and filing a bill has passed. We discover no error in the record proper, which shows proceedings regular in form. Affirmed.

JONES v. STATE. (No. 314.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Dale County; M. Sollie, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

JORDAN v. STATE. (No. 276.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Dale County; M. Sollie, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

LOUISVILLE & N. R. Co. v. ROBERTS. (No. 312.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from City Court of Gadsden; John H. Disque, Judge. George W. Jones, J. Manly Foster, and S. L. Field, all of Montgomery, for appellant. McCord & Davis, of Gadsden, for appellee.

PER CURIAM. Appeal dismissed by appellant.

MARTIN v. STATE. (No. 298.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Dale County; M. Sollie, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

MATTHEWS v. TENNESSEE VALLEY BANK. (No. 275.) (Court of Appeals of Alabama. Feb. 4, 1915.) Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge. John B. Tally, of Scottsboro, for appellant. Bouldin & Wimberly, of Scottsboro, for appellee.

PER CURIAM. Affirmed on certificate.

NORMAN v. STATE. (No. 862.) (Court of Appeals of Alabama. Jan. 14, 1915.) Appeal from Criminal Court, Jefferson County; S. E. Greene, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed by appellant.

PORTER v. STATE. (No. 357.) (Court of Appeals of Alabama. Feb. 2, 1915.) Appeal from Circuit Court, Henry County; M. Sollie, Judge. W. L. Martin, Atty. Gen., for the State.

THOMAS, J. The appeal in this case was taken on March 13, 1914, and no transcript or certificate of appeal was filed here until January 18, 1915, and no showing made as

to an excuse for the delay. The motion of the Attorney General is consequently granted and the appeal is accordingly dismissed. Code, § 2870; Supreme Court Rule 41, as published in 175 Ala. xx, 56 South. vi; Swain v. State, 8 Ala. App. 26, 62 South. 446.

Appeal dismissed.

SEALS PIANO CO. v. BELL et al. (No. 176.) (Court of Appeals of Alabama. Dec. 15, 1914.) Appeal from Circuit Court, Montgomery County; W. W. Pearson, Judge.

PER CURIAM. Appeal dismissed.

SNOW v. CITY OF ANNISTON. (No. 293.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from Circuit Court, Calhoun County; Hugh D. Merrill, Judge. S. W. Tate, of Anniston, for appellee.

PER CURIAM. Affirmed on certificate.

STATE v. WAGES. (No. 300.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Law and Equity Court, Covington County; Ed T. Albritton, Judge. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

STEPHENS v. STATE. (No. 310.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. Lee & Tompkins, of Dothan, for appellant. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

STEPHENS v. STATE. (No. 311.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. E. H. Hill, of Dothan, for appellant. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

STREET v. CITY OF ANNISTON. (No. 277.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from City Court of Anniston; Thomas W. Coleman, Jr., Judge. S. W. Tate, of Anniston, for appellee.

PER CURIAM. Affirmed on certificate.

STUART VENEER CO. v. RAMEY. (No. 122.) (Court of Appeals of Alabama. Feb. 11, 1915.) Appeal from Law and Equity Court, Hale County; Charles E. Waller, Judge. Joseph H. James, of Greensboro, for appellant. Thomas E. Knight, of Greensboro, for appellee.

PER CURIAM. Dismissed for want of prosecution.

THOMPSON v. STATE. (No. 313.) (Court of Appeals of Alabama. Jan. 21, 1915.) Appeal from Circuit Court, Houston County; H. A. Pearce, Judge. E. H. Hill, of Dothan, for appellant. R. C. Brickell, Atty. Gen., for the State.

PER CURIAM. Appeal dismissed for want of prosecution.

TURNER v. CITY OF ANNISTON. (No. 275.) (Court of Appeals of Alabama. Jan. 12, 1915.) Appeal from City Court of Anniston;

Thomas W. Coleman, Jr., Judge. S. W. Tate, of Anniston, for appellee.

PER CURIAM. Affirmed on certificate.

WATTS v. STATE. (No. 281.) (Court of Appeals of Alabama. Feb. 4, 1915.) Appeal from Circuit Court, Colbert County; O. P. Almon, Judge. Kirk, Carmichael & Rather, of Tusculumbia, for appellant. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. Dismissed for want of prosecution.

WHEELER v. STATE. (No. 286.) (Court of Appeals of Alabama. Feb. 14, 1915.) Appeal from Circuit Court, Geneva County; H. A. Pearce, Judge. W. O. Mulkey, of Geneva, for appellant. W. L. Martin, Atty. Gen., for the State.

PER CURIAM. The appeal is on the record without a bill of exceptions and shows regular proceedings and no error. Affirmed.

ALBURY v. STATE. (Supreme Court of Florida. June Term, 1914.) Error to Criminal Court of Record, Monroe County. T. F. West, Atty. Gen., for the State.

PER CURIAM. Writ of error dismissed on motion of Attorney General.

ALLEN v. PALMER et al. (Supreme Court of Florida. Nov. 11, 1914.) Appeal from Circuit Court, Volusia County. McNeill & Butler, of Jacksonville, for appellant. Landis & Fish, of De Land, for appellees.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellant.

ASHMORE et al. v. CROSBY. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Leon County. John L. Neeley, of Tallahassee, for plaintiffs in error. W. J. Owen, of Tallahassee, for defendant in error.

PER CURIAM. Writ of error dismissed for failure to file brief.

BARNARD v. KING et al. (Supreme Court of Florida. Aug. 3, 1914.) Appeal from Circuit Court, Pinellas County. Herman Merrell, of St. Petersburg, for appellant. McMullen & McMullen, of Tampa, for appellees.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellant.

BELL et al. v. COACHMAN et al. (Supreme Court of Florida. June Term, 1914.)

PER CURIAM. Petition to stay further proceedings on part of respondents, pending an appeal, denied by the court. See, also, 67 South. 1021.

BELL et al. v. COACHMAN et al. (Supreme Court of Florida. June Term, 1914.) Original proceeding on petition for contempt rule. H. S. Phillips, of Tampa, and Roy V. Sellers, of St. Petersburg, for petitioners.

PER CURIAM. Petition for rule denied by the court. See, also, 67 South. 1021.

BELL, Sheriff, v. ELECTRIC APPLIANCE CO. et al. (Supreme Court of Florida. June Term, 1914.) Appeal from Circuit Court, Walton County. S. K. Gillis, of De Funiak Springs, for appellant. W. T. Bludworth, of De Funiak Springs, for appellees.

PER CURIAM. This being a suit at law, and no writ of error having been issued, the appeal is dismissed. See, also, 67 South. 81.

CITY OF OCALA v. ANDERSON. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Marion County. Frederick Hocker, of Ocala, for plaintiff in error. R. L. Anderson, of Ocala, for defendant in error.

PER CURIAM. Writ of error dismissed on motion of counsel for defendant in error. See, also, 64 South. 775, 52 L. R. A. (N. S.) 287.

Ex parte CROSLAND. (Supreme Court of Florida. June Term, 1914.) Atkinson, Gramling & Burdine, of Miami, and Fred H. Myers, of Tallahassee, for petitioner.

PER CURIAM. Petition for a writ of prohibition denied by the court.

DAYTONA BRIDGE CO. et al. v. CITY OF DAYTONA. (Supreme Court of Florida. July 15, 1914.) Appeal from Circuit Court, Volusia County. Stewart & Stewart, of De Land, for appellants.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellants.

ELLISON v. ADAMS. (Supreme Court of Florida. Sept. 4, 1914.) Appeal from Circuit Court, Orange County. T. E. Wilson, of Sanford, and Davis & Giles, of Orlando, for appellant. C. B. Robinson and L. C. Massey, both of Orlando, for appellee.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellant.

GARRITY et al. v. RIVERSIDE PARK CO. et al. (Supreme Court of Florida. July 17, 1914.) Appeal from Circuit Court, Volusia County. Stewart & Stewart, of De Land, and F. M. Durrance, of Jacksonville, for appellant.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellants.

JACKSON v. STATE. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Seminole County. T. F. West, Atty. Gen., for the State.

PER CURIAM. Writ of error dismissed on motion of Attorney General.

LINDSAY v. STATE. (Supreme Court of Florida. Jan. 1, 1915.) Error to Circuit Court, Santa Rosa County. H. S. Laird, of Milton, for plaintiff in error.

PER CURIAM. Writ of error dismissed on præcipe of counsel for plaintiff in error.

McNEALY v. STATE. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Calhoun County. T. F. West, Atty. Gen., for defendant in error.

PER CURIAM. Writ of error dismissed on motion of Attorney General.

MANATEE COUNTY et al. v. LORD. (Supreme Court of Florida. Dec. 17, 1914.) Appeal from Circuit Court, Manatee County. Cary B. Fish, of Sarasota, and C. T. Curry, of Bradentown, for appellants. Singeltary & Reaves, of Bradentown, for appellee.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellants.

O'BERRY v. SEABOARD AIR LINE RY. CO. (Supreme Court of Florida. June Term, 1914.) R. B. Sturkie, of Dade City, for petitioner.

PER CURIAM. Petition for writ of certiorari denied by the court.

PASCOE et ux. v. TOBIAS. (Supreme Court of Florida. Feb. 24, 1915.) Appeal from Circuit Court, Walton County; T. Emmet Wolfe, Judge. Suit between Theophilus Pascoe and wife and Arthur W. Tobias, as trustee. From the decree, the parties first mentioned appeal. Affirmed. See, also, 67 South. 1022. W. W. Flournoy, of De Funiak Springs, for appellants. S. K. Gillis, of De Funiak Springs, for appellee.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the decree aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said decree. It is therefore considered, ordered, and adjudged by the court that the said decree of the circuit court be and the same is hereby affirmed. It is further ordered that the appellee do have and recover of and from the appellants his costs by him in this behalf expended, which costs are taxed at the sum of \$——, all of which is ordered to be certified to the court below.

PASCOE et al v. TOBIAS et al. (Supreme Court of Florida. Sept. 8, 1914.) Error to Circuit Court, Walton County. W. W. Flournoy, of De Funiak Springs, for plaintiffs in error.

PER CURIAM. Writ of error dismissed on præcipe of counsel for plaintiffs in error.

RIVERO v. STATE. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Monroe County. The Attorney General, for the State.

PER CURIAM. Writ of error dismissed on motion of the Attorney General.

ROSSER et al. v. GOODWIN et al. (Supreme Court of Florida. Nov. 21, 1914.) Appeal from Circuit Court, Duval County. H. P. Adair and Daniel & Boggs, all of Jacksonville, for appellants.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellants.

SOUTHERN MENHADEN CO. v. HOW et al. (Supreme Court of Florida. Nov. 23, 1914.) Appeal from Circuit Court, Duval County. Daniel & Boggs, of Jacksonville, for appellant. Le Suer Gaudin and F. B. Noble, both of Jacksonville, for appellees.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellant.

STANDARD OIL CO. v. NELSON. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Escambia County. Watson & Pasco, of Pensacola, for plaintiff in error. John P. Stokes and R. P. Reese, both of Pensacola, for defendant in error.

PER CURIAM. Writ of error dismissed on motion of counsel for the respective parties.

STATE ex rel. APPLEYARD v. CRAWFORD, Secretary of State. (Supreme Court of

Florida. June Term, 1914.) W. J. Oven and Fred T. Myers, both of Tallahassee, for relator.

PER CURIAM. Petition for an alternative writ of mandamus denied by the court.

STATE ex rel. BANKS et al. v. HORNE, Circuit Judge. (Supreme Court of Florida. June Term, 1914.) L. E. Roberson and Humphreys & Blackwell, all of Live Oak, for relators.

PER CURIAM. Petition denied by the court.

STATE ex rel. BELL v. DURHAM et al. (Supreme Court of Florida. June Term, 1914.) Thomas B. Adams, of Jacksonville, for relator.

PER CURIAM. Petition for an alternative writ of mandamus denied by the court.

STATE ex rel. BURR et al., Railroad Com'rs, v. FLORIDA EAST COAST RY. CO. (Supreme Court of Florida. June Term, 1914.) F. M. Hudson, of Miami, for relators. Alex St. Clair-Abrams, of Jacksonville, for respondent.

PER CURIAM. Cause dismissed on motion of counsel for relators.

STATE ex rel. HARVEY v. BRANCH, Tax Collector. (Supreme Court of Florida. June Term, 1914.) Macfarlane & Chancey and James F. Glen, all of Tampa, for petitioner.

PER CURIAM. Petition for an alternative writ of mandamus denied by the court.

STATE ex rel. MURRELL et al. v. HACKNEY et al. (Supreme Court of Florida. June Term, 1914.) Augustus Wingood, of Tampa, for relators.

PER CURIAM. Petition for an alternative writ of mandamus denied by the court.

STATE ex rel. SULLIVAN v. BRANCH, Tax Collector. (Supreme Court of Florida. June Term, 1914.) Macfarlane & Chancey and James F. Glen, all of Tampa, for petitioner.

PER CURIAM. Petition for an alternative writ of mandamus denied by the court.

TROST v. COMMERCIAL BANK OF OCALA et al. (Supreme Court of Florida. June 12, 1914.) Appeal from Circuit Court, Marion County. Spencer & Hocker, of Ocala, for appellant. Hocker & Martin, of Ocala, for appellees.

PER CURIAM. Appeal dismissed on præcipe of counsel for appellant.

WATERMAN CO. v. VAN HARLINGEN. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Duval County. Geo. U. Walker & Son, of Jacksonville, for plaintiff in error. M. W. Lewis, of Jacksonville, for defendant in error.

PER CURIAM. Writ of error dismissed, on motion of counsel for defendant in error.

WATSON v. AMERICAN PECAN CO. et al. (Supreme Court of Florida. Nov. 24, 1914.) Error to Circuit Court, Alachua County; I. T. Wills, Judge. Action between E. L. Watson and the American Pecan Company, a corporation, and another. From the judgment, Watson brings error. Affirmed. E. G. Baxter and T. W. Fielding, both of Gainesville, for plaintiff in error. W. S. Broome, of Gainesville, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former day of this

term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered by the court that the defendants in error do have and recover of and from the plaintiff in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WEAVER v. JOHNSON. (Supreme Court of Florida. Dec. 9, 1914.) Error to Circuit Court, Polk County; F. A. Whitney, Judge. Action between Beulah Rose Weaver and W. Fiske Johnson. From the judgment, Weaver brings error. Affirmed. Eppes Tucker, Jr., of Lakeland, and Wilson & Boswell, of Bartow, for plaintiff in error. Wilson & Swearingen, of Bartow, for defendant in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for the respective parties, and the record having been seen and inspected, and the court being now advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendant in error do have and recover of and from the plaintiff in error his costs by him in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

WHITE v. WHITE. (Supreme Court of Florida. June Term, 1914.) Appeal from Circuit Court, Suwannee County. Stafford Caldwell, of Live Oak, for appellant. B. B. Johnson, of Jasper, for appellee.

PER CURIAM. Appeal dismissed on motion of counsel for appellee.

WILLIAMS v. STATE. (Supreme Court of Florida. June Term, 1914.) Error to Circuit Court, Duval County. T. F. West, Atty. Gen., for the State.

PER CURIAM. Writ of error dismissed on motion of Attorney General.

ZEWADSKI v. LUDDEN & BATES et al. (Supreme Court of Florida. Nov. 11, 1914.) Error to Circuit Court, Hillsborough County; F. M. Robles, Judge. Action between W. K. Zewadski, Jr., and Ludden & Bates and others. From the judgment, Zewadski brings error. Affirmed. V. H. Nysewander, G. B. Zewadski, and W. K. Zewadski, Jr., all of Tampa, for plaintiff in error. H. P. Baya, of Tampa, for defendants in error.

PER CURIAM. This cause having been submitted to the court at a former day of this term upon the transcript of the record of the judgment aforesaid and argument of counsel for plaintiff in error, and the record having been seen and inspected, and the court now being advised of its judgment to be given in the premises, it seems to the court that there is no error in the said judgment. It is therefore considered, ordered, and adjudged by the court that the said judgment of the circuit court be and the same is hereby affirmed. It is further ordered that the defendants in error do have and recover of and from the plaintiff in error their costs by them in this behalf expended, which costs are taxed at the sum of \$—, all of which is ordered to be certified to the court below.

END OF CASES IN VOL. 67

